INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

SOUTH WEST AFRICA CASES

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

VOLUME X

1966

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRES DU SUD-OUEST AFRICAIN

(ÉTHIOPIE *c.* AFRIQUE DU SUD;
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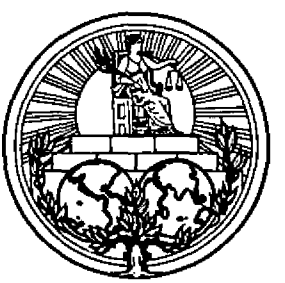

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The present volume contains the continuation of the oral arguments on the merits and the evidence of witnesses and experts in the *South West Africa* cases and covers the period 15 June to 14 July 1965. The beginning of the oral arguments on the merits (15 March to 15 June 1965) is published in Volume VIII, pages 105-712, and Volume IX, pages 1-658. 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.

The Hague, 1966.

Le présent volume contient la suite des plaidoiries sur le fond et les dépositions des témoins et experts dans les affaires du *Sud-Ouest africain*; il porte sur la période allant du 15 juin au 14 juillet 1965. La première partie des plaidoiries sur le fond (15 mars-15 juin 1965) est publiée dans le volume VIII, pages 105 à 712, et le volume IX, pages 1 à 658. Ces affaires ont été inscrites au rôle général de la Cour sous les nos 46 et 47 le 4 november 1960 et les deux instances ont été jointes par ordonnance de la Cour le 20 mai 1961 (*Sud-Ouest africain, ordonnance du 20 mai 1961, C.I.J. Recueil 1961*, p. 13). Elles ont fait l'objet de deux arrêts rendus le 21 décembre 1962 (*Sud-Ouest africain, exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 319) et le 18 juillet 1966 (*Sud-Ouest africain, deuxième phase, arrêt, C.I.J. Recueil 1966*, p. 6).

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

La Haye, 1966.

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20. REJOINDER OF DR. VERLOREN VAN THEMAAT

AGENT FOR THE GOVERNMENT OF SOUTH AFRICA AT THE PUBLIC HEARING OF 15 JUNE 1965

Mr. President, this review will deal with the sources of rules of international customary law as well as the process of creation of such laws, in as far as this is relevant to the present case made by the Applicants. Special attention will be given to points arising in connection with Applicants' contention that the norm is a rule of customary international law which binds Respondent.

Now the late Judge Manley O. Hudson commented as follows on customary law in general; he stated, and I quote from his book *The Permanent Court of International Justice 1920-1942*, New York, 1943, at page 609, the following:

> "*International Custom.* Article 38 of the Statute also directs the Court to apply 'international custom, as evidence of a general practice accepted as law'. This might have been cast more clearly as a provision for the Court's applying customary international law. It seems to emphasize the general law, as opposed to the special law embodied in conventions accepted by the parties. It is not possible for the Court to apply a custom; instead it can observe the general practice of States, and if it finds that such practice is due to a conception that the law requires it, it may declare that a rule of law exists and proceed to apply it. The elements necessary are the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time. The appreciation of these elements is not a simple matter, and it is a task for persons trained in law."

Then I proceed to the following comment by Oppenheim in his well-known work on *International Law*, Volume I, Eighth Edition, at page 26. He states there:

> "International jurists speak of a *custom* when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to International Law, obligatory or right."

I may further refer to the dissenting opinion of Judge Read in the Anglo-Norwegian *Fisheries* case, *I.C.J. Reports 1951*, at page 191, where he said: "Customary international law is the generalization of the practice of States."

There are various theories as to the basis upon which customary international law becomes binding. Most of them fall into one of two groups. The first theory seeks the binding nature of the rules of international customary law in the express or tacit consent of States; this is often referred to as the consensual theory. The second theory bases the binding

force of such rules on a conviction of the States concerned that they are applying existing international law. Other theories are mostly variants upon these basic ones.

Mr. President, there is a vast amount of literature on the subject. To quote a few examples of authorities which refer to these various theories we may mention Judge Spiropoulos, *Théorie générale du Droit international*, Paris, 1930, at pages 91 and 92; former president Basdevant, "Règles générales du Droit de la Paix", to be found in the *Recueil des Cours* of the Hague Academy, Volume 58, 1936, Volume IV at pages 504-520, and then especially at page 518. I may also refer to Judge Morelli's *Nozioni Di Diritto Internazionale*, Padua, sixth revised edition, 1963, pages 25-31, and Professor Verdross, "Das völkerrechtliche Gewohnheitsrecht", to be found in the *Japanese Annual of International Law*, 1963, at pages 1-3.

Mr. President, we do not intend to take sides in the theoretical controversy as to whether custom derives its legal effect from tacit consent or from conduct which presupposes the existence of a legally binding obligation or right. For the purpose of our contentions, and having regard to the general agreement which exists in regard to practical aspects of the principles which are indeed germane to this case, it is unnecessary for us to make a choice between the respective theories.

Most authorities require the presence of two elements before a rule of international customary law can be said to have been established: in the first place a clear and consistent practice, and in the second place what is usually referred to as the *opinio juris sive necessitatis*.

It does not appear necessary to refer to all the numerous authorities on the subject. We may refer, for instance, to Professor Delbez, *Les principes généraux du Droit international public*, Paris, 1963, at page 47; the editorial comment by Joseph L. Kunz in the *American Journal of International Law*, Volume 47, 1953, at page 665. There is plenty of other authority on the point but it does not appear to be necessary to quote it to the Court at this stage.

Now these two elements were split for practical purposes into four by Judge Hudson when he was President of the International Law Commission in 1950. In the *Yearbook of the International Law Commission*, 1950, Volume 2, at page 26, we find a summary by Judge Hudson of the elements which must be present before a principle of international law can be found to be established, and he stated these four principles as follows.

In the *first place*, there must be a concordant practice by a number of States with reference to a type of situation falling within the domain of international relations.

Secondly, there must be a continuation or a petition of the practice over a considerable period of time.

Thirdly, there must be a conception that the practice is required by or consistent with prevailing international law.

Fourthly, there must be a general acquiescence in the practice by other States.

For the sake of convenience, this order of dealing with the subject will also be followed here.

As to the *first*, that is the concordant practice by a number of States with reference to a type of situation falling within the domain of international relations, I may quote in the first place Joseph L. Kunz, in his

editorial comment on the nature of customary law, in the work I have already referred to, *American Journal of International Law*, 1953, page 666. He states there:

> "There must be a 'practice', whether of positive acts or omissions, whether in time of peace or war. This practice must refer to a type of situation falling within the domain of international relations."

This Court, in the Colombian/Peruvian *Asylum* case, *I.C.J. Reports 1950*, page 276, required a "constant and uniform usage practised by the States in question" for the creation of a rule of customary law. The passage in question was approved in the case concerning *Rights of Nationals of the United States of America in Morocco, I.C.J. Reports 1952*, at page 200. The relative requirement of international customary law was previously defined in various ways. In the *S.S. Wimbledon* case, 1923, *P.C.I.J., Series A, No. 1*, at page 25, mention is made of a "consistent international practice". In the Advisory Opinion on Article 3, paragraph 2, of the Treaty of Lausanne—this is regarding the frontier between Turkey and Iraq—*P.C.I.J., Series B, No. 12*, at page 30, mention is made of an "unvarying tradition". Then in Judge Anzilotti's dissenting opinion in the *Legal Status of Eastern Greenland* case, 1933, *P.C.I.J., Series A/B, No. 53*, at page 91, the definition of this element of customary law is "the constant and general practice".

The next authority I wish to refer to is the President of the Soviet Association of International Law, Professor Tunkin. He states in an article entitled "Remarks on the Juridical Nature of Customary Norms of International Law", in the *Californian Law Review* of August 1961, Volume 49, at page 421:

> "Customary norms of international law stem from international practice. The practice of States may consist in their taking definite action under certain circumstances, or, on the contrary, abstaining from action."

Then, Professor Guggenheim, in *Traité du Droit international public*, Geneva, 1953, at page 49, adopts the requirement of the *Wimbledon* case that there must be a "consistent international practice".

The *Fisheries* case was commented on by Judge Sir Gerald Fitzmaurice in "The Law and Procedure of the International Court of Justice", in the *British Yearbook of International Law*, Volume 30, 1953, at page 68, and in that passage Judge Sir Gerald Fitzmaurice discussed Judge Read's dissenting opinion in the *Fisheries* case, in which the latter stated that claims which have not been maintained by the actual assertion of sovereignty cannot establish a practice of States. In this regard Judge Sir Gerald Fitzmaurice wrote, and I quote from page 68—

> ". . . it is believed to be sound principle that, in the long run, it is only the *actions* of States that build up *practice*, just as it is only *practice* ('constant and uniform' as the Court has said), that constitutes a *usage* or *custom* and builds up eventually *a rule of customary international law*".

It follows from the authorities quoted that resolutions of organs of international organizations by themselves cannot create rules of customary law. The accent falls on the *acts* of the States concerned, their practice or conduct.

The next authority I wish to refer to is Max Hagemann, "Die Gewohn-

heit als Völkerrechtsquelle in der Rechtssprechung", *Schweizerisches Jahrbuch für internationales Recht*, Volume X, 1953, at page 65. He states that although acts and declarations of organs of international organizations are regarded as *possible evidence* of an inter-State practice, the Court does not give them much weight. He quotes, in this respect, the *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, at pages 24 and 25.

In this case it was argued and I quote from page 24: "that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties."

This argument was based on a report adopted by the Council of the League of Nations on 17 June 1927, and the Court stated, in regard to this argument, at page 25:

> "At best, the recommendation made on that date by the Council constitutes the point of departure of an administrative practice which, after being observed by the Secretariat of the League of Nations, imposed itself, so to speak in the ordinary course of things on the Secretary-General of the United Nations in his capacity of depositary of conventions concluded under the auspices of the League. But it cannot be concluded that the legal problem of the effect of objections to reservations has in this way been solved."

Now, in the same case, the joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo referred to the Secretary-General's practice which "is a continuation of that constantly followed by the League of Nations" (p. 36). They felt that they were unable to agree to the doctrine that reservations would be permitted as far as they might be compatible with the object and purpose of the Convention because it "propounded a new rule". (The actual quotation is "propounds a new rule"—p. 42.)

It was, however, the actual practice, not the report or resolution, which led to that conclusion.

Now, Mr. President, that resolutions of organs of international organizations are *not a source* of international customary law may also be inferred from the report of the International Law Commission of 1950. I refer to *General Assembly, Official Reports*, Fifth Session, Supplement No. 12, Document A.1316.

Part II of that report discussed "ways and means for making the evidence of customary international law more available". In that Part II of the report resolutions of organs of international organizations were not mentioned as evidence of customary international law. Practice of international organizations was mentioned as possible evidence of international law and it was recommended that, in order to make such aspects of international law more readily ascertainable, a *répertoire* of the practice of the organization of the United Nations be made available.

The distinction here is clear. Customary *rules* may be created *within an organization* such as the United Nations or the International Labour Organisation *on procedural matters*. Examples thereof are, for instance, whether the matter is an important question in terms of Article 18 of the Charter (a matter on which this Court has also given an Opinion), the manner of voting, what matters are to be placed on the agenda, and so forth. But, apart from this, as Professor Tunkin wrote in the *California Law Review* (I am again quoting from the same article in Vol. 49, August

1961, p. 426): "... there is no international body in existence with authority to give a customary rule of conduct juridical power."

May I also refer to an article under the title "International *Jus Cogens*" which Professor Schwarzenberger wrote in the *Texas Law Review* of March 1965. I quote from pages 471-472:

> "While sovereign States are free to create *jus cogens* on a *consensual* footing it is not the function of the doctrine of international law or the international judiciary to transform discretionary powers into legal duties. [Then comes the important part.] *Thus, in matters which under the Charter of the United Nations are the subject of recommendations by the General Assembly, no repetition, however insistent, can transform the right of individual Member States not to take action on such recommendations into an abuse of such freedom and so into a legal duty to accept such a recommendation.*"

This brings me to the *second of the elements* into which Judge Manley Hudson has divided this concept of customary law. The second element is *the continuation, or repetition, of the practice over a considerable period of time*. Now, in the first place, I quote from the *Panevezys-Saldutiskis Railway* case in the 1939, *P.C.I.J., Series A/B, No. 76*, at page 36. In that case a consideration was that the relevant "rule of conduct has been observed *for a very long time*".

Then I may also quote from an article by Kopelmanas, "Custom as a means of the creation of an International Law", which is to be found in the *British Yearbook of International Law*, No. 18, 1937, at page 127, in which the author mentions the "repetition of similar acts".

Then Professor Delbez—the work already referred to, *Les Principes généraux du droit international public*, Third Edition, 1964, at page 47—requires for the existence of a rule of customary law: "*un élément matériel (consuetudo), consistant dans la répétition prolongée et constante des mêmes actes extérieurs*", in other words "a material element *(consuetudo)* consisting in the prolonged and consistent repetition of the same external acts".

The degree of emphasis laid upon this requirement may conceivably vary in accordance with the theory supported by the particular commentator as to the basis of creation of customary law. On the basis of the consensual theory, the length of the period may possibly, in itself, be less important than other elements relied upon as showing tacit consent or acquiescence. On the basis of theories which view the subjective element on the part of States concerned as a conviction that such rule is a legally binding provision, a lengthy period of practice will usually be necessary before the existence of such a conviction can be established. Yet even a support of the consensual theory, Professor Tunkin writes in the same article in the *California Law Review*—I am quoting from page 424: "The creation of a customary norm of international law is a historical process; the elements of the norm of law evolve gradually."

Judge Morelli, in the work already referred to, *Nozioni Di Diritto Internazionale*, which strongly supports the theory which I might call, perhaps, the *opinio juris* theory, in the sense of a conviction that a binding norm exists, states at pages 29 and 30, in paragraph 18, and I translate from the Italian—it is our translation:

> "The element of long continuance (diurnitas) which, moreover, is historically connected with a psychological element since it is only

> constant and prolonged usage that can give rise to the conviction of the obligatoriness of the norm—is necessary in international custom no less than in custom in the sphere of municipal law."

Then, I would like to refer the Court to the Advisory Opinion on the *Free City of Danzig and the International Labour Organisation*, 1930, *P.C.I.J., Series B, No. 18*, at pages 12 and 13. There practice was applied which had gradually emerged "from the decisions of the High Commissioner and from the subsequent understandings arrived at between the Parties under the auspices of the League".

In that case, exceptionally, a ten-year period was considered sufficient to establish a rule of international customary law. But this was a special practice, only referring to *one area*, and only as between Poland (Danzig) and the Commissioner. Moreover, the participants in the alleged custom were agreed as to the existence thereof.

It is only natural, Mr. President, that in the case of suggested establishment of a *general* customary rule of international law—that is not a local rule or a rule applying only between a few parties—the period of crystallization required would usually be a lengthy one.

Mr. President, this leads me to the *third element* mentioned by Judge Hudson, *the conception that the practice is required by, or consistent with, prevailing international law.*

Oppenheim, in the work already referred to—his well-known work on international law, at page 26—distinguishes between a custom and a usage: a *usage* exists "when a habit of doing certain actions has grown up without there being the conviction that these actions are, according to international law, obligatory or right". Such usage does not create a binding rule of international law. On the other hand, he says, and I quote again from a passage which I have already quoted at the beginning of this review:

> "International jurists speak of a *custom* when a clear and continuous habit of doing certain actions has grown up under the aegis of conviction that these actions are, according to international law, obligatory or right."

Then, may I also quote from Professor Delbez—the work already referred to, at page 47—where he states in respect of the so-called *opinio juris sive necessitatis*:

> "C'est sur la nature de cet élément psychologique que se heurtent les doctrines. Les positivistes ramènent l'*opinio juris* à un acte de volonté de plusieurs Etats, à un accord tacite (conception volontariste). Les objectivistes posent que l'*opinio* constitue la reconnaissance obligatoire d'un droit préexistant (conception intellectualiste)."

In other words, as regards the nature of the psychological element, doctrines are in conflict—the positivists reduce the *opinio juris* to an act of will of numerous States to be bound by a tacit agreement (the voluntarist conception). The objectivists state that the *opinio* constitutes the obligatory recognition of a pre-existing right (the intellectualist conception).

I have already referred to Judge Hudson's necessary element of customary law, namely "the conception in each case that such action was enjoined by law".

On the basis of the consensual theory, this element means, as Professor Tunkin puts it in the cited article at page 423, that the practice "has been accepted or recognized by the States as juridically binding as a norm of law". He continues to state that such acceptance or recognition "is, in its juridical sense an expression of the will of the State of its agreement to regard this or that customary rule as a norm of international law".

The fact that General Assembly resolutions of the type in issue here are not legally binding, and that this body has no normative powers under Article 10, has already been referred to by my learned colleague, and I need not therefore deal with it here.

That is, then, the conclusion of this third element referred to by Judge Hudson.

I now come to the *fourth element*; the fourth is *the general acquiescence in the practice by other States*.

Now, Mr. President, the question which arises here is whether a State can be bound by a rule of customary international law if such State has consistently voiced its objection to such rule, and resisted it in its formative process. It must be emphasized at the outset that this question has to be distinguished from another question, namely whether a general rule of customary law needs either the express or the tacit consent of all States, or a conviction on their part that such rule is a legal norm, according to the particular theory adhered to. Many authors require nearly unanimous consent, acquiescence, or recognition for the creation of a rule of customary law. They thereupon deal generally with the question whether such rule can be established in the absence of unanimity; and this usually brings them to the conclusion that such unanimity is not necessary for the creation of such a rule of international customary law. But this does not answer the other question, namely whether a State which has consistently voiced its dissent from a general rule of customary law during the process of its creation can be bound thereby, even if such rule may exist as binding upon other States. As far as we could ascertain, this Court, and all authorities who have dealt specifically with this particular question—not with the other question—hold the view that a State cannot be bound by any rule of customary law from which it has dissented, at the stage of its generation, actual or alleged.

As regards the attitude of this Court, it only appears necessary to quote two cases in which this view was clearly expressed, and that is the Colombian/Peruvian *Asylum* case, to be found in the *I.C.J. Reports 1950*, page 266, and the *Fisheries* case, that is, the Judgment of 18 December 1951 (*I.C.J. Reports 1951*, p. 116).

In the *Asylum* case, a case which was also referred to by the Applicants, at **IX**, pages 350 and 351 of the verbatim record of 19 May, it was stated, and I quote from pages 276-277 of the *I.C.J. Reports 1950*:

> "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 a 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. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'."

Then I refer the Court also to the well-known passage in the *Fisheries* case (*I.C.J. Reports 1951*, at p. 116), and I quote from page 131:

> "In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast."

This case was quoted in our Rejoinder, **V**, at page 141. It was also referred to by the Applicants in the verbatim record of 19 May, at **IX**, pages 350-352.

Now, the Applicants submit that this particular passage from the *Fisheries* case is irrelevant; they say so at page 350, and they say so because, at page 351 (I quote from the same verbatim record)—

> ". . . 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".

Judge Lauterpacht, however, although he considered that this judgment limits the field of customary law too much, understands the *Fisheries* case to mean—and I quote from a part of a sentence at page 370 of his *Development of the International Law by the International Court*, London, 1958—"that the Court found itself unable to give to a practice which was preponderant, though not universal, the status of a binding rule of international law". The particular sentence proceeds, but that is not relevant for our purposes. The passage from Judge Lauterpacht at pages 191-192, referred to by the Applicants and also quoted by them in the verbatim record of 19 May, at **IX**, page 352, should, in our submission, be regarded in the light of what the judge said at page 370.

The next authority, Mr. President, to whom I should like to refer, is Professor Verzijl, who wrote in the *Nederlands Tijdschrift voor Internationaal Recht*, Volume I, page 260 (that is the volume dealing with the years 1953-1954), as follows:

> "The Court had a strong additional ground for this finding in the Norwegian case: 'In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast'."

Judge Sir Gerald Fitzmaurice, in "The Law and Procedure of the International Court of Justice, 1953" (*British Yearbook of International Law*, Vol. 30, pp. 24-26) referred to the *Fisheries* case, especially the passage at page 131, in connection with the question whether a State is bound to a rule of customary law which it has not accepted; and then he stated at page 26:

> "The effect of the Court's finding in the above-quoted passage is therefore an acceptance of the Norwegian contention that Norway had always dissented from certain rules *even at their inception*, and had therefore acquired an exemption from them. The essence of the matter is dissent from the rule *while it is in process of becoming one, and before it has crystallized into a definite and generally accepted rule of law*."

I skip a fairly long passage, and then the quotation continues:

> "Consent can indeed be *withheld*, but this can only be in the formative period, when general consent is still necessary to the

validity of the rule. That is why dissent must be expressed at that stage in order to confer exemption: otherwise it is too late."

I may refer also to the Rejoinder, V, at page 141, in this connection, where another quotation is given from Judge Sir Gerald Fitzmaurice's article, with the same tenor. I should further like to quote the author I have already referred to, Joseph L. Kunz, in the *American Journal of International Law*, Volume 47, 1953, at page 667. The author there states, in the same editorial comment on the evolution of a practice into a general rule of customary law:

"Protests by other States or declarations that they, even if submitting to this practice do so only *ex gratia*, protests against the norm on which an international decision is based, even in carrying out this decision prevent the coming into existence of a new norm of customary general international law."

And Professor Tunkin in the same article in the *Californian Law Review* goes even further than that—I quote from pages 428 and 429—when he says:

"The concept that customary norms of international law recognized as such by a large number of States are binding upon all States not only has no foundation in modern international law but is *fraught with grave danger*." (Italics added.)

Finally, Mr. President, I should like to quote from the work by Professor A. Verdross, *Völkerrecht*, Fifth Edition, 1964, at page 141. I shall give our translation from the German. Professor Verdross states as follows:

"But an analysis of the decisions of the International Court shows us that it has constantly held the view that the norm which has arisen from customary law cannot bind a State which has regularly *resisted* it. Thus, this Court states, for instance, in the case of *Diplomatic Asylum* that a certain usage cannot be held against a State which has refused to ratify an agreement which intended to codify such usage (*I.C.J. Reports 1950*, page 277 and following). Although this only deals with a case of regional international law, the principle expressed there is of general significance. It is also confirmed by the International Court in the *British Norwegian Fisheries* case . . ."

Mr. President, this concludes my review of the authorities relating to customary law in as far as it is relevant to the present case. I thank the Court for the courtesy shown and I respectfully request that Mr. de Villiers be allowed to address the Court in continuance of the argument.

21. REJOINDER OF MR. DE VILLIERS

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA AT THE PUBLIC HEARINGS OF 15-18 JUNE 1965

Mr. President, let us then consider these elements mentioned by my learned friend, Dr. verLoren van Themaat, as dealt with in the authorities, in order to apply them to the Applicants' submissions before the Court. For convenience I shall take them also in the way in which they were divided into four elements by Judge Hudson. This division does not appear to be affected by the differences there are in theories. We shall have regard to those differences as far as may be necessary in the application of each of those elements.

The basic question is, Mr. President, can these elements ever be established by referring only to activities of international organizations? Can the activities of such organizations ever have sufficient weight and can they ever be comprehensive enough to be sufficient in themselves with a view to complying with these essential elements for the generation of a rule of customary law?

Let us take the first element. Let us take them one by one. The first one, the Court will recall, consists of "the concordant practice by a number of States with reference to a type of situation falling within the domain of international relations". That is as it was paraphrased by Dr. Clive Parry in his recently published work, *The Sources and Evidences of International Law*, at page 62. Here we have the following essentials of the concordant practice by a number of States with reference to a type of situation falling within the domain of international relations. Now let us see—how do the activities carried on in international organizations like the United Nations and its organs and the International Labour Organisation—how do those fit into a picture of this kind?

The only practice carried on in these organizations, substantially speaking, is that of talking and of voting. It is true that for the purposes of talking, of making proposals, of voting, of coming to conclusions and so forth, it is necessary to apply certain procedural rules, procedural practices, procedural approaches and so forth and that in that respect, it may be possible, as my learned friend Dr. verLoren van Themaat, pointed out by reference to some of the authorities quoted by him, that within that organization, for that limited purpose, certain customs may originate which are regarded as being binding within that limited sphere. But when it comes to the sphere of substantive legal relationships between States relating to their substantive rights and obligations *inter se* and as between themselves and the United Nations or the organizations concerned, it would seem, Mr. President, that the only practice (in the sense in which that term is understood by the authorities) which one could have in these international organizations, could be of a very limited nature only. If one applies the test very literally to the fact that the only conduct which could have a bearing on a question of this kind, is only talking and voting, then one might be able to say that on satisfying the other requirements for the creation of customary law, one

could eventually land up with an obligation in law, to speak and vote in international organizations.

But, Mr. President, more seriously, the fact is that normally the activities, the practice, of the States themselves, as distinct from the collective acts of the organ or organization in coming to a decision, the practice of the States themselves consists of talking and of voting, of making proposals. Rarely, there may be something in the nature of a legal act involved in a statement. The Court knows the examples, the type of thing where there may be a formal legal act, a pledge, for instance, or an admission against a party. Something of that kind, although consisting of speaking, is also in law regarded as a formal act, for instance, the act of entering into an agreement, the act of legislating in cases where that might occur—I am speaking generally now. It is possible that to a limited extent one may have that sort of thing within the speaking activities of States in the organs concerned.

But again, Mr. President, having regard to what we know of these activities, the scope for that type of act would be very limited indeed. Sometimes, it might well be possible that what States may say in these deliberations may afford evidence as to what their actual practice is, outside of these bodies, but again, Mr. President, the evidential weight of such statements would be slight. Sometimes they could be of the nature of an admission against a State and, I suppose, that could have a greater evidential value than where a State claims, in its own favour, that a certain practice is being conducted.

But, Mr. President, in view of the fact that the purpose of the organs concerned is directed at recommendations and, within a very limited sphere, at decisions in *ad hoc* situations, and not at the creation of norms and not at seeking to establish general legal norms, rights and obligations to obtain as between States, it will become quite evident that the scope for something of that nature to occur is very limited. I may refer the Court to a passage in the work by Dr. Parry to which I have referred, at page 63. Dr. Parry there cites a passage from the *Fisheries* case, dealing exactly with this question of proof of practice, as follows:

> "This cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships . . . The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over trespassing foreign ships . . ."

The author continues:

> "Judge Fitzmaurice, in his literary capacity, has summed up this passage, which occurs in an individual dissenting opinion as suggesting 'that the essential element in the practice of States [is] their overt *actions*, rather than such things as claims, declarations, municipal legislation, etc.' And he comments [citing then from the article by Judge Fitzmaurice in the *British Yearbook of International Law*, XXX (1953), pp. 1, 67-68]: 'While this point of view must probably not be pressed so far as to rule out the probative value, and the contribution to the formation of usage and custom, of State professions in their various forms (legislation, declarations, diplomatic statements, etc., it is believed to be a sound principle that, in the long run, it is only the actions of States that build up practice,

> just as it is only practice ("constant and uniform" as the Court has said) that constitutes a usage or custom and builds up eventually a rule of customary international law'."

The learned author proceeds to comment further on this statement. In certain respects not germane to our purposes, he points out that the verdict can be considered to be a narrow one and that strictly, it should, in some respects, be still further narrowed.

But the emphasis again falls, Mr. President, not on drawing an absolute line and saying ". . . well, statements in themselves can never be relevant to the question of practice"; that is not the purpose of drawing the line; statements can be relevant, but all the indications are that they could be so in a very limited sphere only, since the accent falls so heavily on what is the actual practice.

Therefore, the value which they could have, could, at most, be something additional, something auxiliary, something ancillary. They could be something on the sidelines, but the real issue relates to what practice is. Consequently one would suppose that the vital evidence in each case would have to be directed at what is being done, and not at what is being said, so that at least one can say that it must always be open to a party against whom it is asserted that a practice of States has originated and that such practice has developed into a custom, to refer to the whole evidential field and, particularly, to the actual actions of the States concerned—the actual practice.

One knows, Mr. President, from the authorities—the commentators—to whom I referred earlier this morning, that the activities of these various organs are generally directed at solving a particular problem either by decision or by recommendation. Usually that problem is of a political nature and the attempts made by the body concerned may be to arrive at a compromise; in other cases the purpose may be a demonstration of a propagandistic nature, as one of the commentators said; very often the purpose is the settlement of a dispute. Very often, Mr. President, one finds that the respective approaches of the various States to such a problem coming before these bodies are completely divergent. We saw this repeatedly in the various debates to which we referred on the other issue before the Court, the issue about accountability, and the attitudes taken by the various States on that issue as it came before them from time to time. Some States take up an attitude that there is a legal obligation to do something; some States take the opposite view that there is no legal obligation; some say there is no legal obligation but there is a moral obligation; and others say that it does not matter what the law is, let us see whether we can find something expedient in order to arrive at a solution. So, how can one then say that what goes into the eventual resolution is evidence of an attitude on the part of States as to what their practice is, as to what they consider to be the substantive obligations and rights as among the various States or between a particular State and the Organization?

Very often, because of the functions of these organs, the emphasis falls heavily on attempts towards settlement of a dispute, and it is interesting, Mr. President, to note how the Applicants initially relied upon events in the organs of the United Nations, particularly with a view to showing that there existed a dispute between the Parties to these proceedings—a dispute which could not be settled by negotiation.

Last week, my learned friend, Mr. Grosskopf, traced the development

and the alterations in the Applicants' case in this respect—how they moved from reliance upon the United Nations resolutions and reports, for this purpose of showing a dispute which could not be settled by negotiation, to reliance thereon as authority possessing great weight, and finally, as evidence of a norm and standards binding upon the Court itself and upon the Respondent. The purpose of referring to it at this present stage, Mr. President, is to go back to the first of these three attitudes and to contrast that with what we have at the moment.

We find, Mr. President, that the Applicants' contention which they advanced to the Court in 1962 in the Preliminary Objections proceedings, and the findings of the Court on that question, are directly in conflict with this norm theory which is now presented to the Court on the basis of those same events, largely, coupled with some others, in the activities of the United Nations bodies.

The Court will recall that Article 7 (2) of the Mandate stated as a prerequisite for jurisdiction the existence of a dispute "which cannot be settled by negotiation", and that our fourth preliminary objection was worded to this effect: "The alleged conflict or disagreement is not a dispute which cannot be settled by negotiation in the meaning of Article 7 of the Mandate." It was with particular reference to this issue that the nature of the functions of the United Nations came under discussion in the 1962 proceedings, and, Mr. President, the judgment of the Court on this question is an instructive one. The judgment accorded, to a large extent, with the line of argument presented to the Court on behalf of the Applicants. At page 345, the Court stated:

> "... behind the present dispute there is another and similar disagreement on points of law and fact—a similar conflict of legal views and interests—between the Respondent on the one hand, and the other Members of the United Nations, holding identical views with the Applicants, on the other hand. But though the dispute in the United Nations and the one now before the Court may be regarded as two different disputes, the questions at issue are identical. Even a cursory examination of the views, propositions and arguments consistently maintained by the two opposing sides, shows that an impasse was reached before 4 November 1960 when the Applications in the instant cases were filed, and that the impasse continues to exist." *(I.C.J. Reports 1962.)*

Later, on the same page, the Court said this:

> "It is immaterial and unnecessary to enquire what the different and opposing views were which brought about the deadlock in the past negotiations in the United Nations, since the present phase calls for determination of only the question of jurisdiction. The fact that a deadlock was reached in the collective negotiations in the past and the further fact that both the written pleadings and oral arguments of the Parties in the present proceedings have clearly confirmed the continuance of this deadlock, compel a conclusion that no reasonable probability exists that further negotiations would lead to a settlement."

Then, at page 346, Mr. President, the Court said:

> "It is, however, further contended by the Respondent that the collective negotiations in the United Nations are one thing and direct

negotiations between it and the Applicants are another, and that no such direct negotiations have ever been undertaken by them. But in this respect it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant, and this is obvious even from their oral presentations before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties.

Moreover, diplomacy by conference or parliamentary diplomacy has come to be recognized in the past four or five decades as one of the established modes of international negotiation. In cases where the disputed questions are of common interest to a group of States on one side or the other in an organized body, parliamentary or conference diplomacy has often been found to be the most practical form of negotiation. The number of parties to one side or the other of a dispute is of no importance; it depends upon the nature of the question at issue. If it is one of mutual interest to many States, whether in an organized body or not, there is no reason why each of them should go through the formality and pretence of direct negotiation with the common adversary State after they have already fully participated in the collective negotiations with the same State in opposition."

Now, Mr. President, the point I want to emphasize is that in these passages the proceedings in the United Nations were seen as negotiations between the Respondent and various other States, negotiations which had as a fact broken down, thus leading the Court to the conclusion that the Court had jurisdiction, that the matter was not capable of being settled by negotiation. But the whole concept of negotiation of a dispute presupposes that there are parties standing on the same level, parties of the same status, that they wish to settle that dispute between themselves. For instance, in the expression used by the Court "So long as both sides remain adamant", the Court is talking of two sides, two parties. In other places the Court refers to a "common interest" of a "group of States" vis-à-vis the "adversary State" in these "collective negotiations".

So, Mr. President, viewing the matter in that light, the presupposition is that either of the two sides to this dispute may be right and the other one may be wrong. It is, in essence, something different from saying that the one party has the authority to lay down its will, to impose its will on the other party, and to say to it: "Here I create a norm by which you will be bound—you, and other States falling within the compass of this norm."

The presupposition of a dispute between parties standing on the same footing is further emphasized by the fact that there is an idea that that dispute may well have been capable of solution by negotiation, in principle, but that in this particular case that has proved to be impossible, both parties remaining adamant. That factor is further emphasized by the stress laid on the fact that no reasonable possibility exists that further negotiations would lead to a settlement.

Mr. President, if the contemplation was that the one party, this collectivity, could lay down its will as a binding norm not only for South Africa, but also for other States, how strange would be this very idea that there could possibly have been a thought even of further negotiation between one State, South Africa, and this law-giver which is insisting on applying its law to all the States to which this might apply.

[Public hearing of 16 June 1965]

Mr. President and honourable Members, at the conclusion yesterday I was dealing with certain extracts from the Judgment of the Court in 1962 on our Preliminary Objection No. 4, relating to the question whether there was a dispute which could or could not be settled by negotiation, and I pointed out that the very same material and the very same events in the organs of the United Nations now relied upon by the Applicants as showing the origin of their alleged norm through custom and through practice as a rule of customary law were then relied upon by them in argument and by the Court in its finding on the question of a dispute, as showing that such a dispute existed, and that the events in the United Nations were to be seen as negotiations with a view to a settlement of that dispute. Those negotiations proved abortive and, on that basis, the Court found it had the necessary jurisdiction.

We pointed out, Mr. President, that viewing the events as negotiations between the Respondent and various other States, presupposed that there were two parties to this dispute standing on an equal footing with each other, that one or the other might have been correct in the attitude it took in that dispute, and that that was the exact antithesis of the relationship for which the Applicants now contend—that of a law-giver, on the one hand, able to enforce its will upon the subject, on the other hand.

Proceeding from there, Mr. President, I may point out that the same approach emerges from the separate opinions of Judges who agreed with the conclusion arrived at by the Court—Judges who gave opinions on the majority side.

In the opinion of Judge Bustamante we find at page 385 that he said the following:

> "In the present case, the voluminous documentation put in by the Parties and especially the annexes relating to the activities of the United Nations in this case constitute, in my opinion, overwhelming proof not only of the fact that repeated and reiterated negotiations took place, in which the Applicants and the Respondent participated, but also that all the efforts made to find a conciliatory solution resulted in failure." (*I.C.J. Reports 1962*, p. 385.)

And, Mr. President, one finds a similar reasoning in the opinion of Judge Jessup, at pages 433-436 of the same volume.

Then, Mr. President, when we turn to the minority opinion of Judge Morelli, we find a similar conclusion, i.e., one of antithesis between what the Applicants are contending for now and the way in which the events in the United Nations were looked upon at the time—although for different reasons, because Judge Morelli took a different view from the majority as to the sense in which those negotiations in the United Nations were to be seen.

Judge Morelli's view was, and he emphasized at page 573 of the same volume that the statements in, and resolutions by, the organs of the United Nations "are guided, not by the individual interest of each State Member of the United Nations, but rather by the collective interest of all the States Members as a group".

Now, Mr. President, I submit that the considerations arising in the present context are analogous to the considerations expressed here by

the learned Judge. They emphasize how difficult it would be to say that because of events in the United Nations bodies there could have been generated a norm in regard to these individual relationships between States. The learned Judge emphasized here that the interest there represented by the events which took place, was not an individual interest of each State Member of the United Nations, but a collective interest of all the States Members as a group, and that led him to certain divergent conclusions from those of the majority on the question whether there was a dispute which had proved to be incapable of settlement by negotiation.

Mr. President, it is, therefore, quite evident that this question of the manner in which the events in the United Nations were to be seen—the significance to be attached to them—was very pertinently in the mind of the Court. It was a matter on which, as these passages show, there were divergent opinions between different Members of the Court, and yet one finds that, despite the pertinent attention given to the matter, not a single Member of the Court came upon this thought that those events were to be seen possibly as laying down a norm—that those events were to be seen as generating a new rule of customary law under which the relationship between the participants in the events was to be seen, not as that of equally negotiating parties at all, but as that of a law-giver, on the one hand, imposing its will on a subject, on the other hand.

It is true that nothing of that kind was presented to the Court, but, Mr. President, where a court is composed of 15 members as it was—15 members versed, with respect, in the principles and the application of international law, and where they pertinently gave their attention to the significance to be attached to the events connected with the issue to which I have referred, then surely, if there was any semblance of merit in this contention of the Applicants, one or other Member of the Court would have had a thought that perhaps this other view was to be taken of the situation—another view which could have had a very pertinent consequence on the conclusion to which the Court came on the question whether it had jurisdiction, but one finds that there is no reference by a single Member of the Court to even a possibility of the events having to be seen in that light.

This, Mr. President, is a factor which adds to the significance of the fact that the Applicants did not raise this contention until this very last stage of these proceedings—quite obviously as an afterthought.

If we go back by way of contrast to what they said at the time of the Preliminary Objections as to the manner in which United Nations proceedings were to be seen, we find that they said the following in the written Observations, I, at page 454:

> "The essence of the United Nations and its role in international affairs are well described in the words of Goodrich and Simons: 'The United Nations is fundamentally a voluntary association of states, with a set of organs and procedures through which its Member states have agreed to co-operate, under stated conditions, for common purposes. Like the League of Nations before it, *the essence of the United Nations* [and, if I may interrupt here the words were underscored in the Observations themselves] *is that techniques previously used in international relations—the concert of powers, the international conference, peaceful methods of settling disputes—have*

been institutionalized and made part of the established and recognized process of conducting international affairs'."

That was the quotation from Goodrich and Simons, and the passage in the Observations proceeded: "Indeed, if the above description is not accurate, one wonders what the United Nations is all about."

It seems, Mr. President, that one need wonder no longer; one has now discovered that the United Nations is really a *quasi* legislative body.

I referred to this matter, Mr. President, under the heading of the first of the essential elements for the generation of a norm, or an obligation, or a principle of international customary law, i.e., the requirement of a concordant practice in relation to a type of situation falling within the domain of international relations, and my whole argument was directed to that first part of the essential element, the concordant practice, to show that, in so far as a practice contemplated in the principles and by the authorities existed, in so far as there could be said to be a practice in the United Nations at all, it could be something which could really just exist on the sidelines. It would not be the main essence of the evidence at which one looks in order to see whether such a rule of customary law has been generated. The whole tenor of what occurs in the organs of the United Nations, having regard to the purposes of those organs as one finds them stated in the constitutional documents, and having regard to the limitations upon the powers of those organs, is something different: it is something standing almost in contrast, in most respects, to what one would expect for purposes of a practice which could generate a norm of customary international law.

I should like to deal now with the second aspect of that first element, that is, the aspect which requires the concordant practice to deal with a type of situation falling within the domain of international relations. Mr. President, one will recall that the norm upon which the Applicants rely is one which concerns the allotment of rights and obligations to inhabitants of a stated territory or country on the basis of membership in a race, class or group. Although my argument is on the whole, at this stage, directed not at the suggested content of the norm, at dealing with the question whether a norm of such a content can in fact be said to have been practised—I am dealing only now with the suggested processes of generation of such a norm, independently of what its content might be—I must nevertheless, for purposes of dealing with this aspect of the first essential, refer to the fact that here we have a situation, having regard to the suggested content of the norm, which would, *prima facie* at least, not fall within the domain of international relations. It would fall *prima facie* within the domain of domestic relations within a State—the relationship between the authority and the inhabitants, the subjects, or the citizens of the State, as the case might be.

So again, Mr. President, it becomes so much more difficult to say—I should not say impossible, but it becomes so much more difficult to say—that there has been an international practice, which can be said to be relied upon with a view to generation of a norm of that kind. It becomes a factually difficult proposition, and it becomes even more difficult if that factual proposition is to relate purely, as my learned friends contend, to the events in international organizations, and if it is not to have regard at all to other aspects of inter-State practice and of actual practice within States.

My learned friend in that regard referred to analogies which he said

could usefully apply or be referred to in this respect. He referred to the analogies of slavery and genocide. Now, Mr. President, slavery, as the Court will recall, is a matter which could have an international aspect but it is a matter which could have a purely domestic aspect. The international aspect would relate to slave trade, international slave trade and traffic and activities; the domestic aspect would relate to what one might term domestic slavery within a State.

If I recall correctly—probably Members of the Court may be more specifically and more widely read on the subject that I am—in the history of the generation of rules of international law in regard to slavery, one first found conventions for a long time in respect of the international traffic in slavery, before the question of domestic slavery was touched upon at all in international relationships. Domestic slavery existed for a long time in certain countries, long after the first international conventions were made in regard to the international slave traffic, and then the matter of domestic slavery was dealt with not by way of generation of a general rule of customary law applicable all over the globe but it was tackled piece by piece through specific treaties and conventions between particular States, and from there the resistance against domestic slavery as a matter of international law grew out. But, Mr. President, even to this day, there are commentators who say that if it were to be contended that there is a customary rule of international law prohibiting domestic slavery, it might still be difficult to establish that. I do not say that it would be impossible; I am merely pointing out what the real situation would appear to be in regard to slavery—something which started to receive attention as early as, I think, the previous century, and yet we still have that situation of uncertainty concerning the international legal aspects.

My learned friend says that although in the League time it was perfectly in order to differentiate—it was expected of mandatory and other States to differentiate—suddenly in the last decade or so a completely new and a completely opposite norm has generated in international society, which prohibits such differentiation in this particular field completely. And then he says one can look at the analogy of the case of slavery.

Oppenheim, the Lauterpacht edition, 1955, says the following in Volume I, at page 733:

> "It is difficult to say that customary International Law condemns two of the greatest curses which man has ever imposed upon his fellow men, the institution of slavery and the traffic in slaves."

Earlier, in 1945, the same learned author had stated in *An International Bill of the Rights of Man*, at page 100:

> "The International Bill of the Rights of Man must be used as an opportunity—long overdue—for the final and absolute prohibition of the institution of slavery both in the domestic sphere and as a matter of international law. It is a grave reflection on the modern law of nations, in which the individual is said to be the mere object of law, that the attempts to abolish slavery by international agreement and to vindicate the freedom of man in its primary and most fundamental aspects as part of international law have so far remained unsuccessful."

Schwarzenberger states at page 51, with reference to elementary considerations of humanity, the following:

> "It would be equally difficult to found the admissibility of such considerations *per se* on a general principle of law recognized by civilized nations. If reasons for such hesitation were required, they would be furnished by one example alone: the network of treaties which were thought necessary to bring about the international outlawry of the slave trade." (*International Law*, p. 51.)

One finds, Mr. President, that even as recently as the European Convention on Human Rights it was found necessary to make an express provision in regard to slavery.

Coming to genocide, again one finds the possibility of a dual outlook. A question of genocide may be purely domestic, in the sense that the particular national or ethnic or religious group concerned forms an entirely separate part of a domestic population, that it is entirely confined to the limits of one particular State, or it may have international aspects—there may be questions in law about the treatment of foreigners, subjects of other States, and so forth. So that, again, one could have the two possibilities—a purely domestic aspect and an international aspect.

Coming to the purely domestic aspect, Mr. President, again one has this difficulty, viz., how could an international practice generate in respect thereof, unless the practice must consist of certain States making formal demands as if as of right, and the other State accedes to those demands as if acceding to an obligation upon it to desist because those other States say: "we have a right to demand that you are not to practise genocide in any form in respect of a domestic population"? How else could one expect to find an international practice in that regard, as distinct from the possibility of international conventions?

And, Mr. President, if the practices of United Nations organs and bodies were solely to be relied upon, how often would one expect something of that kind to happen, viz., that a claim be stated on behalf of a State or a group of States with a view to desistance from genocide within a community or within a State and that the other State accedes to it, the other State says: "yes, I agree: there is a rule of customary international law which prohibits me from doing so"?

The Applicants in various respects compare the policy against which they say their norm operates, the policy of apartheid as they describe it, with genocide. We find that they do that in the verbatim record of 13 May, at **IX**, page 260; in the verbatim record of 14 May, at **IX**, pages 272 and 273; in the verbatim of 19 May, at **IX**, pages 355 and 356. This last passage is of note because the Applicants quote from the case on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, and they suggest that in that case this Court "regarded genocide as violative of international law even without the convention then before it". Those were the words used by the Applicants at page 356 of that verbatim record.

Mr. President, it is, in my submission, at least questionable whether the Court ever had such a contemplation, that genocide as described in that convention was to be regarded as violative of international law even without the convention then before it. The context in which the particular passage occurred was something different. The Court was dealing with the question in how far there could be reservations con-

sistent with the main purposes of the convention, and it made an analysis of circumstances as a basis for dealing with that question. In the course of that analysis the Court spoke of the "principles underlying the convention"—that was the expression it used. And the Court said that those were principles "which are recognized by civilized nations as binding on States, even without any conventional obligation".

Now, if we look back at the passage quoted in the verbatim record of 19 May, at **IX**, page 355, we see what the Court probably had in mind in speaking of these underlying principles. The Court said:

> "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 . . ."

In that broad sense then, Mr. President, the Court spoke of the background considerations which underlay the Convention, because it goes on immediately to say:

> "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."

It will be observed that the Court, in this particular passage, was careful to speak of "principles". It was not speaking of particular obligations or particular rights, the Court was speaking of those broad underlying principles, and particularly one finds amongst them this broad concept of the "right of existence of entire human groups"—the very general concept and principle said to be an underlying one and one recognized in international law.

So, Mr. President, what does one find? One finds that the words "binding on States" indicate a contemplation of a principle of international law, probably as part of international customary law. Alternatively, the matter can be viewed in the sense propounded by Schwarzenberger, in his *International Law*, 3rd edition, at pages 51-52, where he stated the following:

> "If due emphasis is put on the words 'from this conception', the Court merely meant to interpret the intentions of a recommendation of the General Assembly. As, however, this recommendation was unanimously adopted by the General Assembly, its contents may be considered to have become binding on all the members of the United Nations by way of estoppel. It is also possible to infer that the Court identified itself with this conception. Then the Court may be understood [then, in that event] to have held that the principles underlying the Genocide Convention are based on the third of the law-creating processes available to the Court."

In other words, general principles of law recognized by civilized nations.

This same view was propounded by the author of an article in the March 1965 issue of the *Texas Law Review*, at page 455. The article was entitled "International *jus cogens*". What is important, Mr. President,

from the comment and from the analysis, is that neither of the two methods which suggest themselves as a proper interpretation of what the Court had in mind, support the Applicants' contention that the Court contemplated a law-creating process, a process of creation of rights and obligations which would be binding upon a party without its consent and, in particular, that something happening in international forums could be regarded as creating a practice which would, even as regards the domestic aspects of a concept like genocide, create international rights and obligations.

There is a very important consideration in regard to genocide which the Applicants very lightly brush aside. We find that in the verbatim record of 19 May, where they say:

> "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." (**IX**, p. 356.)

Mr. President, that is not a consideration which is so lightly to be brushed aside. It is of fundamental importance. In the case of genocide, the Court could find itself on very safe ground in considering that all civilized States would join in their abhorrence of something of that kind, even if practised on a domestic basis, and that that could genuinely be regarded as a general principle of international law underlying the Convention.

In the case of the policies here under consideration, Mr. President, how could that ever be said? Those policies do not relate to a moral concept, as such. They relate to a question of method—a question of a method of seeking to achieve the same lofty purpose as may be held in mind by those who say that this policy is to be outlawed. It is a difference, as I emphasized before, on questions of method, not on questions of principle or of purpose. Therefore, how could it ever be said that, when there is this fundamental difference where those who *defend* the policy say that they are the only possible policies that could work in the interests of all concerned, without those policies and without their basic approach there would be absolute chaos and that the peoples involved would suffer to an extent which is almost unpredictable? If we have those circumstances, Mr. President, then surely all analogy between the case of genocide—between the situation contemplated by the Court in that particular passage—and the case of the policies here under consideration, must fall away.

That brings me, Mr. President, to a consideration of the next element of importance in the generation of a rule of customary international law, and that is the continuation or repetition of a practice over a considerable period of time. Here again, one starts with the conception of what is a practice, a matter with which I dealt under the previous head. It is the practice that is to be repeated over a period of time, not statements and resolutions reflecting what the views of particular States might be. Those statements and resolutions, as I have said, might perhaps be used to throw light upon practice, to demonstrate what practice really is, to show in what light it is to be seen, but mere repetition of statements, particularly in the face of opposition and resistance to them, could never qualify as showing an international practice in the sense as contemplated.

In the case of the norm, as suggested by the Applicants, they would,

in order to comply with this requirement of the generation of a rule of customary law, have to show that that norm, with the content they purport to assign to it or attempt to assign to it, was practised over a long period of time. Actually, the significance of that, Mr. President, as I conceive it with respect and submission, is that in the generation of customary international law there is a large element of testing something out in practice. One finds it not only in regard to customary international law, but also in regard to multilateral conventions particularly, sometimes even ordinary bilateral treaties. There is first a testing out of the standards involved—the standards which are prima facie in existence or contemplated which, in themselves, are non-binding, and which are to be first tested out properly.

If we take it under the first head—the creation of law, of obligations, by treaty or convention—what is the common practice in that regard? One finds that the matter is discussed tentatively for some time. Later on, a conference may be organized, and at this conference there may be discussions—if necessary, there may be technical advice, expert advice and assistance—and if the conference cannot come to a conclusion, it adjourns and comes back to its task later, or the effort is abandoned and taken up again at a later stage, depending upon how difficult a particular problem may be. Sometimes success is achieved easily and quickly, but sometimes it is not. Eventually, when the whole matter has been thoroughly thrashed out, when the processes of drafting have been gone through, when everybody concerned has seen that there are certain qualifications to be inserted, when all those processes have been gone through one has a draft document or perhaps something resolved upon at this particular conference, and that, normally, has to be referred back to the various participating States for their further detailed consideration with a view to ratification or non-ratification. So, Mr. President, it is a carefully devised process, providing every opportunity for testing whether these standards, sought to be elevated to the level of an international legal norm, are really worthy of being so elevated, whether one can be satisfied that they will serve the purpose intended for them—a good purpose—and that they will not have opposite or deleterious effects.

In the case of the generation of rule by practice, a rule of customary law, *a fortiori*, Mr. President, the testing out processes become even more important, and this would seem to be the type of case where it has been particularly impossible to achieve general international agreement upon the subject, or where it has not been considered worth-while to take up the matter, or where it seems that the prospects of attaining such complete unanimity may not be too good unless the matter has been tested out for some time. The regular practice over periods of years would indicate to States to what extent the suggested standard is a good one or to what extent it is not—to what extent there may or may not have to be qualifications in such a standard if it is to be elevated to a norm of international law.

This process of testing under both these main heads of creation of an international obligation my learned friends wish to short-circuit with this contention of theirs. They say that the mere fact that large majorities have been found, on what basis does not really matter, for a proposition which would bear some resemblance to the norm which they suggest has come into operation must, in itself, be regarded as sufficient to bring that norm into operation, even in the face of opposition, and as being binding

upon those who have opposed it. It is, Mr. President, also in that sense a complete evasion and a complete refutation, I should say, of the principles of the approach involved and contemplated in international law.

We come to the case of the third suggested element, the third necessary element, the *opinio juris sive necessitatis*. Here again, Mr. President, it is an element which links up very closely with the first one we discussed, namely that of a concordant practice. It is from the concordant practice that the law is to make its inferences, its generalizations; where the Court is to draw an inference in the case of a disputed proposition. It is from that concordant practice that one has to see whether the practice has been one which involved this element of acknowledgment of obligation, or whether it was merely one of courtesy or one which in some other way did not acknowledge any obligation at all.

And again, having regard to the possible divergencies of approach to a particular matter coming before organs of the United Nations, it must be so very difficult to say that the ultimate conclusion arrived at, even though by a large majority, even though by an agreement which approached unanimity, rested on the same view of the law. I mentioned the various possibilities yesterday, which we have seen in the records time after time—various possible divergent approaches to a draft resolution coming before a body of the United Nations—with the result, therefore, Mr. President, that it is not sufficient just to have regard to an accumulation of resolutions upon a particular subject. In order to see whether they really involved this particular element, one would have to analyse those resolutions themselves; one would have to start with the resolution, have regard to its contents and see whether that in itself involved any indication of what the opinion of the participant States —States who voted for the resolution—was on the questions of their rights and obligations *inter se*, or the rights and obligations of a particular State vis-à-vis the United Nations.

Let us take one resolution as an example, but before I do so, may I point out that a further element of investigation might also be necessary: the provisions of the resolution themselves may be insufficient to indicate whether the participant States—the States which voted for it—had a particular view of the law or not; one may have to look back into the debates; one may have to see why did they vote for this resolution, why some abstained from voting, and so forth; why some voted against. One would have to look into those points in order to see what the real attitude of the States was with reference to this requisite of the law. My learned friend cannot simply bypass it and say: "We look at an accumulation of resolutions, and they provide the answer."

I should like to refer the Court, just by way of example, to a very well-known resolution, and one which is strenuously relied upon by the Applicants in the list which they give in their Reply. It is resolution No. 1702 of the Sixteenth Session of the General Assembly (19 December 1961) on the question of South West Africa. That was the resolution, the Court might recall, which was taken shortly before the visit of the Carpio Committee to South Africa and South West Africa. It was on the basis of this resolution that the further steps were taken which made that event possible.

Now let us start with the Preamble. The very first paragraph referred back to previous resolutions, particularly the declaration on the granting of independence to colonial countries and peoples; and then the third

one "*Notes* [correct text: "*Noting*"] *with approval* the special report of the Committee on South West Africa", and the next one says this:

> "*Bearing in mind* the findings, conclusions and recommendations of the special report of the Committee on South West Africa on the measures to be taken to ensure the institution of the rule of law and such democratic processes, reforms and programmes of assistance as will enable the Mandated Territory of South West Africa to assume the full responsibilities of sovereignty and independence within the shortest possible time."

Just pausing there for a moment, Mr. President, a very important part of the reasoning is involved here—"findings, conclusions and recommendations of the special report of the Committee"—those are to be gone into to see what was the *ratio* of what goes into this resolution, what really moved the various States to vote for this resolution.

We go on, and we have some indication. The question related to what the Committee considered to be necessary for the institution of the rule of law and such democratic processes, reforms and programmes of assistance as were apparently considered desirable. Again, there is no indication whatsoever of a view on the part of the participating States in regard to an obligation of a particular kind on the part of the Government of the Republic of South Africa.

The next paragraph in the preamble reads:

> "*Noting with deep regret* that the Government of the Republic of South Africa has prevented the Committee on South West Africa, with threats, from entering the Territory."

Mr. President, here is a reference to an allegation, a dispute, of fact—nothing which appears to be relevant to the context of what we are discussing.

The following paragraph reads:

> "*Noting with increased disquiet* the progressive deterioration of the situation in South West Africa as a result of the ruthless intensification of the policy of *apartheid*, the deep emotional resentments of all African peoples, accompanied by the rapid expansion of South Africa's military forces, and the fact that Europeans, both soldiers and civilians, are being armed and militarily reinforced for the purpose of oppressing the indigenous people, all of which create an increasingly explosive situation which, if allowed to continue, will endanger international peace and security."

Mr. President, this paragraph contains factual allegations—factual allegations with regard to this policy of apartheid alleged to be ruthlessly intensified; references to "deep emotional resentments"; references to alleged "rapid expansion of . . . military forces" and of the creation of "an increasingly explosive situation which, if allowed to continue, will endanger international peace and security", and in the course thereof the allegation that the Europeans were being "armed and militarily reinforced for the purpose of oppressing the indigenous people"—incidentally, Mr. President, some of the very allegations with which the Joint Communiqué after the visit dealt, and indicated that those were not found to be justified by the two members of the Committee who visited South West Africa. But again, Mr. President, it is part of this case which my learned friends have now abandoned, part of this case

brought against South Africa to the effect that "you are engaged on a policy of oppression", not that "you are engaged upon a policy which violates a conceived obligation on your part not to discriminate at all in the field of allotment of rights and obligations".

Then, Mr. President, the next paragraph proceeds to say:

> "*Considering* that the Government of South Africa has persistently failed in its international obligations in administering the Territory of South West Africa on behalf of the international community."

Now that is just about as vague as it could be. The "international obligations" are not identified, and various States could have various ideas as to what these international obligations were that were being referred to in this part of the Preamble. Probably they referred to the aspect of submitting to supervision by the United Nations, because it was generally in that context that the international obligations were spoken of, but, as I say, various States may have interpreted that in a different way.

The following paragraph reads:

> "*Reaffirming* that it is the right and duty of the United Nations to discharge fully its obligations towards the international Territory of South West Africa."

Again, this is a statement wholly neutral as far as this particular question is concerned.

The final paragraph reads as follows:

> "*Convinced* that the implementation of resolution 1514 (XV) and the discharge of the responsibility of the United Nations under the Charter towards the international community and the people of South West Africa require the taking of immediate steps by the United Nations."

And then comes the operative part of the resolution. We see the reasoning, therefore—it all works up to this: that the United Nations considers itself to have a responsibility "towards the international community and the people of South West Africa", and therefore it becomes desirable to take certain steps.

Those steps are then set out in the operative part, and I should like to refer to a few (it is unnecessary to go through the whole process):

Firstly, the General Assembly "*Solemnly proclaims* the inalienable right of the people of South West Africa to independence and national sovereignty"—a statement, therefore, Mr. President, of a policital aim for the particular people—no reference whatever to a concept, to an *opinio juris*, in relation to the suggested norm.

Secondly:

> "*Decides* to establish a United Nations Special Committee for South West Africa, consisting of [a certain number of members—I am not reading all that], whose task will be to achieve, in consultation with the Mandatory Power, the following objectives:
>
> *(a)* A visit to the Territory of South West Africa before 1 May 1962;
>
> *(b)* The evacuation from the Territory of all military forces of the Republic of South Africa;
>
> *(c)* The release of all political prisoners without distinction as to party or race."

I might remind the Court in passing that no political prisoners were found.

> "*(d)* The repeal of all laws or regulations confining the indigenous inhabitants in reserves and denying them all freedom of movement, expression and association, and of all other laws and regulations which establish and maintain the intolerable system of *apartheid*."

Then it goes on, Mr. President:

> "*(e)* Preparations for general elections to the Legislative Assembly, based on universal adult suffrage, to be held as soon as possible under the supervision and control of the United Nations."

I do not think there was any suggestion that there was a norm binding upon the Government of the Republic of South Africa to have such elections as soon as possible in the Territory.

But to come back to the condemnation which we there find of "the intolerable system of apartheid". We are not told what the reasons are for finding it to be "intolerable", except that we get some idea of the view taken of the factual situation, rightly or wrongly, by those who voted for this resolution, or the sponsors of the resolution: a contemplation of a denial of "all freedom of movement, expression and association". If we read this condemnation of apartheid, as being an "intolerable system", with the condemnation which was expressed in the previous resolution of the very same kind adopted at the previous session, then we find what the authors of the resolution probably had in mind. At page 222 of the Reply, **IV**, the Applicants quote this resolution 1596 of the previous Session, and if I am not mistaken it is one of those referred to in the Preamble of the resolution with which we are dealing. There the Assembly noted:

> "*with grave concern* the continuing deterioration in the situation in South West Africa resulting from the continued application, in violation of the letter and spirit of the Mandate of tyrannical policies and practices, such as *apartheid*".

There, Mr. President, we find, again, a contemplation of fact—a contemplation of tyrannical and oppressive policies and practices.

So all that relates in part to the case which the Applicants first brought against us, that of deliberate oppression, a case which is no longer being brought. And, Mr. President, we come back to the question: how does one infer from a collection of motivations of that kind, a collection of various things sought to be achieved in resolutions of that nature, how does one infer from that the *opinio juris sive necessitatis* with reference to such a highly technical norm as now contended for by the Applicants?

Finally, there is the element of general acquiescence, the most important one from the point of view of the present discussion of the issue between the Parties. One must again emphasize that the general acquiescence should relate to conduct, not to words. Words could at most constitute evidence of conduct, or they could, in a particular situation of the kind I have mentioned before, constitute an act in themselves, an act of demand to which there could be a reaction indicating a submission to an obligation. But one would have to have very unequivocal acquiescence of that nature if such a proposition were to be established with reference to words. And, of course, the whole case is brought by the Applicants on the basis of an admission that on the part of the Respon-

dent, there has certainly never been acquiescence of that kind, but that, on the contrary, the Respondent has been an objecting, a dissentient, a protesting State. That is the crux, the nub of this whole issue. That is the major obstacle which the Applicants must attempt to by-pass, and which they attempt to by-pass in all these devious ways.

We referred, Mr. President, to the position of a dissenting State in our Rejoinder, **V,** at page 140, and it may be useful, for purposes of the present discussion, to refer back very briefly to the passage which we quoted there from an article by the honourable Sir Gerald Fitzmaurice:

> ". . . 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".

I may point out, Mr. President, that the honourable author discusses the same principle also in the *Recueil des Cours*, 1957, II, at pages 99 to 101.

Now, how do the Applicants attempt to meet this vital difficulty, this vital difficulty of principle, relating to the very foundation of an international obligation. Surely, Mr. President, this is the crux, and the Applicants' case must stand or fall by the way in which they seek to meet it—by the measure of success or otherwise which they attain in the attempt at meeting this problem. Let us see how they attempt to deal with it, and let us see what merit there is in any of those attempts. They begin to say that Article 38 (1) *(b)*: ". . . says nothing about unanimous consent as a prerequisite to the coming into being of a customary norm." That is in the verbatim of 19 May, at **IX,** page 347.

Certainly, Mr. President, Article 38 (1) *(b)*, of course, says nothing about that, but Article 38 (1) *(b)* or any part of Article 38 was not intended to set out in detail the various requisites of law—to bring into being rules or principles or obligations or rights in international law. It referred under certain broad headings to methods known to international law, of bringing such obligations and rights into existence. Article 38 (1) *(a)* says nothing about the requirements for having a valid treaty. It says that conventions can give rise to international obligations, and the Court is to apply those that arise from such conventions. But it does not say how the Court is to interpret the conventions, it does not say when a convention arises; it does not say when a convention may be said to be violated; it does not say what are the requisites for bringing those conventional obligations into being. All that the Court has to decide by applying the law, and the law is not intended to be codified in Article 38. I do not think I need say anything further about this attempt at meeting the obvious requirements of the law, the law as contemplated by reference, by incorporation, by reference as it were in Article 38 (1).

Next the Applicants say, at the same page, "it is reasonable to regard the collective acts of the competent international institutions as evidence of a general practice accepted as law". Now, Mr. President, if the suggestion is that the collective acts of the competent international organs

are to be seen as the exclusive and conclusive evidence of what might be regarded as a general practice accepted as law, then this is a purely legislative argument, because it does away with all the known principles of the approach of international law to the field of evidence to which one looks in order to determine whether a principle of customary international law has come to form part of the law. Even, Mr. President, in so far as the suggestion is that one must look at those acts as evidence bearing much weight in such an enquiry I have already dealt with all the considerations why we have said of these acts that to the extent that they could be relevant at all, the weight to be assigned to them could be very little, it must depend on particular circumstances. The circumstances of this case do not seem to support any suggestion that much weight could be attached to them, any more than in any normal or other situation where the whole effect of the practice in the international institution could really be merely of an auxiliary or an ancillary nature—where it could be additional to what must really be considered, namely the actual consistent practice.

Next, we find, at **IX**, page 348, of that record of 19 May ". . . 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 . . .". Mr. President, this is, again, a purely legislative argument—an argument which presupposes the desirability of a capacity on the part of international society to develop international law to meet developing needs.

It may well be that there is a need in that direction; it may well be that some think that that need is to be fulfilled by advancing further in the direction of the creation of an international legislature. But there are others who do not think so. The capacity of international society to develop law must always be measured by the willingness of the various States comprising international society on the basis of equality to subject themselves to such law-generating processes, and when my learned friend is contending for a process which falls clearly outside that which is desired by the States now forming international society, then he is bringing a pure legislative consideration to the Court and not a legal argument. He is arguing for reform, even for revolution, if one wishes, but not for application of law.

Then, Mr. President, the Applicants seek to rely—at page 347 in the record of 19 May—on Goodrich and Hambro. The passage is the following:

> "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."

Now, Mr. President, in the context it is perfectly clear that all the authors were dealing with was a possibility of generation of custom within the internal organization of the United Nations itself relating to matters of procedure and the like, and *not* relating to substantive obligations and rights as between States or as between a State and the organization. In any event, Mr. President, the problem of the dissenting State is not referred to in any way in this discussion in Goodrich and Hambro. So that does not help the Applicants as far as their fundamental problem is concerned.

Next, the Applicants quote certain passages from a work by Mrs. R. Higgins. We find quotations in the verbatim record of 19 May, at **IX**, page 348 and 358, in support of their contention. The passage at page 348 is a very general one, speaking of flexibility possible in regard to the generation of international custom; then at the same page we find this passage:

> "Resolutions of the [General] 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."

Mr. President, that passage in itself appears to be quite innocuous. It acknowledges the basic proposition that the resolutions are not *per se* binding, but then it assigns to such resolutions the possibility of providing evidence of a custom. It puts the possible weight to be attributed to this source of evidence somewhat higher than I should be prepared to do so, with the greatest respect and submission, for the reasons which I have already adduced to the Court, but further than that the passage does not take the matter. It does not help the Applicants in their fundamental problem—the problem of the dissenting State. The Applicants rely more directly on the passage at page 347. I think it may be as well to refer to the wording of that after all:

> "Of all these sources, that is [those mentioned in Article 38 (1)] . . . 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' [of States]."

Now, Mr. President, the Applicants emphasized these words "the consensus of the great majority" of States. However, Mr. President, they did not quote the passage immediately following upon this one. It is in the work of Mrs. Higgins—*The Development of International Law through the Political Organs of the United Nations*, at pages 1-2 and reads: "The emergence of a customary rule of law occurs where there has grown up a clear and continuous habit of performing certain actions in the conviction that they are obligatory under international law." Later on the same page, Mr. President, there occurs the further passage which is relied upon by the Applicants, namely: "Collective acts of States, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain in the status of law" (p. 2).

Now, Mr. President, taking this whole context it seems perfectly clear that the authoress did not purport to propagate a new basis for the generation of customary law, but that she was merely seeking to apply well-recognized principles. Her references to "great majority" and to "sufficient numbers" clearly do not imply any view that a great majority could impose its will on a small dissenting minority. She certainly says nothing of the kind. She speaks of giving effect to a clear and continuous habit of performing certain actions in the conviction that they are obligatory under international law.

So, what she says, Mr. President, in regard to these collective acts by States, the weight to be attributed to them, the inferences to be drawn from them, certainly does not mean that she suggests that if there is opposition by a State or by a minority group of States, until the coming into existence of such a rule of customary law, any collective will or even collective acts by other States can bind such an opposing minority. What she says is perfectly compatible with the widely held view that customary international law can arise among certain States, although not binding dissentients.

Indeed, Mr. President, the passages relied upon are compatible even with the elementary proposition that the active consensus of all States is not required for the coming into existence of a rule of customary law, but that such a rule *will* be binding also on non-consenting States which did not expressly dissent from the rule during its period of gestation. She merely puts the proposition in general when she speaks of "collective acts . . . by sufficient numbers with sufficient frequency" by the great majority of States. It is a general proposition; it does not purport to deal with the problem which arises when there is active opposition.

Mr. President, in concluding my remarks on the Applicants' attempted reliance on the work of Mrs. Higgins, I may point out to the Court, in no unkind sense, that the work is a research student's thesis. As I have said, I do not mean that in an unkind sense as far as Mrs. Higgins is concerned—I have certainly not read through the whole work to see what merit it has or what it may not have as a work of its kind. The point I want to make is this, that that mere fact shows the lengths to which the Applicants find it necessary to go in order to try to find some support for this revolutionary contention which they are putting to the Court and trying to substantiate; they have to rely on phrases ambiguously worded in the thesis of a research student and then, on proper analysis, one finds that those phrases do not support them.

Next, Mr. President, the Applicants attempted to rely on certain extracts from the works of Dr. Wilfred Jenks. That we find in the verbatim record of 19 May, at **IX,** page 350, and at page 358; but again, none of these passages even remotely implies that any process of law exists whereby a majority in international society can impose its will on a dissenting minority.

In particular, we find the Applicants rely on a passage which reads as follows *(it is quoted at* **IX,** *p. 358, of the verbatim record of 19 May):*

> "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."

I should like to pause for a moment at that sentence, because it is the key to the whole passage. A contrast is drawn between the distinctions "the will of the community" and "the law of the community". The will of the community constitutes the basis of obligation but the law of the community comes into being by the known processes.

Then the passage proceeds:

> "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."

Now, Mr. President, the Applicants say that this passage appeared "in the context in which Dr. Jenks was demonstrating the possibilities . . . for accommodating law-creating by the organized international community within the three main subsections of Article 38 (1) of the Statute". I state it again—"for accommodating law-creating by the organized international community", for accommodating that within the three sections of Article 38 (1) of the Statute.

Mr. President, on any reading of this passage, careful as we can try to make it, there seems to be not the least justification for this reading of it, the reading suggested by the Applicants. Dr. Jenks was quite clearly dealing with the ultimate sources of law, the ultimate source of legal obligation, in a *jurisprudential* sense. He was comparing in that respect what he regarded as being the ultimate source, viz., the will of the world community, with other alternatives that come to mind in the theories and the discussions of academic lawyers, namely the theories of natural or fundamental rights of States, or the consent of States, or other theories that have been suggested. It is in this will of the community that he sees the ultimate source of the obligation, and he says that it is in terms of that will of the community that the present known processes of law-generation exist; it is because the community does not want any less or any more than those law-creating processes that they are there. It fits in perfectly with the situation so forcibly stressed by other commentators too, namely that it is because many of the States of the world, particularly the major States, but also the smaller ones, do not want an international legislature, that we have not got such a legislature, and that the extent to which binding powers given to international organizations, are so limited as they in fact are. At no stage of the essay, Mr. President, does Dr. Jenks appear to touch on the problem which is here in issue, namely whether a majority of the world community, employing that term in a philosophical sense, can bind a dissentient minority. Consequently, he also provides no support whatever for the Applicants' contention.

Next we find, at **IX**, page 348, of the verbatim record of 19 May, that the Applicants said the following:

"... 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 relevant only if the subject of this litigation were apartheid within the Republic of South Africa itself."

At an earlier stage, Mr. President, the Applicants said, and I quote now from the verbatim record of 17 May:

"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." (**IX**, p. 305.)

Now, as a matter of first comment, Mr. President, it will be observed that the later admission which came on 19 May—in the passage which I read first—is a more explicit one than the earlier in so far as it concerns the position of the Republic of South Africa with respect to its own policies in its own country.

The earlier admission in the second passage is put more tentatively: "This conceivably might be claimed by Respondent with respect to its domestic jurisdiction as sovereign", but, in the later passage, it is put more explicitly: "Respondent's citation of Judge Sir Gerald Fitzmaurice's apt summary of the traditional doctrine would be relevant only if the subject of this litigation were apartheid within the Republic of South Africa itself."

No attempt was made, Mr. President, to reason in support of the contention that it might not be possible for Respondent to claim that exemption in respect of its own policies in its own territory.

But, Mr. President, in addition, we find that no reasoning, apart from what I have just read to the Court, was suggested in support of the distinction sought to be drawn between Respondent's position in its own territory and Respondent's position as Mandatory, because that now, in the final analysis, appears to be the manner in which Applicants seek to meet this basic, this fundamental difficulty about the dissentient State. They attempt to meet it, Mr. President, apparently, by conceding that no norm binding on Respondent could arise in the face of its dissent, as far as South Africa is concerned, and by seeking to draw this distinction. It really amounts to this, that, for the purposes of their norm argument, they now fall back again upon a distinction which they sought to draw for purposes of their standards argument. The Court will recall that the sole distinction which they sought to draw between the norm argument and the standards argument was this, that the standards, although not binding in themselves, became binding upon Respondent because of Respondent's position as a Mandatory. Its relationship as Mandatory to the so-called organized international community, or to supervisory bodies in that community, was why standards could become binding upon Respondent as Mandatory, i.e., because of that particular relationship. We have dealt with that argument and we have shown, in my submission, that it has no substance.

Now we come back to the norm argument. That was said to be something which constitutes legal obligations quite independently of the Mandate—legal obligations which would be binding upon Respondent quite independently of the operation or the content of the Mandate. But

we find that, in the ultimate result, having to meet their fundamental difficulty in that respect, the Applicants find it necessary to fall back upon an argument relying upon Respondent's position as Mandatory, an argument then, in essence and on analysis, the same basic one as we have already controverted in respect of the standards theory.

This is, in effect, what the Applicants say here. As I have said, we have really disposed of that suggestion before. I think I could usefully add something as to the merits of this distinction especially, within the sphere of international relations, the function that could be assigned to the Mandatory in respect of the external international relations of the mandated territory, in order to see whether there is any merit whatsoever in the distinction which is sought to be drawn between Respondent's role as a Mandatory, in that respect, and its role in respect of its own territory, particularly in so far as its relationship with the so-called organized international community is concerned.

There is ample authority, Mr. President, for the proposition that the Mandatory was in law capable of entering into binding international legal relations on behalf of the mandated territory. This, indeed, appears from the terms of the mandate instruments themselves. The B mandate instruments, except that for Tanganyika, stipulated, in general, that the Mandatory should apply to the territory "any general international convention applicable to his contiguous territory", without qualification. (*Mandates Dependencies and Trusteeship*, p. 234.) That was for all the B Mandates, except Tanganyika. In the case of Tanganyika there was a more qualified formulation. Article 9 of that Mandate replaced the words "applicable to his contiguous territory" by the phrase "already existing, or which may be concluded hereafter, with the approval of the League of Nations, respecting the slave trade, the traffic in arms and ammunition [and some other matters mentioned]" (p. 234). This formulation, with the approval of the League of Nations, came, as I have said, in the case of the Tanganyika Mandate; it did not occur at all in the formulation in the case of the other B Mandates.

Duncan Hall, in his well-known work *Mandates Dependencies and Trusteeship* (I quote the wording at p. 234) points out that in the case of two of them, the A Mandates, those for Palestine and for Syria, the corresponding articles were to the same effect as that relating to Tanganyika.

But, as I have said, that qualification even of "with the approval of the League of Nations" does not occur in the case of the other formulations in the B Mandates.

The important point which emerges from these provisions is that the authors of the mandates system, by obliging the Mandatory to apply certain types of conventions to the mandated territories, recognized that the Mandatories possessed the general competence to enter into international conventions, subject, of course, to the provisions of the mandate.

That would, indeed, Mr. President, in my submission, be a natural consequence flowing from the grant of the full power of legislation and administration described by Mr. Hymans in his report as something involving a full exercise of sovereignty.

Now that recognition, Mr. President, of the general competence of the mandatory in this respect appears also from the League practice. Norman Bentwich says, in his well-known work, at page 105:

"As regards the cognate question of the application to the mandated territories of Treaty rights existing between the Mandatory and foreign States, effective action has been taken at the instance, again, of the Mandates Commission. It was manifest that the treaties did not apply as of right to the mandated territory even where it was administered as an integral part of the Mandatory's territory, since in law the mandated area was a separate entity. It has, however, become the regular practice for the Mandatory to provide in any commercial treaties with foreign States, and other conventions affecting the rights and privileges of its subjects abroad, that the instrument shall apply to any territories in respect of which it holds a Mandate in the same way as it does to its Colonies. The inhabitants of mandated territories obtain, therefore, rights of trading and carrying on their business or profession in foreign countries, and enjoy rights with regard to industrial property under the same terms as the subjects of the Colonies. In passing, it may be mentioned that extradition treaties of a Mandatory are now regularly extended to mandated territories." (*The Mandates System*, p. 105.)

Then Quincy Wright, at page 122 of his well-known work, states that—

". . . on advice of the Commission and most of the mandatories, the Council took the position that the mandatory is primarily responsible for the observance of the mandate and has power, not as sovereign but in the capacity of mandatory, to make treaties or agreements with respect to mandated territory or to pledge its resources for loans without prior Council consent". (*Mandates Under the League of Nations*, p. 122.)

As regards treaties providing benefits, the Permanent Mandates Commission in its Sixth Session in 1925, at page 172 of the relevant records, suggested to the Council that it might (these are suggestions to the Council as to what it might do):

"1. Recommend that the mandatory Powers, and also all States, whether Members or not of the League of Nations, which have concluded special treaties or conventions with the mandatory Powers, should agree to extend the benefits of such treaties or conventions to mandated territories if possible and expedient and if the provisions of these international agreements are consistent with the stipulations of the Covenant and the mandate;

2. Request the mandatory Powers, subject to the above reservations, to insert in any special treaties or conventions they may conclude hereafter a clause providing for their application to mandated territories;

3. Request the mandatory Powers to indicate, in their annual reports the reasons and circumstances which have prevented the application to mandated territories of the special treaties or conventions which they may have concluded with other Powers during the period under review."

Those were the recommendations.

And according to Duncan Hall, in the work to which we have referred at page 235,

"By 1931 the Mandates Commission, the Council, and the mandatory powers had reached a working rule that treaties of this kind

should be extended regularly to the mandated territories." (*Mandates Dependencies and Trusteeship*, p. 235.)

Mr. President, the conclusion then is—resulting from the wording of the instruments, their ordinary legal consequences, the comments and the practice in the League time—that both as regards the incurring of obligations and as regards the acquisition of benefits, the mandatory was entitled to act on behalf of the mandated territory as far as its international relations were concerned. There were, of course, qualifications which it was necessary to state, qualifications ensuring consistency with the Covenant and the mandate instrument. The exceptions which arose in that regard in practice were, as far as we could ascertain, generally found to relate only to one particular matter, namely settlement of boundaries of mandated territories. One could quite understand that that would be a matter which could be said to relate to the provisions of the mandate instruments themselves. The provisions indicated, in a description, what was to be regarded as the mandated territory: if that territory was, or might be, altered by a new boundary adjustment, that might well involve a possible question of alteration or modification of the terms of the Mandate, and that modification would have to be dealt with in terms of the specific provision therefor, in Article 7, paragraph 1, of our Mandate and corresponding articles of other mandates, by agreement between the mandatory and the Council.

But with that necessary qualification—and as I say, as far as we could ascertain this was apparently the sole type of case of practical application that arose—in regard to the ordinary processes of international intercourse the authority to act rested in the mandatory, and the League organs merely exercised their normal supervisory or co-operative functions. That was something the mandatory had to do in the exercise of its discretion; there was, of course, a power of supervision, a power on the part of the supervisory organs of seeing whether good use was made of power or of discretion, and that would lead to the normal discussions, co-operation, suggestions and so forth in that respect, but no binding imposition of the will of a supervisory organ upon a mandatory which did not wish to agree. This was all in accordance with the principles and practice we discussed before.

So, for instance, one finds during the Thirty-seventh Session of the League, 1939, according to page 56 of the records of the Permanent Mandates Commission, that in discussing the report for Ruanda Urundi:

> "Count de Penha Garcia expressed the hope that the annual report would in future contain a table showing all the internationa Conventions in force in the territory. Tables of that kind were given in the annual reports for other territories, for instance, Tanganyika."

So, Mr. President, once it is accepted that it is part of the mandatory's power of government to regulate the external relations of the territory, then it becomes confirmed that the purported distinction which the Applicants draw between the Respondent acting *qua* mandatory and its acting *qua* sovereign State is without any substance; that it is completely untenable. Both in regard to the mandated territory and in regard to South Africa itself, Respondent would be the responsible authority to decide whether to incur, or to decline to incur, rights and obligations which are being generated in international society. Respondent would be the authority whose volition would in this respect be the decisive factor,

both in regard to agreeing to specific treaties and to their extension to the mandated territory, and in regard to the principles and processes relating to the generation of rules of customary law.

There could, in our submission, in principle, be no distinction between the right to conclude, or to refuse to conclude, a treaty, and the right to assent to or dissent from the establishment of a custom binding upon the territory as such. In both cases the mandatory would be deciding as to which obligations should be binding in international law on the mandated territory. It would be the function of the mandatory to do so, Mr. President, because the mandatory is entrusted not only with the power of government but also with the obligation of using that power for the purpose of promotion of well-being and progress. If it is not for the mandatory to judge whether a particular practice which seems to be arising in some circles in international society would or would not be beneficial for the mandated territory, and whether it should or should not join in a norm-generating process in that respect, who else can take that decision?

The contrary attitude suggested by the Applicants, Mr. President, would indeed lead to absurd results. If the mandatory could not take these decisions to which I just have referred, no other State or organization could conclude or ratify a treaty on behalf of the territory. No other State or organization could participate in the evolution of a custom, could entertain a relevant *opinio juris sive necessitatis*, could, in appropriate cases, dissent from or protest against the generation of a customary rule of law. The effect would then be that the mandated territory would be entirely outside the confines of international intercourse, because there would be no responsible authority which could make the developing international law applicable to the territory, in so far as it depends on volition, or render it inapplicable to the territory.

So, Mr. President, that purported distinction again shows the utter lack of any legal basis for the Applicants' contention in respect of norms. Apart from being devoid of merit for these very reasons I have just indicated, because it is *the* task of the mandatory to decide in this respect whether it wishes to co-operate or not in creating new international legal relationships with respect to the mandated territory; the lack of merit is also shown by the fact that in the ultimate result the Applicants, in effect, have to fall back here on their standards argument, which has already fallen away for other reasons, in my submission.

Finally, Mr. President, and we are still discussing the attempt of the Applicants to meet their fundamental difficulty about a dissenting State, we find that the Applicants make a frontal attack on the applicability of traditional rules regarding the generation of custom. They say at **IX**, page 350 of the verbatim record of 19 May that the traditional formulation—

> ". . . is meshed with the emergence of customary international law as a consequence of State practice, rather than as a result of the form standard and norm-setting processes of the organized international community, acting through its competent organs".

May I pause there. The word "form" appears to be a mistake in the sentence; apparently it should either not be there at all or it should be the word "formal", or something similar. The emphasis is on the emergence of customary international law as a consequence of State practice

rather than as the result of the standard and norm-setting processes of the organized international community. It may be that the intention was to speak of formal processes in that regard, through its competent organs. The quotation proceeds:

> "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."

Mr. President, taking this passage by itself as a suggested argument in support of the general contention, it is entirely question begging. The two factors relied upon in this last sentence as I read them are, "the centralization of the normative process in international society", that is, a centralization which is said to have arisen from the other factor, namely "the existence and the expanding role and the ever-increasing importance of a decisive nature of the international institutions themselves".

Mr. President, is that not the very issue, namely whether there has now been such a centralization of normative processes in international society, as is contended for by the Applicants, that one is precluded from looking at what States *do* in contrast with what they *say*, as distinct from what they say, or in addition to what they say? Is it not the very crux of the issue whether it can now be said that importance of a decisive nature is to be attached to the international institutions themselves? But, Mr. President, apparently the Applicants do not rest on the mere assertion contained in this passage; they argue further in the record, in passages which would appear to be relevant to this contention, especially at pages 351 and 352, that a distinction should be drawn between cases involving, firstly, "an adjustment of directly competing interests of States" and, secondly, those involving "promotion of common interests and collective interests of States, and of the organized international community taken as a whole". Both those phrases are quoted from **IX,** page 351, of the verbatim record of 19 May.

Apparently, the Applicants say there is the type of case which was considered by this Court, in the *Asylum* and *Fisheries* cases for instance —a case of the adjustment of directly competing interests of States—and with that they contrast the case of promotion of common interests and collective interests of States and of the organized international community taken as a whole.

I should like to refer the Court to the passage, in the record of 19 May, in which the Applicants then apply this suggested distinction:

> "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 ['of this character' refers to the later category where there is said to be a common interest and a collective interest]. Such a law-creating procedure [the Applicants say] 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." (**IX,** p. 352.)

So, Mr. President, it is a matter of considering what merit there is in

this suggested distinction. In our submission, there is none and there can be none. The distinction, indeed, comes very strangely from the Applicants who have consistently urged upon this Court that there is a conflict of interest between themselves and the Respondent concerning the subject-matter of this litigation—the dispute now before the Court. That is the contention which they bring to the Court in order to show that there is a dispute which cannot be settled by negotiation; it is something upon which the Court must adjudicate. They then say there is a conflict of interest, but when it comes to the drawing of this distinction they say this matter of the application or otherwise of the suggested norm relates to a sphere where there is a collectivity of interest, a promotion of common interest and collective interests of States and of the organized international community taken as a whole.

Apart from that, Mr. President, as to the distinction itself, no authority whatsoever is quoted for that suggested distinction or for the legal effect attributed to it. Indeed, the Applicants would appear to be asking the Court to apply revolutionary principles of law with far-reaching implications only on the basis of the asserted desirability of doing so, which is expressed in various ways in their argument at pages 351-353 of that record.

What is this suggestion of a "law-creating procedure" in the latter type of situation which is said to be vested in the "collective judgment", the "collective will" of the organized international community? Is that not entirely revolutionary, Mr. President? The understanding I have of the international legal order is that which emerged from discussions such as those contained in the book of Judge Morelli which I cited yesterday, that it is an individualistic approach; that there are various States standing to one another on a paritative basis, a basis of equality, in a relationship of equality in what might be called a society merely because it comprises these various entities or elements. It is, in that sense, only a society; it has no hierarchical structure superimposed upon it. The approach in this society has always been an individualistic one, and if there is to be generated a law applicable to the relationship between these entities in the international society, it is a law which they create themselves by their will, by their co-operation and agreement. That is the way in which it is brought into being.

That stands in marked contrast to the situation which obtains within a domestic municipal society, in which the individual is born into an order where the collective will, acting through the legislature or whatever the authority may be, is imposed upon individuals whether they like it or not, and where those laws are to be accepted by the individuals because the collective will stands behind it, the collective will in this centralized organization in this highly organized domestic-law entity, which is organized on the collective basis. Is not my learned friend in effect suggesting to the Court now, Mr. President, that the collectivistic approach is to be applied to international society, and that there is to be a bowing on the part of individual States to the collectivistic will which is expressed not by unanimity, but on the majority principle? It is true he says it must be a vast majority; it must be something approaching unanimity, but it still falls short of unanimity. And he says that the collectivistic will is now to be applied in this sphere of common interests, the common interests of the States concerned and of the international society itself.

Mr. President, what would be the implications of doing that? It may be worth-while to pause for a moment and consider one or two possible examples.

Suppose all the nations in the world were to agree—all the nations that is except for the two large Powers, the Soviet Union and the United States of America—that it is absolutely necessary to have international control over the production of nuclear weapons or upon attempted space travel, or upon both. Could that collective will now be imposed as a matter of law upon the Soviet Union and the United States in this matter of common concern to the whole of humanity, in view of the implications which those matters might have on its future and upon its existence? Is not that the effect of what my learned friend is contending for? And what would be the reaction of the Soviet Union and of the United States of America if such a suggestion were made to them on the basis of a proposition urged upon this Court and which this Court is asked to endorse and apply in this case?

If the major portion of the world were to turn Communist, Mr. President, and only the United States of America and some other States in America were to hold out, could the Communist part of the world then impose its will by this preponderant majority on the rest of the world; so that this is a matter of common concern, this collectivistic will decides that it is a matter of common concern, and the whole world is now to become Communist, that there is to be now a norm of non-capitalism? Mr. President, it becomes absurd. Is not this the very negation of the order which does exist, and in which this Court itself finds its own existence as part of that order, which this Court is asked to apply as the international legal order? Does that not run counter altogether to the carefully devised checks and balances which we have in the organizations of the international community providing, for instance, for the veto right of the two large States I have mentioned in the Security Council?

I do not think I need say any more, Mr. President, to show that the suggested distinction and the suggested merit of the application of the so-called collective will or general combined interest is entirely without merit or substance.

That concludes what I wanted to say on the process of the generation of a rule or obligation in customary international law, within the contemplation of paragraph *(b)* of Article 38 (1) of the Statute, but before I proceed to paragraph *(c)*, I should just like to say this in general before leaving these two main, primary sources of international obligation, as contained in *(a)* and *(b)*:

The Applicants' contention avoids entirely and seeks to short-circuit, in the manner which I indicated this morning, that testing process which is inevitably involved in both of the heads contemplated in *(a)* and *(b)*, both with respect to the formation of international treaties or conventions and the generation of rules of customary law. The traditional rules applicable to those two sources of law do not assist in any way to solve the Applicants' problem about imposing the will of a majority, however large, upon that of a minority who insists that its will is not to be bound by this new suggested norm in international society.

Now the Applicants attempt to overcome that difficulty, with reference to the third of the paragraphs, i.e., in Article 38 (1) *(c)*, the paragraph which authorizes the courts to apply "the general principles of law recognized by civilized nations".

Mr. President, the meaning and the scope of this paragraph have been discussed by various authors. Some of them have suggested certain difficulties, certain uncertainties about aspects of the meaning and the scope of the paragraph and the provision. But again, it is a case where the differences between the views of these authors do not seem to matter at all for the purposes of this present case. There is a substantial measure of agreement underlying all these various different formulations upon the matters which do seem to be relevant and decisive for purposes of this case and it is with a view thereto that I should like to refer the Court to a few expressions of view and of comment by certain of the well-known writers.

I should like to refer first to Sir Hersch Lauterpacht, in his work *Private Law Sources and Analogies of International Law*, which appeared in 1927. At page 68 of that work, the learned author quoted the corresponding provision of the Statute of the Permanent Court which in its sub-paragraph 3 referred to "the general principles of law recognized by civilized nations". And then, at page 69, the learned author proceeds:

> "The will of States as expressed in treaties, or, failing that, in international custom, remains thus the primary sources of law. If, however, these sources are silent, the Court, far from having to declare its incompetence, is bound to pronounce on the basis of general principles of law which are thus definitely recognized as a subsidiary source of international law. What remains now is to answer the question: What is the exact meaning of those 'general principles of law as recognized by civilized nations'? Bearing in mind that they are not identical with decisions *ex aequo et bono*, which are dealt with separately, we may point to three sources from which the answer to the question may be drawn. *(a)* It may be drawn, firstly, from the study of international arbitration before the establishment of the Permanent Court of International Justice. Such an investigation, to which the last part of this monograph is devoted, shows that whenever international tribunals have recourse to 'general principles of law' they apply, as a rule, a general principle of private law, i.e. a principle not belonging to the system of law prevalent in one country, but expressing a rule of uniform application in all or in the main systems of private jurisprudence.
>
> *(b)* The query may be answered, secondly, on the ground of a simple logical inference drawn from the context of Article 38 (3). The Statute refers here to such general principles of law as are neither international law proper nor considerations *ex aequo et bono*. This means that although the Court may apply, for the purpose of a particular case, a rule of criminal or administrative law of sufficient generality, it is of general rules of private law that, on the whole, we must needs think in this connection. For it is, as a rule, private law which gives shape and definite form to those general sources. Here lies the organising and ordering part played by it. Those 'general principles' threaten otherwise to degenerate into altogether subjective natural law or legal philosophy.
>
> *(c)* Thirdly, the utterances of jurists drafting the Statute do not fail to throw some light on the meaning of the clause in question. Thus the Chairman of the Committee, from whom the substance of the clause originated, explained its meaning by reference to the principle of *res iudicata* adopted by the tribunal in the *Pious Fund*

case; and another member suggested, while referring to that case, that this was a rule which had the same character of law as any written law, and that all such general principles of common law, being a part of international law, are applicable to international affairs.3"

In the footnote No. 3, Mr. President, there is a reference to what Lord Phillimore said at page 316 of the relevant records of the preparatory work, and the footnote continues:

"He [that is Lord Phillimore] pointed out in another place, (p. 335), that the general principles of law were those accepted by all nations *in foro domestico*, such as certain principles of procedure, the principles of good faith, of *res iudicata*, etc." (pp. 70-71).

I should like to refer next to the work by Dr. Cheng—*General Principles of Law as Applied by International Courts and Tribunals*. After saying that "principles are to be distinguished from rules", at page 24 of this work, the learned author stated the following:

"This part of international law does not consist, therefore, in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short of Law."

May I pause there for a moment? The distinction drawn here between rules and principles, Mr. President, is of course, a matter of a use of words which is not uniform—the distinction which the author appears to have in mind is this—that he speaks of a rule as something which is specifically binding in a particular relationship, such as an obligation as between particular persons or parties, whereas a general principle is something more general. It is something which underlies that rule and other rules and may serve in helping to interpret and apply the rules. As I say, that usage of distinction between rules and principles is not universal, but I am merely explaining in what sense the distinction is being drawn here.

The author proceeds:

"Thus, Lord Phillimore, who proposed the formula, explained that by general principles of law he meant 'maxims of law'. But how is it possible to ascertain whether a given principle is a principle of law and not of another cognate social discipline, such as religion or morality? The recognition of its legal character by civilized peoples supplies the necessary element of determination. Lord Phillimore also explained that the principles referred to in Article 38 I *(c)* were those which were 'accepted by all nations *in foro domestico*'. M. de La Pradelle took them to mean that general principles of law were the basis of the municipal law of all or nearly all States. The recognition of these principles in the municipal law of civilized peoples, where the conception of law is already highly developed, gives the necessary confirmation and evidence of the juridical character of the principle concerned."

So, Mr. President, what do we find so far? We find an emphasis upon this matter that when there is a reference to "general principles of law" that is something subsidiary to the main sources of rights and obligations found under heads *(a)* and *(b)*. They are general principles of law applied by civilized States *in foro domestico*—in other words, in their own

domestic legal systems. They are the underlying general principles in those domestic systems and they are applied in so far as they are general in the sense of being common to these various systems, common as general principles.

That, in itself, indicates that their mode of application in international law is of a secondary and auxiliary nature. They are taken from the realm of municipal law, they are elevated by analogy from that law into international law relationships and applied there; and they are applied not because they in themselves define a right or an obligation or bring about the origination of a right or an obligation on the part of a State, a subject of the international law. They relate to the definition of legal relationships in domestic law, to the relationships between individuals in that law, i.e., persons in that law, individual persons, corporations, the person, or the subject and the State—all the various types of relationships which one gets in domestic law; and from those relationships they are then taken by way of analogy applied in the sphere of relationships as they obtain in international law—relationship between States (A) and (B) or between various States or between a particular State and an international organization.

They are therefore ancilliary in the sense that one first has to determine the existence of a possible right or obligation said to apply under the main headings of sources of international obligation and right—treaty on the one hand, and custom on the other—and they come into play when certain questions arise about matters which have not received particular attention in customary practice as between States or indeed in the practice or jurisprudence of courts of law and international tribunals. Then the analogy drawn from domestic law assists. It assists, for instance, in the interpretation of the treaty, in bringing to bear upon the interpretation of a treaty or a convention the general principles recognized in the legal systems of the various nations. It could assist in giving effect to a treaty, in assigning certain effects to certain situations that may arise in treaty relationships. Let us suppose there is a violation of a treaty obligation. The question may arise: "is that violation such as to make it possible for the other party now to cancel that treaty or to reject it entirely—to repudiate it?" The situation may be of such a nature that an exact precedent does not exist in international custom, but there is a fund of general principles of the law of contract, in domestic relationships, from which the Court can draw.

And so, Mr. President, the same applies with regard to the generation or the effect or the interpretation of international customary law. Questions may arise which have never been settled in an exact sense in relation to a suggested custom, and the answer may be supplied by these general principles of law. In the *Corfu Channel* case the Court was concerned with a concept known to international customary law, namely that of an international delinquency. The Court had to decide whether particular acts in the particular case could be said to constitute an international delinquency. It could not rely on an exact precedent in all respects, or it was suggested that it could not rely on an exact precedent in all respects in the international custom, and therefore it drew upon the general principles applied in the various domestic systems in order to supply the answer.

But there must first be something basic, Mr. President, something upon which it is said there is a concept already recognized in international

law—a treaty, or a rule of customary law—and that is said to apply in this particular case. Then there is something on which, as it were, one can post the bull; there is something for the purposes of which one can draw on this additional, this subsidiary source, with a view to assisting the application of that particular principle or the exposition of that particular obligation. That is the way in which it seems to have been contemplated by these authors and also by the jurists who were responsible for the drafting of this provision originally. It seemed to them that subsidiary assistance could be derived from this source, and that is the way in which it appears to be applied in practice.

I may refer the Court further to Schwarzenberger, at page 43—just a brief passage, referring to Article 38 (1) *(c)*, which is to the following effect:

> "In order to be applicable, a principle of law must fulfil three conditions.
>
> *First*, it must be a general principle of law as distinct from any more specialized rule of law. It remains for comparative lawyers to elaborate the exact contents of such general principles of law. Until this task has progressed very much further than, so far, has been the case, a sympathetic but reserved attitude to this law-creating process appears advisable." (*International Law*, p. 43.)

The emphasis is on the generality of the principle as something which could be of assistance in a subsidiary, in an auxiliary, in an ancillary way.

I should like to refer also to the following passage in the work of Dr. Parry, to which I referred yesterday, at page 83:

> "The general object, then, of inserting the phrase in the Statute seems to have been, essentially, to make it clear that the Court was to be permitted to reason, though not to legislate, and by, for instance, the application of analogies from the law within the State, to avoid ever having to declare that there was no law applicable to any question coming before it."

Then, Mr. President, I refer to Louis Cavaré, *Le Droit international public positif*, Volume I, 2nd edition (Paris), 1961. At page 220 he eliminated from this source of law first the concept of equity, then general principles of justice, or natural sentiment of justice—he eliminated those possible constructions and said they were obviously not what was intended; and thereafter he said (I quote our free translation): "All that remains . . . is a rational interpretation: general principles of law signify general principles of internal law [internal meaning domestic, municipal law]. It concerns rules common to the majority of legislations, principles above all controversy, which constitute the legal heritage common to all civilized nations."

Next, I refer to Paul Guggenheim, *Traité de Droit international public*, Volume I, 1953, at pages 151-153. I read only a passage at pages 151 and 152, again a free translation:

> "This disposition [that is, as regards Article 38 (1) *(c)*] was inserted in the Statute of the Court because the Committee of jurists which drafted it agreed in declaring the customary and treaty law contained many gaps. In order to fill these, it should therefore be necessary to create legal norms such as those accepted *in foro domestico* by all civilized States. The overwhelming majority of

members of the committee were in any event of opinion that general principles of law should not be applied by The Hague Court unless they were universally—or quasi-universally—accepted by the internal legislations of civilized States."

So, Mr. President, again on this general survey it becomes clear that this concept, defined in Article 38 (1) *(c)* of the Statute, cannot assist the Applicants in any way as regards their basic problem, their problem of bringing into effect in international law some new type of norm, something which did not exist before, but which is now said to be binding even upon a State which has dissented from it—which has made it clear that it opposes the generation of a norm of that kind and that it does not want it to govern its relationships.

How can that proposition, Mr. President, of applying a suggested norm against the protests of the State on which it is sought to be applied, how can that in any way be said to accord with the basic considerations here, the basic underlying principles of municipal law of all or nearly all States which are to be applied to fill the gaps that there may be in international legal situations?

It is clear, Mr. President, that it is merely by analogy that one comes from those basic principles into the sphere of international law, and that one cannot use that as a source for saying that there has now been generated something new, a new obligation, a specific obligation of a certain substantive content as between certain States in international law. It arises merely in order to serve to interpret or in order to assist in interpreting and giving effect to an existing or a suggested obligation falling under the heads *(a)* and *(b)* of Article 38 of the Statute.

Under those circumstances, Mr. President, it seems to us that there can be no assistance for the Applicants to be derived from the source of law contemplated in Article 38 (1) *(c)*.

[Public hearing of 17 June 1965]

Mr. President and honourable Members, just before the adjournment yesterday I dealt with certain authorities and commentators on the concept of general principles of law recognized by civilized States or nations. I need not repeat what I said then. The upshot of it was that, in the context of the present case particularly what are required to be applied are principles which can be said to form the underlying basis of municipal law of *all or nearly all* States—the basic underlying principles. Therefore, Mr. President, they could never include something which is possibly now in the process of being incorporated in the legislation of *some* States because it is necessary to have legislation in order to bring it about at all in the municipal systems of States—something which is now being incorporated, or may have been incorporated, in the legislation of *some* States but not of others—something to which certain States agree—and those States are now taking steps towards making it a part of their municipal system, but certain States do not agree and emphatically object to any attempts at enforcing such a rule upon themselves.

That fundamental difficulty in my learned friend's case cannot be overcome by attempting to apply a concept derived from these general principles. The fact is that my learned friend has to contend with the dissentient State and that his contention amounts to this that an obligation can be imposed upon a State against its will and despite its

protests. Mr. President, this is exactly the way in which the Applicants attempt to apply this concept. They say, in the verbatim record of 19 May, at **IX**, page 353:

> "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 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."

Mr. President, all I need say about that is that according to the authorities I have referred to, the general concept, the underlying ideas with regard to this source of law, make it perfectly clear that we are dealing with underlying principles which must be general and, in so far as they are not general, they do not assist the Applicants.

More specifically, the Applicants suggest that there are two ways in which Article 38 (1) *(c)* might establish their contention that a legal norm of non-discrimination and non-separation has come into being, and we find it put in this way in the record of 19 May:

> "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)*." (**IX**, p. 353.)

If I may pause there for a moment, Mr. President. In the first place, we shall endeavour to show later that it is not true to say that there is a "presence of laws and regulations against racial discrimination and segregation in the municipal systems of virtually every State"—certainly not, Mr. President, in the sense in which my learned friend uses the terms "discrimination" and "separation" for purposes of his norm of non-discrimination and non-separation; certainly not in the sense that there is to be an abstention from differentiation in the sphere of allotment of rights and duties of which he speaks. But that is a matter to which I shall come later. We shall show, Mr. President, that, in so far as there are attempts in this direction, such principles are still in the process of being incorporated—such principles in the municipal legal systems. Therefore, the principle itself can never be said to be the basis of the law in such municipal systems.

Secondly, we want to point out that this suggested application of a principle by civilized nations is not a correct analogy and application as contemplated by Article 38 (1) *(c)*. As I pointed out yesterday with reference to the authorities, the suggested analogy and application involve, that one takes something from the relationships between subjects of municipal law—persons, individuals, corporate persons and individuals, or the person and the State—relationships in municipal law, and they are then transferred from municipal law by analogy into the situations which obtain in international law. If one were to apply that method of application in this particular instance, one would have to say that if there were a norm of non-differentiation as between individuals within a State on the basis of membership in a race, class or group, as a relationship existing between those individuals and the State authority, then the analogous position in international law would be that an

organization like the United Nations is not entitled to differentiate as between various nations on the basis of their belonging to one race or the other, but that all nations are to be treated equally. That would be the type of analogous application. One could never say that, because there is legislation dealing with the domestic relationships between a State and its citizens or subjects in particular systems, therefore that legislation ought to be elevated to a rule of international law and made applicable in the domestic systems of various other countries. That would be a form of application of these principles which could never have been contemplated, and, indeed, it is clear from the history and background that it was never contemplated by the authors of this Article of the Statute.

I proceed with the Applicants' second suggested approach. They say at page 353 of that same record: "The second approach might be to regard the international consensus, as, for example, evidenced in the Reply at IV, pages 493-510, as a general principle of law recognized by civilized nations everywhere in the world."

Again, Mr. President, this is a completely wrong analogy and approach. If we adopt the correct approach, along the lines I have just suggested to the Court, then we would have to see what happens within a municipal system. Then it would be true to say that in some municipal communities such consensus, as spoken of by my learned friend, may have a normative effect—such consensus, although not a real consensus in the sense of involving unanimity, but in the sense in which my learned friend uses the term, of a preponderant majority, such a preponderant majority might be able to impose its will upon a dissentient minority and that dissentient minority might be bound. That is the position in some municipal societies, depending, of course, upon the organic structure of the particular society.

But, Mr. President, one could never take that as a general principle of law which could, as such, be taken from a municipal system and transplanted into the international system because that is the very essence of the difference between the international society and municipal law society, the very essence of the difference to which I referred yesterday, namely that in the municipal societies one very often has this collectivistic approach under which there is an authority which can impose its will by way of legislation, because that is constitutionally provided for, whereas in international society that authority is lacking; it is not there. And, therefore, my learned friend cannot rely on that analogy. That particular analogy is impermissible because of the very basic structure of the law of nations.

Now, Mr. President, in this sphere of the application of Article 38 (1) *(c)*, also, the active opposition or objection on the part of a particular State or States against the generation of a rule of international law or against the application of a so-called "principle" in terms of the said Article would also be a fatal defect, a fatal objection to a contention that such a suggested principle or rule is to be applied. That appears very clearly not only from the analysis I have given but also, in this particular case, from the history of the preparation of this specific provision in the original Statute of the Permanent Court. It appears, Mr. President, that the actual contemplation of the authors of this provision was that it could not operate to bind a State against its will.

The first drafting occurred in the operations of the 1920 Committee

of Jurists. The proposer of the original formula was Baron Descamps who originally proposed that this sub-paragraph 3, as it then was, now sub-paragraph *c*, should read: "The rules of international law as recognized by the legal conscience of civilized nations." However, that formula immediately met with very strong opposition, especially from Mr. Root of the United States, and from Lord Phillimore of the United Kingdom.

In a very brief summary of the proceedings at the Thirteenth Meeting of the Committee Mr. Root is reported to have said that he could not understand the exact meaning of this proposed clause. We find this passage—as I say, a very brief summary—in the *procès-verbaux* of the proceedings of the Committee at pages 293 to 294:

> "Did it refer to something which had been recognized but nevertheless had not the character of a definite rule of law? It was the same with clause 4. These two clauses constituted an enlargement of the jurisdiction of the Court which threatened to destroy it. If these clauses were accepted, it would amount to saying to the States: 'you surrender your rights to say what justice should be.' Was it possible to compel nations to submit their disputes to a Court which would administer not merely law, but also what it deems to be the conscience of civilized peoples."

A later statement, Mr. President, by M. Fernandez, which was attached as an annex to the summary report of the Fifteenth Meeting, shows somewhat more extensively what the nature of the issue was in this respect. As I say, the report of what Mr. Root actually said was a very brief condensation. M. Fernandez said the following:

> "It seems to me essential to find at any cost a basis for conciliating the views expressed on the one hand by the President and on the other by Mr. Root. The question merits the effort because the whole future of the Court depends upon it. For very good reasons Mr. Root opposes granting to the judges—in addition to their ordinary task of applying international law—the power to some extent to create it. He believes that a great Power could never agree to a system which would lay it open to having its disputes settled by the application of a rule which had not been approved by it; or, what will be more serious, of a rule whose legality it had systematically contested at all times.
>
> I think that Mr. Root might say the same thing of any State whatever, and perhaps with even more reason of those not provided with military power."

That was at page 345 of the same record, Mr. President.

That could hardly have put more clearly what the underlying intention of the authors of the formulation was which eventually went into the Statute. That formulation was a Root-Phillimore amendment, in respect of which the explanations were given by Lord Phillimore, which we have already noted, to the effect that the general principles referred to in the new formulation, which went into the Statute in point 3, were these which were accepted by all nations *in foro domestico*, such as certain principles of procedure, the principle of good faith and the principle of *res judicata*. That is at page 335. His further explanation was that by "general principles of law" he had intended to mean "maxims of law".

Mr. President, the Applicants say, further, that a restrictive inter-

pretation of Article 38 (1) *(c)* (by which they apparently mean an interpretation which differs from theirs)—

> ". . . would also ignore the close association of general principles with the ideas of equity and natural justice which have been present since 1920 . . .". (**IX**, p. 354.)

And, in purported substantiation, they refer to something said by Baron Descamps, to the effect that he referred to this source of law (i.e., "general principles") as "the legal conscience of civilized nations", and they say that M. de Lapradelle said that the general principles would enable the International Court to "judge in accordance with law, justice and equity". But they failed to explain to the Court, Mr. President, that those expressions were used in respect of the initial formulation as proposed by Baron Descamps, and that they did not relate to the formula eventually agreed upon and inserted into the Statute, but that the formula which eventually went into the Statute indeed arose because of a reaction, an objection on the part of the other members, to the idea of allowing the Court to judge on this vague basis of justice, conscience and equity.

One of these objections was made by M. Hagerup, immediately after M. de Lapradelle had spoken. M. de Lapradelle's statement is to be found in the *procès-verbaux* at page 295, and it is quite clear that there he was speaking *before* the Root-Phillimore proposal came before the meeting at all. The objection immediately expressed by M. Hagerup, at pages 296 to 297, read that, "equity was a very vague conception and was not always in harmony with justice".

So, Mr. President, that history further confirms that the Applicants, in attempted reliance on this subsidiary head of principles or rules of international law applicable in this form, are not assisted at all by Article 38 (1) *(c)*, and it fortifies the conclusion already reached by reference to the concept contained in the Article and its purpose.

That brings me then to Article 38 (1) *(d)* of the Statute which refers to judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law. It is interesting to see, Mr. President, in this respect, that Applicants do not quote any authors, or, for that matter, judgments of courts to establish that their norm exists. They quote authors in purported support of the procedures whereby they seek to establish the existence of the norm: that we find in the verbatim record of 19 May, at **IX**, pages 357 to 359, and they particularly attempt to rely upon authors in order to bolster up their contention that consensus, in the sense in which they use that term, would be sufficient to establish custom.

Mr. President, I have already dealt with the authors on whom they rely—Mrs. Higgins, Dr. Schacter and Dr. Jenks—and indicated that they, in truth, provide no support whatever, even for the contentions of the Applicants. The only other author to whom they refer in this respect is Judge Spiropoulos, the honourable Member of this Court, that is at **IX**, page 357 of that record, and the quotation was to this effect, "natural law sets off the ethical conscience of mankind against the will of a sovereign State". That is all—"natural law sets off the ethical conscience of mankind against the will of a sovereign State". Now my learned friends seek to apply it in this way; they say—

> "... consequently, the collective will of the organized international community becomes endowed with a law-creating competence which can overcome the defiance of a non-conforming State, particularly one which stands alone".

Mr. President, all I need say is that the honourable author of the particular passage would, with respect, probably be most surprised to hear that that is a true application of what he said.

Those are the only authors on whom my learned friends seek to rely in support of any of their propositions, but, as I have said, these authors do not support them as to the law-creating process, and they do not even attempt to rely on any author in respect of the existence of the norm itself.

In regard to the law-creating process there is reference to only one decision of a court and that is in the *Sabbatino* case. The reference we find in the same verbatim record of 19 May, at **IX**, page 358. That was a decision by the United States Supreme Court in 1964, and my learned friends say in that respect—

> "... 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".

Now, Mr. President, when one has regard to that decision itself, it becomes very clear that there is consensus *and* consensus. My learned friend speaks of consensus in the sense of an overwhelming majority within a group, and contends that "consensus" in the international community may be said to have a law-creating or a normative effect of a semi-legislative kind. When one refers to the decision one sees that the term "consensus" was used there in a completely different sense. The Court used the term to indicate the measure of agreement which existed amongst commentators on international law in regard to a particular proposition of international law, and said that that consensus could be a relevant factor in determining the applicability of a suggested rule. That was all, and that is the only reference I could find in the whole judgment to the concept of consensus. It is nevertheless interesting to refer to the case because it goes on to another proposition which is pertinent, but I am afraid not as supporting the Applicants' case indeed it tends in the opposite direction.

The Court was concerned there with a question—I need not go into the details of the facts—of the application of international law in some instances by municipal courts. The Court dealt with one instance where it was suggested that international law should be applied. In particular, the Court was concerned with suggested limitations which were said to exist in international law, viz., limitations upon the powers of a State to expropriate the property of aliens, and it was urged upon the Court that such suggested limitations were to be applied in the particular case before it.

Now, on the consensus question, the Court said, at page 807, paragraph 22, of the head-note:

> "The greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary [the Court will recall this decision concerns the judiciary in municipal systems] to render decisions regarding it,

> since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." (*U.S. Supreme Court Reports*, 11 L/Ed. 2d. U.S. 376, p. 807.)

It will be immediately evident how completely different the sense is in which the Court speaks there of consensus, from the sense suggested by Applicants. The portion of the head-note is derived from the portion of the judgment reported at page 823 and I have checked on it; it would seem to be a word for word rendering of the particular portion of the judgment.

But the judgment goes on now to apply this concept in the particular case, and it states, at page 824:

> "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens."

This fact, viz., that opinion in international law amongst commentators and publicists and authorities was so divided in that respect influenced the Court in coming to its conclusion that it was not to apply the suggested limitation in that particular case.

The Court, in further discussion of this matter, said, at page 825, after looking at the practical implications involved:

> "It is difficult to imagine the courts of this country embarking upon adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations."

That was a major consideration why the Court decided to stay its hand.

So again, Mr. President, that is an authority which does not support my learned friend, it goes the other way.

This, Mr. President, brings me to the conclusion of the review of these various sources of international law mentioned in Article 38 (1) *(c)* in their application to what one might call the suggested "norm-creating processes" relied upon by the Applicants. The Court will recall that I dealt with them in the context of saying "let us forget for the moment about the actual content of the suggested norm, let us assume any content—content x—and then we shall still see that these suggested procedures could not, as a matter of norm-creating processes, bring about the desired result of a binding rule of law, binding upon a dissentient State". That proposition was supported, I submit, entirely in regard to the heads *(b)*, *(c)* and *(d)*. In regard to *(a)*, conventions, I had to draw a distinction, Mr. President, between the two aspects of the Applicants' contention; that relating to wording, or content, of particular provisions of the Charter of the United Nations and the Constitution of the International Labour Organisation. I said I would have to deal later with the question whether the content of those particular provisions constituted an obligation according to the suggested norm relied upon by my learned friends. As far as the second aspect is concerned I dealt with the attempted reliance upon the so-called process of "authoritative interpretation", authoritative interpretation at later stages by the organs, or by majorities in the organs, of the particular organization,

and I showed to what extent the attempt to find a basis for the Applicants' case in such "interpretation" has failed and how dangerous would be the implications of acceding to a contention of that kind.

In regard to all other suggested sources of law, other than the actual content of the various provisions in the Charter and in the I.L.O. Constitution relied upon by my learned friend, I submit that we have shown, that no norm could possibly have become binding upon the Respondent in the manner suggested by the Applicants. There is not one shred of support for their contention, their revolutionary contention in this respect. On the contrary the review I have given has shown, in my submission, that all the traditional rules and principles of international law make it perfectly clear that that is not the method by which an obligation can be imposed upon a State.

I therefore turn now to deal with the matter on the basis of having regard to the content of the norm itself—of the suggested norm. It is, for the reasons I have mentioned, really unnecessary to do so except in relation to the particular provisions of the Charter and of the I.L.O. Constitution, but I shall nevertheless, Mr. President, also consider the possible effect of other sources of law. I shall attempt to demonstrate to the Court that, with reference to all these various sources of international law, and, having regard to the actual practice of States and to actual principles of law generally recognized by civilized nations, there is no such generally accepted norm. We commence with a consideration of that question in relation to the particular provisions of the two instruments I have mentioned.

However, before I can proceed to this demonstration, it is necessary to revert to the question of what exactly the content is of this norm sought to be relied upon.

The Court will recall that my learned friend, Mr. Grosskopf, dealt with that matter quite extensively in his argument which is reported in the verbatim record of 9 June, particularly at **IX,** pages 534-542, and I need not repeat what he said to the Court. I merely want to refer to certain salient features as the basis for the part of the argument which is to follow.

My learned friend pointed out, Mr. President, that the definitions given by the Applicants in their submissions and in their formal explanations of their submissions are absolute in terms, absolute in the sense that upon analysis the content of the suggested norm involves a prohibition against *all* differentiation or distinction on the basis of membership in a race, group or class in a particular sphere, namely in the sphere of allotment of rights and obligations, privileges and burdens. In other words, in that particular sphere, the sphere of allotment of those rights and obligations, the suggested content of the norm is that there is to be *no* differentiation or distinction at all, be it for good or bad. That is all one can infer if one has regard to those, shall I say, formal definitions given of the norm. One finds it actually in the wording of Submission 3, where the word "distinguishes" is used: "has practised apartheid, that it, has distinguished" as to racial, tribal origin and so forth in this allotment. (**IX,** p. 374.)

One finds this feature also in the definition given at **IV,** page 493 of the Reply, which definition is incorporated by reference in the formal explanation tendered of the submission, where again we find that all that is stated is that the allotment of rights and obligations on the basis

of membership in such a group, etc., is prohibited, if that allotment proceeds on the basis of such membership, rather than on the basis of individual merit or capacity. Therefore, again, it becomes clear that the objection to a distinction or a differentiation is absolute in that sphere of allotment.

In other ways the Applicants have made it clear—there are other statements on the subject—that they are not relying upon alleged unfavourable effects of differentiation, that they are not relying upon suggestions of improper motives or purposes attached to differentiation. That is, in our submission, because they realize that if they were to do so that would open up an area of factual dispute and enquiry in this case which they want to avoid, and so they have made it perfectly clear that we have correctly reflected the position when we said that, on the basis of their suggested norm, differentiation in that particular sphere would be prohibited and would be proscribed (and the admitted differentiation which is practised in terms of South Africa's policies would be in conflict with the norm) whether or not that differentiation is intended to enure or in fact enures, for the benefit of the population.

That, Mr. President, is the only inference which one can reach—the only conclusion to which one can come, whether from the formal explanations—the formal expositions—in the Applicants' submissions, or from their formal explanations of those submissions, or from these informal explanations given repeatedly in the course of the argument.

Yet, Mr. President, when one takes them up on their basis, and when one considers that suggested norm in its implications in various situations, then my learned friends say: No, you are ascribing to us something that we do not say, which is not our contention. You are distorting what we say. You are ascribing to us extreme attitudes and then trying to make them ridiculous. You are really presenting a caricature of what our case is and you are really indulging in a "sleight of hand"—that is an expression also used by them in that respect.

But, Mr. President, they make these protestations, they say they are not relying upon differentiation but upon what they call "discrimination"—the norm of non-discrimination and non-separation—and yet, when it comes to defining and explaining what the distinction is, they fall back upon that self-same definition. The definition as we have said refers simply and solely to allotment of rights and obligations—and is not limited to an allotment with a disadvantageous effect, with an improper purpose or anything unfavourable attached to it, or any qualification attached to it whatsoever. The allotment on the differential basis indicated—is said to be proscribed in itself, and the reason for its being proscribed is because of differentiation and not because of improper discrimination. That is the only conclusion one can arrive at.

Then my learned friends have difficulty in explaining that attitude with reference to cases where they are forced to admit that differentiation is legally permissible and, indeed, desirable. They were confronted time and again with this situation in regard to the minorities treaties. And how do they attempt to get out of that? They say: "Well, they must admit that there is this differentiation", but they say: "of course, that is permissible differentiation, whereas in the case of apartheid the differentiation is impermissible—that happens to be impermissible", they say. But then, when they go into a further explanation, one finds that they come back to this again: that in the case of apartheid one has this

differential allotment. On the other hand, they say in the case of the minorities treaties: "The purpose is a good one, the purpose is one of protecting the individual rather than the group", and that "you have a situation there where the Treaties were perceived of as a means of assuring that the individual does not suffer by reason of membership in a group, amongst others, because of the consideration that he is normally free to quit his group". That was the way in which my learned friends sought to distinguish the two positions.

But, Mr. President, as my learned friend, Mr. Grosskopf, pointed out to the Court, that distinction does not relate to the factor of allotment—allotment on the basis of membership in a group, allotment of rights and obligations. The allotment aspect applies in both cases, i.e., in the case of the policy of separate development and in the case of the minorities treaties. In the latter case also there existed a situation where the allotment of rights and obligations was a differential one, and my learned friend does not explain, with reference to any qualification attached to the allotment as such, why these provisions would be permissible but with qualifications suggested to apply to the purpose of the provisions and to the factor that the individual might not suffer hardship in the particular case by reason of his ability normally to renounce membership in the group.

My learned friend, Mr. Grosskopf, also pointed out that in fact these factors bring about no distinction whatsoever; that, where the object of differential provisions is an object of protection, as it is in the case of separate development as well as in the case of the minorities treaties, that protection surely operates for the individuals as well as for the groups. It, therefore, becomes artificial to say that the protection, in the one instance, is meant for the individual, and, in the other instance, for the group, because in both instances it applies to the whole of those groups and to all individuals within those groups.

It may well be, Mr. President, that the differential measures affect some individuals in a different way from that in which they affect other individuals, but that does not mean that the protection involved is not intended for the group as a whole, and for all members of that group.

Then again, Mr. President, on this question of assuring that the individual does not suffer by reason of his membership in a group; surely it is a matter which requires a weighing-up in cases where there is a differential measure, because of the fact that some individuals in a group may be affected differently from others. Consequently, one has to weigh up and say "Now, on the whole, what is better—the individual may suffer in some respects, some particular respects where he may want to do something, but on the whole, do the advantages which he derives from being a member of this group, and which the group of which he is a member, derives from the differential measure—do they not outweigh the particular disadvantages which might apply in some marginal cases?" Surely that is a factor which applies equally in the case of the minorities treaties as in that of a policy such as separate development, except only for this factor to which my learned friend refers, and that is, in the case of the minorities treaties, the individual may be able to quit his group. But my learned friend does not put that absolutely; he says: "Normally, in cases of such permitted differentiation, the individual may quit his group." So he does not make that an absolute criterion of distinction between what is permitted and what is not permitted. And

indeed, Mr. President, one can see that he could have difficulty about making that an absolute criterion, because how could it possibly be seriously suggested that it is a factor of relevance to say to a member of a religious group: "You can escape the differential situation applying in respect of your religious group by forfeiting your religion" (I am dealing of course with the case where such differential measures are conceived of as beneficial). Surely, Mr. President, as soon as one differentiates, and says a certain group is to be treated in a certain way—they are to have special rights, special obligations—whereas another group is to have different rights and different obligations, then one finds that the element of compulsion comes into it automatically. Members of the one group are not allowed to share the special benefits stipulated for the members of the other group, and vice versa. And therefore, Mr. President, in situations of this kind, is it realistic to say that it can be a factor of distinction that in some instances it may be possible for a member to quit his particular group and to join another one?

I have mentioned only an example of forfeiting one's religion—that is one instance which shows how completely unrealistic this suggestion is. Take another instance—take land reservations in favour of members of the Indian community in various American states. The situation may well be that there is protection for members of the Indian group as long as they stay within that reservation, as long as they participate in the benefits of what that reservation might mean for them—the use of the ground, the making of a living, and so forth. But, Mr. President, there is an element of compulsion on them which is intended for the protection of the group, and that is that they may not sell those rights to outsiders because otherwise the protection will fall away. Therefore that element of compulsion is there in order to enable them to enjoy the protection, and is it realistic to say: "Yes, but the member of the group can escape that—he can be taken up in the large community if he wishes"? It is certainly true that he can, Mr. President, but then he forfeits the economic value of what he had—that is the price he must pay.

So in all these instances it is not so easy to say you must draw your dividing line on the basis of ability to quit a group, or a facility to quit a group, because it is, in truth, not a realistic basis at all. And that is probably the reason why my learned friends say, not that that is to be an absolute criterion or that it applies in all cases, but that in these other cases of what they admit to be permitted differentiation, the individual is normally free to quit his group.

My learned friend, Mr. Grosskopf, therefore demonstrated to this Court that the contrasts which we have here are really contrasts without a difference, and that these drove the Applicants into the position where they eventually, in effect, abandoned the attempt to formulate a clear definition of, a clear dividing line between, what is permissible differentiation and what is impermissible differentiation, and said that the decisive factor is that the organized international community has applied the suggested norm specifically in its judgments to the case of the Respondent in South Africa and in South West Africa by condemning its policies there, and that ought to be enough for this Court. That is the shield behind which they eventually tried to take refuge.

That being so, Mr. President, how do we test this alleged norm against specific provisions of international instruments and against international practice—the actual practice of States—in order to see whether or not

it can claim the existence claimed for it by my learned friends? How do we do it in respect of such a nebulous thing, in regard to which we in effect in the end have no definition, because there is first an absolute definition, then certain qualifications are suggested, but in the end those qualifications are not defined and we do not know where we stand? It seems to me that the only practical way of setting about it is by having two strings to one's bow: to do the testing on a dual, alternative basis.

First, we shall test on the absolute basis; we shall test on the basis of taking the Applicants at their word when they say that the alleged norm means that the allotment of rights and duties on the basis of membership in a race, class or group is impermissible everywhere and anywhere in the world. That they said several times. That is, after all, the signification of their Submissions; in No. 3 this signification appears from the wording of the Submission itself, and in Submission No. 4 from the wording of the Submission read with the formal explanation; and those definitions and that explanation contain no qualification whatsoever; it is differentiation *per se* in this defined sphere that is struck at by the suggested norm.

At the same time, Mr. President, and alternatively, we shall also consider the matter with reference to the factors which have been mentioned by the Applicants, not as clearly defined qualifications, but as possible factors which could distinguish permissible from impermissible differentiation—factors mentioned by them in relation particularly to their discussion of the case of the minorities treaties. We shall deal with these factors on the assumption, for purposes of this argument, that they were intended to be qualifications attached to the suggested norm. We have given a good deal of thought to this matter and it seems to us that the only fair way of doing this would be to assume that the qualifications involve that differential allotment of rights, etc., in the sphere as defined by the Applicants, would nevertheless be permissible if such differentiation could be said, firstly, to serve the purpose of protecting the individual rather than the group, and, secondly, if it could be said to avoid the consequence that the individual might suffer by reason of membership of his group, *inter alia*, by having regard to his facility, or otherwise, to quit the group.

Those seem to be the considerations which one must bear in mind as possible features of qualification, and we are quite prepared to do that, in testing the suggested content of this norm against the processes by which it is said that the norm has been brought into existence.

I may point out, Mr. President, that in approaching the matter in this way, we are going very far in avoiding a technicality of approach. We might well have been entitled to say, technically, that we are required to look only at the submissions and the formal explanation of the submissions, in order to see what the case is which we have to meet, and that if the submissions, as formally explained, rely on the existence of a norm unqualified with reference to anything which is not stated or incorporated in those submissions and in that explanation, then we need only demonstrate that such an unqualified norm does not exist. It would not be necessary for us to chase possible qualifications which may, or may not, have been intended by the Applicants. I say it might well have been possible for us to approach the matter in that way—to look only at the submissions and the formal explanation with a view to demarcation of

what the case is which we have to meet, because, Mr. President, the presence or the absence of qualifications is very important from a practical point of view and from a point of view of fair procedure, and this I must, with respect, emphasize to the Court. The presence or the absence of a qualification in the suggested norm can make all the practical difference to the case which one has to meet as a matter of fact and, therefore, to the case which one has to present to this Court on issues of fact.

It would be apparent to the Court that if there had been a qualification rendering the allotment impermissible only if it was practised with an oppressive or injurious intent towards some or all of the inhabitants, or if it was practised with an oppressive or injurious effect for some or all of the inhabitants, then the whole nature of the case on the facts would change. Then we would be called upon to demonstrate, and we would wish to demonstrate, and it would be open to us to demonstrate, that the differentiation *in fact* has no such intent attached to it, and that *in fact* it does not have the consequence assigned to it.

But, Mr. President, if that is the case which we are called upon to meet, then it must be fairly so stated so that we can know it.

Similarly, Mr. President, these possible qualifications, which I have just referred to as they emerged from the discussion in regard to the minorities treaties, would also, if they are seriously suggested as qualifications to the norm, alter the type of situation which, either by description in a document, or by existence in practice, could be relied upon as *a fact* to show the absence of such a qualified norm, and therefore it would again alter the field of enquiry which we are called upon to undertake in order to refute the case being made against us.

If the Court should find (I am just postulating a theoretical possibility) that there has been established against the Respondent a case on the basis of a qualification which is not expressed in the case brought against us by the Applicants, then it would, in effect, mean there has been a failure of the principles of natural justice because it would, in effect, mean that the finding is being made against a party in respect of a matter in which it has not had a fair opportunity of putting its case to the Court. That is what it would amount to. That emphasizes the importance of a clear intimation, whether formally or informally or both, by the *dominus litis*, the Applicants in this particular case, to the other side of what exactly the case is which the other side is called upon to meet. That is the purpose which is served as a matter of natural justice, or is intended to be served, by formal submissions in proceedings of the kind before this Court—the purpose which is intended to be served by formal pleadings and the formal prayers in pleadings of the more concise nature with which we are acquainted in our normal municipal practices.

We are quite prepared, Mr. President, as I have said, to take the non-technical line of approach. We are quite prepared to do it to the extent of looking, not only at the letter of the Submissions and the formal explanation, but to go further and to look also at the other explanations which have been offered by the Applicants' representatives, provided —and this is an important proviso—that those explanations are clear and fair, that they are not ambiguous and obscure, or inconsistent, or concealed, so as to be likely or calculated to mislead—so that we do not know what it really is that we are called upon to meet. In so far as they are clear and they tell us fairly what it is that we are called upon to

meet, we are prepared to meet that, even if it does not come in the formal part of the case.

On the basis of facts which I have already referred to, we understand the Applicants to have informed us and the Court very clearly, not only in their formal submissions and explanations, but also in a series of informal but emphatic ones which I have cited to the Court, that they are *not* bringing or asking us to meet any case of alleged oppressive, injurious, or otherwise unfavourable purpose or effect. That is why I said that we regard ourselves as being in a position that we no longer have to meet a case of that kind. That does not seem to be a qualification; it seems perfectly clear that that is no longer, and it definitely is not at this stage, a qualification which is said to attach to the Applicants' suggested norm—to the differentiation which they say is proscribed.

But now, as to the possible qualifications to the norm, which I mentioned this morning, as arising from the discussions on the minorities treaties, the Applicants have not been equally clear, and, as I have said, we are really going out of our way in taking cognizance of those possible qualifications, but we are, nevertheless, doing so on the alternative basis of the possibility that such qualifications may be intended to form part of the Applicants' case.

So, Mr. President, we traverse again—we can do it much more quickly now than before—the various sources of international law referred to in Article 38 (1) with a view to dealing with this aspect of the application of the issue.

The Court will recall that under paragraph *(a)* the Applicants rely on the Charter and on the I.L.O. Constitution. We dealt in the Rejoinder, V, at pages 131 to 133 with the particular provisions of the Charter and the I.L.O. Constitution which the Applicants intended to rely upon, and which they intimated to us that they were relying upon as at the stage of the Reply. Substantially, those are still the same provisions relied upon by the Applicants. We demonstrated in the Rejoinder, firstly, that no "norm of non-discrimination or non-separation" was contained in either of these two instruments, and, in any event, neither of these instruments purported to amend or supplement the provisions of the Mandate.

I shall now, Mr. President, because the Applicants have reverted to this area of controversy in the oral reply, revert briefly to these matters. Firstly, I shall deal separately with the Charter where the reliance is mainly on the Human Rights provisions and particularly those contained in Articles 55 *(c)* and 56 of the Charter. Let us then see what their content is, and then how that content can be said to compare with the suggested content of the norm, with or without the qualifications which I have mentioned.

If one reads those two provisions together, Mr. President, for present purposes, beginning with Article 56 and then reading from that on to Article 55 *(c)*, the effect is as follows:

> "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purpose . . ." to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Now, Mr. President, for present purposes what are the important features there? If we look for words of legal obligation, we find them

only in these words "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of a purpose". That is the gist of obligation that may be intended to be referred to because the rest of the provision, that contained in Article 55 *(c)*, does not take the form of a legal definition of obligation. It takes the form, Mr. President, of referring to certain things which, it is obviously, in terms of the language, presupposed, do exist. They are not brought into existence by this language; the language does not purport to bring them into existence or to give them any legal content. Those things are "human rights and fundamental freedoms ... without distinction as to race, sex, language or religion". The purpose is the promotion of universal respect for, and observance of, those human rights and fundamental freedoms.

So, Mr. President, it is quite clear that there is a presupposition that those human rights and fundamental freedoms exist. The authors of the Charter gave no indication whatsoever—I am speaking now merely on the basis of the language employed—whether they regarded those rights and freedoms as being a concept existing in law in any sphere such as municipal law or international law; or whether they considered them as being something existing outside the sphere of law, strictly so-called, perhaps in the sphere of natural law, falling somewhere in between, or merely falling in the sphere of philosophical concept. They may have been any of those, as far as the language of this Article is concerned. The language merely presupposes that they exist and the purpose of the Article is to promote respect for them and observance of them.

So it is clear that the Charter did not purport to create those human rights and freedoms; it did not purport to define them either or to clothe them with legal validity.

And that brings us to the phrase "without distinction as to race, sex, language or religion". Again in the context, Mr. President, it becomes clear that that phrase relates to the observance of these human rights and fundamental freedoms (whatever they might be) for all people. It does not, in general, relate to the allotment of rights, burdens, privileges and so forth, outside the sphere of what might be termed human rights and, in particular, Mr. President, it does not prescribe a rule of mechanical abstention from differentiation under all circumstances. The effect of what is said is, that in promoting respect for and observance of these fundamental rights and freedoms, you are to do so for all persons; you are not allowed to say "I am doing so for some of my citizens and not for others, because some are of this race and others are of a different race or because some are of this religion and others are of a different religion or sex, or group, as the case may be". That you are not allowed to do. You are not allowed, therefore, to discriminate unfairly or unfavourably towards some, in seeking to promote the observance of these rights. You are to have the same concern for all of them, irrespective of what race or colour or group or sex or language group, or religion they belong to. But there is *no* statement of any norm, of any rule—that there is to be a mechanical abstention from differentiation in seeking to promote this purpose.

Mr. President, I submit that that is not only abundantly clear from this language but it becomes clearer when one has regard to other aspects of the Charter, because, after all, the Charter forms a unit. It is one instrument and the rules of logic and basic principles of interpretation

enjoin us very forcibly to have regard to the whole of an instrument in its context, in order to determine what the intent of its authors might have been. One is not to presume that the authors intended to have various parts of an instrument in conflict with one another or irreconcilably inconsistent; and that is why it becomes so important to have regard to some of the provisions of Articles 73 and 76 of the Charter. With regard to Article 73, as we pointed out in the Rejoinder, V, at page 132:

> "... at least the possible need for such differentiation in particular instances appears to be contemplated in the Article itself, particularly in paragraphs *(a)* and *(b)* thereof, which require administering authorities to observe 'due respect for the culture of the peoples concerned', and to have regard to 'the particular circumstances of each territory and its *peoples* and their varying stages of advancement'."

All that, Mr. President, is in a programme of promoting their well-being and progress. Surely those words, if they have any meaning at all, have the meaning that the administering authority is to have regard to those varying circumstances pertaining to the peoples concerned, various cultures, various circumstances and varying stages of advancement, so the only inference that can be drawn is that the necessity, the desirability, of differentiation in view of those varying circumstances was considered an essential by the authors of the Charter, and was intended to be taken into account by the administering authority.

As to Article 76, regard should be had to paragraph *(b)* which qualifies the general objective of promoting political, economic social and educational advancement with the words "... as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned".

Again, Mr. President, here and in Article 73, one finds this concept of "each territory" in the singular, and "its peoples", in the plural, indicating a contemplation of a plurality of peoples within one political unit, and therefore the need of possible differentiation on that basis. If it were not, Mr. President, for this clear meaning of these Articles, then it would have been quite impossible for the Union of South Africa to become a signatory to the Charter, because of its insistence at all times that a method of mechanical abstention from differentiation in dealing with the problems arising from the plurality of its peoples could never be subscribed to by it.

Mr. President, for the reasons I indicated just before the adjournment, as to the proper interpretation of Article 56 read with Article 55 *(c)* of the Charter, we said at V, page 131 of the Rejoinder:

> "Thus, on Applicants' argument, a Member of the United Nations would not be entitled to provide special protection or special public conveniences for women, or would not be entitled to grant separate public holidays for different religious communities on their respective religious days, or to establish different public schools for various language groups or even for the two sexes. In the words of Sir Hersch Lauterpacht (commenting on a provision in a proposed International Bill of the Rights of Man)—
>
> '... it must be borne in mind that "equal treatment in all re-

> spects" ... does not imply identical treatment ... A purely mechanical absence of differentiation may result in inequality and injustice'."

And we referred to a similar pronouncement of the Permanent Court in the *Minority Schools in Albania* case.

So, in answering this, Mr. President, in the Oral Proceedings the Applicants said that here is an example now of the Respondent's attributing an extreme position to them, something which they never intended.

But, Mr. President, is that really so? Even if we bring into play the suggested, the possible, the postulated qualifications we discussed this morning, which the Applicants raised with reference to the minorities treaties, how do they affect the position? Would the question of being concerned more with the individual than with the group, apply, for instance, in the case of making separate provisions for women and men in the sphere, say, of public conveniences, or in schools for children? Would that be a consideration at all? Would one say that that is for the individual rather than for the group? Would one say, Mr. President, that the individual who might find himself or herself affected by this, could clearly escape the adverse effects by simply quitting the group? I have heard of certain operations that could be conducted to make a woman out of a man, but I have never heard of the opposite type of operation as a possibility, even in modern science. Again take the different provisions for different religious communities; there is a complete lack of realism in saying that the individual can escape that position by quitting his group.

Mr. President, the interpretation I have suggested to the Court as being the natural one, the only one, that could have been intended, having regard to the language of the particular Articles and to the Charter as a whole, and to the implications I have mentioned, finds considerable support from commentators and also from indications in the history of these provisions both before and after they came into existence.

There was a divergence of view shown at various stages on the question whether Articles 55 *(c)* and 56 could be said to bring about legal obligations at all. Of course, it is a matter with which I am not particularly concerned. As far as I am concerned there is an obligation, in so far as one can call it a legal obligation, to co-operate with a view to the promotion and encouragement of respect for these basic rights and freedoms. My contention is that the method by which the objective is to be pursued was not laid down with reference to a mechanical abstention from differentiation, and that position does not affect my argument in this case at all.

As I say, some commentators differed on the question whether legal obligations were intended at all in these provisions, and indications on that subject are afforded by a reference to the discussions in the International Law Commission on the draft declaration on rights and duties of States, which discussions appear in the 1949 *Yearbook* of the Commission.

The views regarding the legal effect of the relevant Charter provisions were expressed by some members in a debate, on a proposed provision (Art. 7) for a draft declaration on the rights and duties of States. That proposed Article 7 would read:

"Every State has the duty to treat all the persons under its jurisdiction with respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion." (*Yearbook of the International Law Commission, 1949*, p. 164.)

So the proposal here was that it should be stated specifically that every State has that duty.

The Chairman, Judge Manley O. Hudson, after discussing the various Charter provisions on human rights, said at pages 167-168 of that record:

". . . that Member States had not, by signing the Charter, assumed a legal obligation to treat persons under their jurisdiction with respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion. They had merely agreed to promote international co-operation to that end. Article 7 of the Declaration went beyond the Charter in attempting to lay down a legal duty for Member States, and much beyond anything so far known in existing international law in attempting to lay down a legal duty for both Member and non-member States. Moreover, the term 'human rights and fundamental freedoms' was not defined either in the Charter or in the Universal Declaration of Human Rights."

Mr. Brierly said the following at page 168:

"To say, however, that no distinction could be made on any of the four grounds as they stood was another matter altogether. That went far beyond anything in the Charter or in the rules of general international law outside the Charter. He felt that it went beyond anything that present-day world opinion would be prepared to accept. Probably more than half the Members of the United Nations made a distinction between the sexes, and if the Declaration were to state that they were violating the Charter by so doing, it would not be taken seriously and the members of the Commission would be considered with some reason as academically-minded doctrinaires."

That was Mr. Brierly's objection.

A view to some extent to the contrary was expressed, *inter alia*, by Mr. Scelle, at page 169. He said:

"He disagreed with the Chairman's view that the Charter did not impose any positive obligations in the matter. While it did not establish specific obligations or specific rights, in Article 55, for instance, certain real obligations were implied, though vaguely expressed. The Charter provision that Members of the United Nations should *promote* respect for human rights constituted an obligation, though not a very strict one."

Therefore, to that limited extent, there was an indication by him of an obligation, Mr. President, but as I say, that is a matter which does not affect the real issue between the Parties here. What is important is the very positive support from the previous speakers on the points that do matter.

In the result, after this discussion, the draft article was approved, first by six votes to four, and subsequently by seven votes to five. One finds that in documents A/CN.4/SR.23 and 25 and in the *Yearbook of*

the International Law Commission, 1949, at pages 170 and 179. The voting, of course, was not necessarily decisive as to what view the various Members took on the question of the interpretation of the Charter because other considerations also entered into the matter.

For completeness sake, the subsequent history of the *Draft Declaration on Rights and Duties of States*, which was considered by this Commission, may be very briefly noted. It is summarized as follows in *Everyman's United Nations*, Sixth Edition, 1959, at page 410:

> "At its 1949 session the General Assembly commended the draft Declaration to the continuing attention of member states and of jurists of all nations. It also invited the suggestions of member states on: (1) whether any further action should be taken by the Assembly on the draft Declaration; and (2) if so, the exact nature of the document they wished drafted and the future procedure to be adopted in relation to it. As the number of replies received from governments was considered too small to form the basis of a definite decision regarding the Declaration on Rights and Duties of States, the General Assembly at its sixth session in 1951 decided to postpone further consideration of the matter, but in any case to undertake its consideration as soon as a majority of member states had answered. Eighteen member states by October, 1952, had sent in their comments. No comment has been received since that date and no further development has taken place."

This was written, Mr. President, in 1959, and, as far as we are aware, no further development has taken place since that date, that is on this *Draft Declaration on Rights and Duties of States* which was one of the consequential steps envisaged when the subject of human rights was first mooted in international circles. That (it is one illustration of showing) the wide distance to be covered between a stage where one begins to discuss a matter in terms of suggested standards and the long way one has to go before one ends up with an international legal obligation.

A number of authors on international law have also expressed the view that the provisions of Articles 55 *(c)* and 56 do not impose binding obligations. So we find Bentwich and Martin in *A Commentary on the Charter of the United Nations*, London, 1951, at pages 8 and 9, wrote the following:

> "Article 1 (3) [of the Charter] does not amount to a guarantee that the United Nations will presently enforce the undisturbed enjoyment of human rights and fundamental freedoms. That is the ultimate purpose, but the Charter only asserts that the organization will strive to promote, and encourage respect, for human rights, e.g., by studying the state of these rights in various countries, by trying to find a common denominator acceptable to all, or at least to the majority of States, and by endeavouring to secure the adoption of suitable international conventions."

That was the basis on which the Charter started, Mr. President—this process of striving towards a study of the matter, trying to find a common denominator acceptable to the various countries, or at least by the majority, and endeavouring to secure the adoption of suitable international conventions.

At page 118 of the same work, specifically regarding Article 56 of the Charter, the author stated:

> "A promise to take joint and separate action 'in co-operation with the Organization' reduces the responsibility of Members to giving, separately or jointly, such support as they think fit. Even if on a stricter view the Article does not permit Members to remain inactive in the face of positive recommendations, they have no direct responsibility for the achievement of the purposes stated in Article 55. They need not act unless the Organization takes the initiative."

As I have said before, Mr. President, I am not concerned with the question of the exact scope or otherwise of the obligation of co-operating with the Organization, except to this extent, that it does not involve any obligation to abstain mechanically from differentiation.

Charles de Visscher, *Theory and Reality in Public International Law*, Princeton, 1957, wrote, at page 126:

> "The Charter envisaged human rights as a source of moral inspiration and a principle of collective action for the organs of the United Nations. That is why in a series of articles it assigns to the United Nations the functions of promoting the ideal of such rights and stimulating respect for them but the Charter nowhere defined the rights of man. Leaving them undetermined in object and scope, it could not have intended to impose upon States Members the legal obligation to grant or guarantee them to their nationals by internal legislation."

Then Goodrich, *The United Nations*, 1959, at page 246, after referring to Articles 1, 13, 55, 56, 62 and 76 of the Charter, remarked:

> "It is to be noted, however, that nowhere in the Charter is the phrase 'human rights and fundamental freedoms' defined. Some delegations at San Francisco desired such a definition but recognized that time did not permit attempting it. Furthermore, it is to be noted that while there are repetitive enumerations of United Nations purposes and functions, the key words are 'promoting', 'encouraging' and 'assisting in the realization of', not, 'protecting, safeguarding and guaranteeing'."

Then there was another interesting facet of the discussions in the International Law Commission in 1949, if we may go back to that for a moment. Mr. Cordova said, as reported in the 1949 *Yearbook*, at page 168: "The instances which had been quoted concerned political rights, but those were not fundamental human rights." In other words, Mr. President, he laid stress on this aspect that there is another limit to the scope of these articles—they concern human rights and fundamental freedom only, and matters which fall outside the scope of that concept could not be said to be touched upon by these articles at all, and in the view of the learned speaker, Mr. Cordova, political rights were not fundamental human rights. This was confirmed by Mr. Scelle. He said at page 169 that:

> ". . . [he] thought that a clear distinction should be drawn between political rights and the fundamental human rights. Until recent years women had not had the right to vote in such civilized countries as France and England in which the fundamental human rights had yet been fully respected and recognized constitutionally."

Now, Mr. President, subsequent events confirmed both that the Charter provisions were not intended to be binding, in so far as laying obligations in respect of human rights on States in their own domestic sphere was concerned, and that they did not refer to differentiation as such, but that they only concerned the promotion of certain postulated fundamental freedoms and the equal concern for everybody, independently of race, colour, group, religion, sex, and so forth.

The European Convention on Human Rights provides an interesting illustration on all these aspects. In the first place, the fact that it was considered necessary to have a convention falls in entirely with the contemplation that the Charter did not make sufficient provision in that respect and that one required a specific convention. Secondly, it is noteworthy that when it came to this Convention, which now contemplated legal obligations on the part of States, it was considered necessary and found essential to have a much clearer definition than one had in the Charter—a specific definition—as to what fundamental freedom and human rights were contemplated, and to define them exactly so that every State could know where it stood. Indeed, a recent commentator, G. L. Weil, quoted by us in the Rejoinder, V, at page 152, referred to the rights protected by the Convention as "rights which States were willing to enforce because of their precise definition".

The Convention, like the Charter, does not prohibit official differentiation as such. That becomes clear from its whole tenor and in particular also from Article 14, which provides for non-discrimination but not for non-differentiation as such. The Article is quoted in the written Reply of the Applicants at IV, page 509, and it reads as follows:

> "The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinions, national or social origin, association with any national minority, property, birth or other status."

So, Mr. President, it is a criterion of discrimination, and the gist of the Article is the securing of the enjoyment of these rights and freedoms. It enjoins that the rights and freedoms set forth in this Convention shall be secured and that in securing them there is to be no discrimination on the basis of race, sex, etc. This, on the one hand, again confirms that outside the scope of these particular rights there is no norm of non-differentiation or even non-discrimination contemplated in this particular instrument in regard to other subjects or other aspects of life. On the other hand, it makes the fact clear that in regard to these fundamental rights and freedoms the line of partition is not one of non-differentiation but of non-discrimination.

Consequently, Mr. President, in practice one finds that it has been held lawful for a party to the Convention, a State party to the Convention, to discriminate between the sexes on matters falling outside the scope of the Convention, for instance, as regards prohibitions on homosexual practices. That matter is commented upon in the *European Convention on Human Rights Manual*, published at Strasbourg in 1963, at page 67.

It may be useful, Mr. President, in this context, to say some more also on the Universal Declaration of Human Rights. The Applicants in their written Reply relied on this Declaration as affording "evidence for the proposition that official non-discrimination has become a generally

accepted international human rights norm" (**IV**, p. 501). They apparently meant to describe it as a legally binding undertaking in the form of a declaration (**IV**, p. 493). So that is the basis of their discussion of this Universal Declaration, that is, affords evidence for the proposition that official non-discrimination, in the sense contemplated by them, has become a generally accepted international human rights norm.

The contention did not make it perfectly clear what the basic nature of the Applicants' case was. If they intended to suggest that the Universal Declaration of Human Rights had created binding legal obligations they were clearly wrong. That was succinctly stated by us in the Rejoinder, **V**, at page 130.

Now when it comes to the Applicants' oral reply in these proceedings they have been more specific. They now use this Declaration under the rubric of Article 38 (1) *(a)* of the Statute of the Court as one of "the formal acts of the constituent organs of the United Nations which have produced an authoritative construction of Articles 55 *(c)* and 56 of the Charter". That we find in the verbatim record of 19 May, at **IX**, page 347.

And they further contend, in the verbatim record of 18 May, at **IX**, page 337, as follows:

> ". . . 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".

And the Applicants continued further on:

> "It is possible . . . 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."

Mr. President, I have dealt before with the merit or otherwise, in general, of this contention regarding so-called "authoritative interpretation" by organs, by majorities, even by large majorities, of the United Nations. I need not repeat what I said in general about the complete demerit of such a process as something relied upon in support of the Applicants' contentions; that is, in regard to the norm-creating process in general. We could further demonstrate what I have said there with reference also to the specific content of this norm, on the basis on which we are now discussing it, and with reference to what actually happened in this particular aspect of so-called authentic interpretation. We shall do so with a purpose not confined to Article 38 (1) *(a)* of the Statute, because the purpose of this authentic interpretation would seem to extend beyond merely relying on convention: the contention again speaks of this so-called consensus approaching unanimity as a force to be taken into account in this respect.

We look at the matter with a view to these questions: firstly, does the Universal Declaration purport to "interpret" the actual provisions of the Charter, or was the intention something totally different, namely to create something new, that is, a political platform for further political action, or something similar? Secondly, Mr. President, was the Declara-

tion intended to reflect or does it in fact reflect a "general practice" of States "accepted as law", or, put in other words, was it intended that its content should be regarded as binding customary law? Does it contain any evidence tending in that direction? Thirdly, was the Declaration *intended to create binding obligations in any other way?*

Now, Mr. President, even a cursory glance at the Declaration itself, and at the discussions which preceded its adoption in the General Assembly, is sufficient to supply a very clear answer. The wording and the content of the Declaration itself make it plain that neither an "interpretation" of the Charter nor a codification of "general practice accepted as law" was intended. The preamble makes it abundantly clear that the Declaration was intended as a political platform for future action. Each and every one of the preambular paragraphs contain what could be called "legislative arguments" of the type I have mentioned here, arguments dealing with the desirability of having certain things rather than with a contemplation that there is legal obligation already existing in that regard. And after this preamble, the content of the Declaration is [proclaimed]—

> "... as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, ... to secure their universal and effective recognition and observance ...".

In other words it provides, Mr. President, for striving by teaching and education to promote, and in consequence thereof to have progressive measures for implementation of an ideal, a common standard of achievement.

If we turn to the background and the discussions which preceded the adoption of the Declaration, we immediately find that it was intended as the first step in a process which contemplated the subsequent drafting of a convention to be ratified in the ordinary way, and the ultimate creation of methods of implementation of such a convention. So all those steps still lay in the future, before one could reach the stage which my learned friend says has been reached by some short-circuiting process. The first step, the Declaration, was never intended to create binding obligations. In fact, when a proposal was made that the discussions should be postponed to the next year in order to improve the contents of the Declaration, that proposal was rejected. A number of States advanced as the reason for their rejecting of the proposal that the Declaration was not binding in any event, and that improvements could just as well be made to its contents at a later stage. The discussions also show that the Declaration was never intended to be a reflection of an existing practice of States accepted as law. On the contrary, the whole process was intended to influence the development of State practice in future. The discussion therefore carried the explicit and the implicit acknowledgment that current State practice did not accord with what was visualized in the Declaration, which is directly contrary to the basic principles on which my learned friend would have to establish a norm of customary law.

On a reading of the discussions in the General Assembly these facts I have mentioned, become immediately apparent, and we shall give only a few examples to illustrate this. We commence with Mr. Watt of

Australia—this is in the *General Assembly, Official Records*, Third Session Part 1, Plenary, page 876:

> "Whatever its importance, however, the declaration did not by itself constitute an international charter of human rights. The working plan of the Commission on Human Rights had laid down that such a charter should also include a covenant relating to human rights and measures of implementation. The declaration represented a common ideal to be attained by all peoples of the world; it had no legally binding character. The General Assembly should see to it that the rights listed in the declaration did not remain a dead letter and should ensure effective respect of those rights."

Next, Mr. Davies of the United Kingdom in the same record, at page 883, said:

> "That declaration was, however, only a first step. While in no way wishing to minimize its moral force, the United Kingdom felt strongly that the Commission on Human Rights should continue its work on the draft covenant and on the measures for implementation of the declaration."

And then there is a further quotation from the same speaker, at page 885:

> "Finally, the new article which the Soviet Union proposed for inclusion after article 30 would have the effect of transforming the declaration into a pact which would be legally binding upon the signatory States; it was in contradiction to the last paragraph of the preamble."

Next, Mr. Aikman of New Zealand in the same record, at page 888, said:

> "It was true that the universal declaration of human rights, as a statement of principles, had moral force only. It imposed no legal obligations. It was for that reason that the New Zealand delegation had insisted on the draft resolution according to which the Commission on Human Rights should continue to give priority to the preparation of a covenant on human rights and measures of implementation.
>
> Mr. Aikman recalled that the international bill of human rights should eventually consist of three parts: first, the declaration which was before the Assembly; secondly, a covenant or convention imposing on States obligations that would be legally binding; and lastly, effective measures of implementation. The New Zealand delegation considered that the covenant on human rights would be a more important document than the declaration itself, in view of the fact that it would impose legal obligations on the States ratifying it. It was to be hoped, moreover, that a series of international conventions would progressively elaborate and define the principles set forth in the universal declaration of human rights; a beginning had been made by the preparation of three draft conventions on the freedom of information which the Third Committee had now on its agenda.
>
> In the opinion of the New Zealand delegation, the Commission on Human Rights in its work on the covenant should in the first instance concentrate on only some of the rights set forth in the Declaration. The other rights would be dealt with later."

Mr. President, this again emphasized the amount of work to be done in the future in order to achieve the ideals—to achieve what my learned friend says was done almost as if by *fiat.*

We find that in the same record, at page 867:

> "M. Cassin [of France]—outlined the work that remained to be done and stressed that the declaration must constitute a beacon of hope for humanity. It must pave the way for the covenant, to which States would consign their undertakings in order to make them legally binding."

General Romulo of the Philippines in the same record at page 868 said:

> "The declaration, it should be borne in mind, constituted the first step towards a universal bill of human rights. The covenant would constitute the next step; then there would be measures of implementation which would reinforce the declaration. The imperfections of the universal declaration of human rights in themselves did not constitute an adequate reason why the Assembly should not adopt it. It could always be improved later."

Mr. Campos Ortiz of Mexico said at page 885 of the same record:

> ". . . his delegation considered that the universal declaration of human rights was a truly fundamental document. Although it was not a legal document with binding force, that declaration would serve as the basis for the realization of one of the highest aims of the United Nations, that of developing and encouraging universal re spect for human rights."

Mr. Pearson of Canada, at page 898 of the same record, remarked that:

> ". . . his Government regarded the universal declaration of human rights as inspired by the highest ideals and as expressing the most noble principles and aspirations. It believed that each nation would endeavour to implement it, in its own way and according to their own traditions."

We found a statement along the same lines by the representative of Paraguay in the same record, at page 901—I do not think I need read it all to the Court.

Mr. Katz-Suchy of Poland said, at page 904 of the same record:

> "The Polish delegation had welcomed the formation of the Commission on Human Rights. In the Economic and Social Council it had expressed its disappointment at the fact that the Council had only prepared the draft declaration and not the draft convention nor the measures of implementation which should have been elaborated simultaneously, especially in view of the fact that the declaration, as presented, was only an expression of principles with no legal force, with no provisions for implementation, and with only moral value."

He said further, at page 909:

> ". . . he would not have hesitated to vote for it, in spite of its many imperfections. It had however been clearly established that it was merely a declaration of principles, which no Government would be obliged to implement. Under those conditions, its adoption did not seem to be a matter of any apparent urgency."

Then, Mr. President, I might point out that the President of the

General Assembly, immediately after the Declaration was adopted in the General Assembly, summed up what had been achieved and stated at page 934 of that record:

> "As had been pointed out, however, the Declaration only marked a first step since it was not a convention by which States would be bound to carry out and give effect to the fundamental human rights; nor would it provide for enforcement; yet it was a step forward in a great evolutionary process."

Mr. President, to suggest, as the Applicants do, that in these circumstances the Declaration amounted to an "interpretation" of the provisions of the Charter, and accordingly falls under the rubric of Article 38 (1) *(a)* of the Statute of the Court, is completely untenable. Equally untenable, Mr. President, would be any suggestion that the contents of the Declaration reflect a general practice accepted as law which could bring into operation the law-creating source of international custom in terms of Article 38 (1) *(b)* of the Statute. Indeed, nearly 17 years have elapsed since the adoption of the Declaration, and still no agreement has been reached on the contents of the proposed Convention.

Finally, the whole tenor of the discussions showed that there was no general intention to formulate a fundamental norm of mechanical non-differentiation, either absolute or with the slight qualifications which we postulated this morning. The delegates in the debates expressed themselves against oppression, against tyranny and against unfair discrimination, clearly exhibiting their intentions in that respect. The words "without distinction of any kind" in Article 2 of the Declaration, therefore, tend to create a wrong impression as to what the real intentions of the speakers were, as one finds them expressed in the debates. In fact, Mr. President, the Soviet Union and certain other delegations exerted every effort to insert clauses which, they said, were designed to assure to ethical or religious groups the use of their mother tongue, the right to have their own schools and the right to develop their own culture, which proposals would, if inserted, have involved differentiation on those bases, on the basis of membership in a group. There were arguments against those proposals at that particular stage, but those arguments in not a single instance suggested that such forms of differentiation on the basis of membership in a group were contrary to the contents and spirit of the Declaration. Instead, Mr. President, the gist of the argument employed against the inclusion of such ideas was expressed by Mrs. Roosevelt, the representative of the United States, who said that—

> "... it was clear from the USSR amendment ... that the aim was to guarantee the rights of certain groups, and not the rights of individuals, with which alone the declaration was concerned". (P. 861 of that record.)

Mrs. Roosevelt, emphasizing the distinction, said that they were concerned with the "rights of individuals" in this Universal Declaration; they were *not* concerned with a guarantee of the "rights of certain groups". That was what the Soviet Union proposals were concerned with.

How, Mr. President, does this stand by comparison with my learned friend's contention, with his suggested line of delimitation between what is permissible and what is impermissible, by saying: "you could differentiate in order to protect the rights of individuals but not in order to protect the rights of groups"? It does not fit in, Mr. President.

Mr. Davies, of the United Kingdom, stated, with regard to one of these amendments:

> "Paragraph 2 of the USSR amendment to article 3, was a new version of an article on minorities which had already been discussed and rejected by the Third Committee. It was better not to insert such an article in the Declaration for the time being, since the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities was in the process of examining the question. Moreover, the USSR amendment was concerned only with national minorities. There were, however, also cultural minorities. Draft resolution C of the Third Committee showed that the Assembly, as the United Kingdom delegation had already pointed out, was not indifferent to the fate of minorities."

That statement was at pages 884-885 of that record.

So, Mr. President, the review shows very clearly that there is no basis whatsoever for relying on the events in regard to this Universal Declaration, either on its contents or on its history as to how it came into being, to support the Applicants' contention in regard to the existence of a suggested norm of non-differentiation in that sphere of allotment of rights and obligation, either in its absolute form or with the suggested qualifications we mentioned.

The question of differentiation is a question not of *ideal*, not of the principles with which these bodies were concerned, it is a question of *method* towards attainment of a common ideal. That is the basis upon which the Respondent has to stand, and is standing, in this respect, and, Mr. President, these events do not help in the least towards showing that a binding norm to the contrary has been established.

I think that should suffice in regard to the human rights provisions in Articles 55 *(c)* and 56.

My learned friend, still under Article 38 (1) *(a)* of the Statute of the Court, sought to rely also on the provisions of Article 2 (6) of the Charter. *On 19 May, at* **IX**, *page 346 of the verbatim record, after referring to the* "normative capacities of the General Assembly"—those were my learned friend's words—*inter alia*, as regards interpretation of Articles 55 *(c)* and 56, my learned friend stated:

> "Further evidence of the law-creating competence of the United Nations is dramatically evidenced by Article 2, paragraph 6, of the Charter which I quote:
>
> > '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."

Now, what is the implication there, Mr. President? Is it an implication that, by making this agreement amongst themselves, the Members of the United Nations have imposed obligations on non-members of the United Nations? If that is the suggestion, it is certainly not borne out either by the wording of the provision, or by the logic of the situation, or by the comment of eminent commentators.

It may suffice, Mr. President, to refer to one or two of these comments: the honourable Member of the Court, Judge Jessup, said in *A Modern Law of Nations*, at page 135:

> "It is to be noted that the language employed does not suggest that non-Member States are under obligation to comply with the Charter, but rather indicates a warning to non-Members that, under certain circumstances the Organization will use the combined power of its Members to exact compliance with the Charter in the interest of the world community as a whole. Surely the Members intend to assert their legal right to take such measures, but to admit also that the right flows from their assumption of the role of guardian of the world's peace rather than from any theory of an obligation on non-Members derived from a treaty to which they are not parties. In a sense, therefore, the United Nations assumes a legislative role; but the frank assertion of the fact must wait on the creation of an actual world legislature."

In a very recent work, Mr. President, entitled *The Authority of the United Nations to Control non-Members*, by Richard A. Falk, of Princeton University, a work published in 1965, the learned author stressed the following arguments which militated against an extensive interpretation of Article 2 (6)—extensive in the sense of imposing obligations outside the scope of the contracting parties. I quote from pages 38-39:

> "1. It [it refers to the extensive interpretation] tends to abolish the distinction between Membership in so far as obligations are concerned; this seems plainly inconsistent with other parts of the Charter, such as Articles 4 and 25, and with the assumed consequence of rejecting a proposal to make membership in the United Nations compulsory.
>
> 2. It makes the choice not to join the United Nations illusory, and it makes a non-member potentially as fully subject to duties as is a Member, without sharing with Members the decision-making power of the Organization.
>
> 3. It undermines any consensual basis that the Charter possesses by virtue of its character as an international agreement and *fully* disregards the right of non-members to be immune from an obligation to which they have not consented.
>
> 4. It goes beyond the plain language of Article 2 (6) by presuming that all the obligations of Membership are necessary to ensure the maintenance of international peace; if this was intended, why was it not so stated?"

The learned author does not state that these arguments are, in his view, conclusive; he does not say so explicitly, but the whole tenor of them implies that that is his view, because he does not advance any arguments to the contrary.

In the result, Mr. President, Article 2 (6) makes provision for action to be taken against non-members for the maintenance of international peace and security. It renders it constitutional for the United Nations organs to decide upon such action. It makes it impossible for a Member to get up in a debate and say: "what is now being proposed is outside the scope of our Constitution, because our Constitution does not enable us to take action outside of the sphere of membership." That is all. It binds Members against raising an objection of that kind. It does not apply

to any possible obligation on the part of non-members at all, and certainly not any under Articles 55 *(c)* and 56 of the Charter. How it could assist the Applicants in the present case is, in my submission, completely obscure. It certainly does not bestow any legislative function, in the ordinary sense, either as regards Members or as regards non-members.

That brings me, Mr. President, to the end of consideration of provisions of the Charter in the sense under consideration. What remains under Article 38 (1) *(a)* of the Statute is the Applicants' reliance on certain provisions of the International Labour Organisation Constitution.

Mr. President, we dealt with the provision relied upon by my learned friends, actually one in the Declaration of Philadelphia, in the Rejoinder, **V**, at page 133, where we set out its wording, as follows:

> " '. . . 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 . . . equal opportunity . . .' ".

The same question arises here as in regard to the articles we have dealt with in the case of the Charter. Is the implication one of an absolute *mechanical abstention from differentiation, or a prohibition of unfair* discrimination? We pointed out in the Rejoinder that the latter was quite obviously the correct interpretation, and that the use of the words "equal opportunity", as distinct from "identical opportunity", supported our argument in that respect.

We pointed out further that there was in the Declaration itself a provision which, in the context of the present argument, serves the same purpose as Articles 73 and 76 of the Charter did in the context of that argument, in that it shows positively that there was a contemplation that, in certain circumstances, there would have to be differentiation. That section is also quoted at **V**, page 133, and its import is perfectly clear. I need not read it again to the Court.

Yet, Mr. President, in response to this argument, what do we get from the Applicants on 18 May, in the verbatim record, at **IX**, pages 337, and the following? We get a long tirade again to the effect that we attribute extreme situations to them, that we present a caricature of their argument, that we are practising a sleight-of-hand in substituting identical opportunity for equal opportunity and then ridiculing the idea. That is not what we did at all.

If we test again on the basis of what the Applicants really say their *norm amounts to in their formal definitions of that norm, if we test it* on that absolute basis, or even if we test it with reference to the suggested qualifications, we come to the same answer that here this document did *clearly not* contemplate that there was to be either an absolute abstention from differentiation, or even an abstention subject to qualifications mentioned by the Applicants. And that is *all* we are concerned with, and that is again the full answer to what the Applicants say.

The Applicants go on, in this same record, to deal with so-called "authoritative interpretation" of these provisions by organs of the International Labour Organisation.

And again, Mr. President, if we go into the matter to see whether there was such an authoritative interpretation, something which really purported to interpret what was already in the Constitution as distinct from attempts at creating something new, then we find there is nothing of the kind in the whole history referred to by my learned friend.

I referred the Court before to the clause in the I.L.O. Constitution, which makes it clear that a dispute as to the interpretation or application of provisions would be referred to the Court for adjudication; it would not be the function of the organs of the Organisation themselves.

My learned friends say, in the verbatim record of 18 May, at **IX,** page 339:

> "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 . . ."

May I pause there for a moment, Mr. President. Why is that so? Does one presuppose that if a board of directors of a company takes a resolution, that that must necessarily be *intra vires* the Constitution? If that is so, why does one ever have litigation on a question of *ultra vires*? But, be that as it may, in the case of this Organisation this is even further from the truth for another reason, namely because those organs are entrusted with functions that could go beyond what is already agreed to in the Constitution, i.e., functions relating to the preparation of draft conventions for the future, which could then be referred back to the members for ratification.

The statement by my learned friend continues—with reference to the conventions, reports, resolutions and conclusions—

> ". . . 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."

I think there may be a mistake in the quotation. In any event, the reference is to " 'the equal opportunity' provision in the Constitution", and it is said that such resolutions, etc., provide an authoritative interpretation of this provision:

> "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 . . ."

Mr. President, I think enough has been said to show that this line of reasoning is totally unfounded. The "equal opportunity" clause contained no provision in regard to the question of method involved in the suggestion that there is to be a mechanical abstention from differentiation. To say that later suggested conventions, moving in that direction, could be taken as an authoritative interpretation, binding upon the Respondent, despite the fact of non-participation by the Respondent, and of its known objections to any such line of development, is just another form of assigning legislative powers to that Organisation by a large majority capable of binding an opposing and contesting minority.

I may, in passing, say that the Applicants rely in the verbatim of 18 May, at **IX,** page 338, particularly on a specific Convention, which is there referred to as the "Convention and Recommendation

concerning discrimination in respect of employment and occupation, adopted by the Conference in 1958".

Mr. President, according to up-to-date information which we specially asked for and obtained officially, we understand the situation is that out of a total of 113 Members of the international organization, up to now only 50 have ratified that particular Convention—a Convention which was drafted, prepared and finalized by the Organisation itself as far as its work was concerned, in 1958—seven years ago. Yet my learned friend says that one must not look at what people actually agreed upon; one must not look at the practice of States and so forth; one must regard this process, this so-called consensus, approaching unanimity, as in itself norm-creative. I submit that argument also refutes itself.

Mr. President, that concludes then what I have to say by way of application to the Applicants' specific norm of the provisions of the Charter and of the I.L.O. Constitution—the provisions relied upon by my learned friends for purposes of bringing, or attempting to bring, the matter under Article 38 (1) *(a)* of the Statute.

In regard to the other heads of generation of rules of international law contained in *(b)*, *(c)*, and *(d)*, I need not say much at this stage. We could, for instance, in regard to Article 38 (1) *(b)*, have rested upon the submissions I have already addressed to the Court, namely that the Applicants have made it plain that they do not bring before the Court any evidence as to actual practice of States, but that they rely purely on what has been happening, they suggest, in these international organizations, in the organs of these international organizations, and they say that that in itself is sufficient as a norm-creating process under this head, even in the face of active opposition by the Respondent.

It could suffice for my purposes entirely to rest on our answers that contention, without having regard to the application of Article 38 (1) *(b)* or the principles contemplated therein, to the specific norm, with the content as relied upon by my learned friends.

But we prefer, Mr. President, to take the matter further. We should like to demonstrate by evidence, evidence both by witnesses and by further material which we may be able to put before the Court in comments on the evidence that has been given, materials abstracted from documentary sources available to the Court, that, in fact, there has been no consistent practice whatsoever of the kind relied upon by the Applicants, and upon which they would have to rely in order to say that there has been the generation of a norm as contemplated in Article 38 (1) *(b)* of the Statute.

Before leading the evidence, we shall indicate in more detail, Mr. President, what the evidence will be about. I shall at this stage merely indicate very broadly what some of the aspects of that evidence will be. It will be directed at showing how far the actual facts in practice are removed from a general concordant practice of a type which could form the basis of the norm contended for by the Applicants. We shall demonstrate to the Court, Mr. President, that in a sense and for this purpose it might be said that various parts and countries of the world fall into two categories: firstly, the category of those which have peculiar problems arising from the co-existence of different racial, ethnic, and national groups, co-existence in close contiguity with one another, and in sufficiently substantial numbers to create a problem. That is the one category of the world and its countries; another category of the world

and its countries is that which does not have that problem, either because there are not sufficient numbers of a divergent population group to create any real problem, or because, substantially, there is no plurality at all.

One will see from the evidence I submit, Mr. President, that the approach in these two parts of the world to questions of differentiation and non-differentiation in fact varies very greatly, and it must necessarily do so when regard is had to the facts. It must do so in the interests of the peoples concerned. It is quite impossible to expect uniformity of approach and practice along the lines of a norm as suggested by the Applicants. An attempt to do so would necessarily amount to an attempt on the part of the world which does not have the problem, to impose its views on the part of the world that does have the problem, just as if the non-maritime States of the world were to say to the maritime States how they are to solve their coastal problems.

We shall endeavour to show by this evidence, Mr. President, how chaotic the results would be of attempting to apply such a norm in some parts of the world, including South West Africa, but not confined to South West Africa. It will be relevant, Mr. President, to the contention advanced by the Applicants regarding suggested standards which are now said to have crystallized into a norm by this short-circuiting process which I have described before.

We shall endeavour to demonstrate by evidence that if those standards were properly put to the test, how calamitous the results would be, and that therefore, in so far as any standards may exist in the conceptions and theories of some people, time must necessarily show in practice that those standards require substantial adjustments, in some respects at least complete reversal, and that when the Court is asked to short-circuit the normal testing processes, it is in effect asked to endorse a legislative process, or to indulge in a legislative process which can have the most disastrous consequences for a very large portion of mankind.

[Public hearing of 18 June 1965]

Mr. President and honourable Members, I was dealing at the conclusion yesterday with some of the purposes, the main purposes, to which the evidence to be called will be directed, particularly in the context of the provisions of Article 38 (1) *(b)* of the Statute and the attempt of the Applicants to bring their case under that heading.

To what I said yesterday I might add this aspect, that not only in the evidence, but also, and in particular, in further material to be put before the Court after the conclusion of the oral evidence, we shall attempt to analyse somewhat the processes of the international bodies relied upon by my learned friends as being the processes which have generated a norm of customary international law, in order to demonstrate, Mr. President, that when regard is had to the necessary elements for the generation of such a norm they certainly do not exist in respect of the proceedings of those bodies.

That I think ought to suffice at this stage, with respect, in regard to our case as it will be further presented with reference to Article 38 (1) *(b)*.

In regard to Article 38 (1) *(c)* we have already shown in principle, Mr. President, and with submission, that that head could not assist the Applicants with a view to the creation of an obligation of the kind. They

could not rely on it as binding the Respondent without its consent and despite its opposition.

Nevertheless, the evidence of the tenor which I have indicated will also further demonstrate, in our submission, that there is in fact no generally recognized principle which accords with the Applicants' norm.

That brings me to Article 38 (1) *(d)*. Now the mere fact that my learned friends could cite no authority at all in support of their suggested norm, that Mr. President, is, in itself, in my submission, a significant feature. Surely, if they could contend even plausibly that there is such a norm which has just come into existence, or which must be regarded as being in existence, then there must have been commentators on these processes in international law, particularly those who have interested themselves in the sphere of human rights and analogous subjects. There must have been at least one to comment to the effect that such a norm must now be regarded as having come into existence; but they have not been able to find one.

On the contrary, we have found an authority stating very definitely that in his opinion no such norm has come into existence. Of course, he does not direct himself to the question in those terms, because nobody had suggested to him that such a norm had come into existence, but what he says about it makes it very clear that in his opinion there could be no substance whatever in a contention to the effect that such a norm exists. The authority is Professor Wilhelm Wengler, a German authority in international law, and I refer to his work *Volkerrecht* 1964, Volume II, pages 1028-1029.

There is, in the 1961 (III) Volume of *Recueil des Cours*, at page 275, a brief bibliographical note of Professor Wengler, which indicates that he was then Professor of International and Comparative Law at the Free University of West Berlin. The bibliographical note indicates that he is a man of standing in his subject, it gives his previous history, which appears to be an impressive one.

I quote then from this work at the pages indicated:

> "The vagueness of the contents of many of the human rights formulated in the U.N. Declaration is particularly apparent in the Right of Equal Treatment by the State. It cannot be accepted that the question concerning the extent of the prohibition of discriminatory treatment on the basis of sex, which is the subject of heated dispute in the constitutional law of many States, has to be answered *uniformly in all countries since, and because, the human rights* protected by International Law include the right of equal treatment of the sexes. But even the differential treatment of the inhabitants of a State in accordance with their origin, their standard of education, and even their race, etc., is clearly not as stringently forbidden by the principles of International Law in respect of human rights as in the case where the relevant precepts are entrenched in the constitutions of individual States or are embodied in special treaties. What is prohibited in terms of the legal views currently held by most States, is the deliberate placing in a worse position, or the deliberate retardation of the development of certain population groups because of race, religion or language, or because of their ethnically determined desire to form a community of their own. On the other hand, it can obviously not unconditionally be regarded as a violation of the human rights recognized in general International

> Law if a State does differentiate between persons who are regarded as its citizens for the purpose of International Law, by granting certain groups lesser political rights than others, or when it does not permit the inhabitants of different parts of its country to participate equally in the government of the whole State."

Then the author says that that, in his view, could not unconditionally be regarded as a violation of the human rights recognized in general international law. He proceeds:

> "Nor does the human right of equal treatment place States under an obligation to apply the same civil and criminal law in respect of all its citizens recognized as such in terms of International Law. They are, in fact, under no obligation to apply the principles of their own jurisdiction to all population groups."

Then, in a footnote, at page 1028, the author states:

> "Conversely, the question may be put whether members of population groups who differ in respect of language, religion or socio-historic affinity from other groups in the State, can claim a human right of protection of their group identity, in particular by the grant of special legal rights to them."

The author proceeds:

> "The displacement of the protection of particular minority rights by the legal recognition of universal human rights, could be used as an argument tending in this direction. The question must probably be solved in conjunction with the right of self-determination. If a population group, whose feeling of affinity appears to entitle it to self-determination as a potentially independent people of an independent State is denied the creation of such a State because expediency dictates that in the interests of all the inhabitants a particular territory should, notwithstanding the diversity of its inhabitants, remain one single State, then the group consciousness of those who are denied the opportunity of creating an independent State must be taken into consideration in the legislation of the greater whole. On the other hand, as regards for instance the members of religious groups, who do not want to constitute a potentially independent population, there does indeed exist a human right to the free exercise of religion, but no human right to a position which is privileged by comparison with that of the rest of the population."

I have read, Mr. President, our own translation from the German. I emphasize that this was a work which appeared in 1964, last year, and it refutes entirely in these various ways the suggestion of the existence of a norm as relied upon by the Applicants.

It remains for me, Mr. President, only to refer to certain invitations extended to this Court by the Applicants to act in what I could perhaps conservatively describe as a rather peculiar and unconventional way for a court of law.

I have referred, Mr. President, to formulations by the Applicants in regard to approval being sought for novel law-creating processes attributed to organs of the international political bodies. But the Applicants, as I understand them, go further than that. They also ask this Court to perform a novel and completely unconventional task.

In the verbatim record of 18 May, at **IX,** pages 328-329, they place special emphasis on the fact that this Court is the principal judicial organ of the United Nations, or of the Charter, as they put it.

Then on 19 May in the relative verbatim, at **IX,** pages 353-354, there is a significant passage which I should like to read to the Court. There my learned friend urges upon the Court an approach which—

> ". . . would view the interpretation of the sub-divisions of Article 38 in the 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."

Mr. President, this must mean and can mean only one of two things: either the Court is asked to fulfil its function of applying the law, or it means more than that. If the Court is merely asked to fulfil its function of applying the law, why is all the verbiage necessary? What does it all mean? Why is there all this reliance upon the Court being an integral part of this structure of organized international society, and, as such, required to give effect by dynamic and flexible means to the concepts which are now being urged upon the Court? There is, Mr. President, urged upon the Court what might in effect be called an invitation to decide this case not on justice in accordance with law, but on what might be termed, for these purposes, revolutionary justice. There is urged upon the Court the same dynamic approach and flexible principles of interpretation in accordance with which so many States which are diagnosing the present position of the United Nations, have contributed to such a vital extent to present difficulties.

They are in effect assigning to this Court a most unworthy role in this whole process, viz., that of a revolutionary tribunal to aid and abet, and to rubber-stamp, the usurpation, by the political majorities in international organs, of legislative powers which have not been granted to them in the constitutive instruments or with the consent of the States which have created them. That is in effect what they are asking this Court to do, and the role they are asking this Court to fulfil.

That stands, Mr. President, in marked contrast to the attitude taken by my learned friend on behalf of the Applicants in the 1962 Oral Proceedings. At the opening of his address then he struck a note which he considered so appealing at that stage, that he found it desirable to repeat it again at the conclusion of his oral rejoinder in those proceedings. We find it referred to at **VII,** page 261 of the Oral Proceedings on the 1962 Preliminary Objections. It is the second sentence on that page of the record, as I say, at the opening stage, and then at the concluding stage, at page 368, of that record. I should like to refer to the latter

passage, at page 368, because it gives the effect. My learned friend, Mr. Gross, there stated:

> "Mr. President and Members of the Court, may I conclude in thanking the Court for its attention, with a statement with which I opened my comments:
>
> 'It is possible to achieve the Rule of Law only because this Court sits.' "

Mr. President, that again demonstrates the change which has come over this case. Apparently the rule of law is now no longer good enough. My learned friend could hardly have indicated in a more significant way his realization that he is asking this Court for something to which he is not entitled in law. In our submission, Mr. President, only time can bring a solution to the political aspects of this dispute which has found itself in the proceedings before this Court. It is with respect to finding a political solution that dynamics and flexibility can and will undoubtedly play their part if allowed to take their course.

The evidence which we intend to produce and lead to the Court will undoubtedly reveal to the Court the enormous fund of goodwill still existing throughout Africa amongst all her peoples, amongst Black, White and Brown, across colour and ethnic lines, a fund of goodwill waiting to be tapped in circumstances in which one people does not feel itself threatened by another.

My learned friend speaks of qualitative versus quantitative aspects of development, contrasting those features with one another. He speaks of moral versus material progress. Mr. President, does he really think that South Africa's policies are concerned only with quantitative and material results? Could he really seriously think that? Could tens and hundreds and hundreds of thousands, and even millions, of Native children be educated on the basis of having true respect for what is good in their own culture, and could it then be said that that has produced nothing good for their souls?

Mr. President, does the concept of development of an own homeland have no moral or qualitative aspects? And when the White man assists in this development, and he sees that the Black man is rising to a position not of domination but of equality, of friendship and co-operation, can that leave the soul of the White man unstirred in these circumstances?

Surely, Mr. President, these are the ingredients which are required to work, which are to be left to do their work, towards finding a positive solution in which the past and present mistakes can be rectified, and sore points can be eliminated or eradicated. Surely that is where dynamics and flexibility are to play their part, but then at history's own pace.

My learned friend, by asking this Court to be dynamic and flexible in the sense for which he contends, is really asking this Court to arrest the developing course of history in this respect. He is asking the Court to introduce into the situation an element of rigidity, and thus a removal of the elasticity which exists. He is asking the Court to introduce that element which is so strongly resisted by the mandatory power, by the administrating authority, and which would undoubtedly be as strenuously resisted and resented by the peoples themselves. And therefore, Mr. President, the following of this course by the Court would have a very good chance, to put it at its lowest, of spelling disastrous revolution rather than constructive evolution.

My concern has been to show that there is no merit whatsoever in this suggested substantive legal ground for achieving the result contended for by my learned friend; and also, Mr. President, that there is an equally complete lack of merit in the suggestion that this Court should assume the revolutionary non-judicial role urged upon it, rather than, as its Statute provides, decide, in accordance with international law, such disputes as may be referred to it by the parties.

I thank the Court. That brings me to the conclusion of the rejoinder on the legal argument and it brings me to the next stage of the proceedings which is the presentation of our case on the facts, with reference to the evidence to be lead.

I shall present to the Court a brief opening statement in regard to that evidence and my learned friend, Mr. Muller, will then present the first witness to the Court. This opening statement in regard to the evidence can now be much shorter than we visualized at first. When we were thinking of a different type of dispute to be canvassed in the evidence, we contemplated dealing fairly extensively with the facts which are already on record in the pleadings with a view to analysing the issues, and how they have developed up to this present stage, and of thus indicating what precise points there are in the various aspects of the matter to which we desire to direct evidence, and what the significance of the evidence would be in relation to those particular points.

But, now, Mr. President, that situation has largely changed. The facts, as relied upon by the Respondent in its pleadings, are largely admitted by the Applicants. The dispute about Article 2, paragraph 2, of the Mandate is different, and the purpose for which the evidence is to be adduced is very substantially different from what it was before.

I have already indicated in my legal argument—the rejoinder on the law—what the broad purposes will be of the evidence to be led and this explanatory introductory statement will therefore be relatively brief.

First, it may be useful to take note of the fact that certain of the Applicants' Submissions have now been entirely disposed of—the case in respect of Submissions Nos. 1, 2, 7 and 8. Nos. 1 and 2, of course, concern the continued existence of the Mandate and the alleged supervisory functions and powers of the United Nations, and Nos. 7 and 8 are consequential on No. 2. It has always been common cause that Respondent refused, in fact, to render reports and to transmit petitions to the United Nations and the only issue with respect to Submissions 7 and 8 and the relevant part of Submission 2 has, therefore, concerned the question of a legal obligation or otherwise to submit reports and transmit petitions. That issue, together with the question pertaining to the lapse or otherwise of the Mandate, has been disposed of in the legal argument.

Of course, Mr. President, the Applicants, in their attempt to establish charges formulated in their other submissions, still attach great significance to the alleged failure on Respondent's part to comply with the alleged duty of accountability, and it may therefore be necessary for us in dealing with the other submissions to make some further reference to this aspect of the matter, but only in the way in which the Applicants have sought to apply to these other submissions a contention on accountability taken from its case on Article 6. That would be in the cases concerning militarization—Submission No. 6—concerning unilateral incorporation—the Applicants' Submission No. 5—and in some aspects also concerning Article 2, paragraph 2, itself—their Submissions Nos. 3 and 4.

Our further conduct of this case is, therefore, directed at meeting the charges involved in Submissions Nos. 3, 4, 5, 6 and 9.

Now, first, in regard to Submissions 3 and 4, we have already demonstrated that these submissions, as now formulated, constitute in effect one submission only and can, for all purposes in the further proceedings in this case, be treated as one. We have also demonstrated that the Applicants' whole case on this subject now rests on the single proposition that there is in existence the alleged norm and/or standards which prohibit the Respondent from distinguishing as to race, colour, national or tribal origin, in establishing the rights and duties of the inhabitants of the Territory.

We of course admit, Mr. President, that Respondent's policies and practices in South West Africa do distinguish as to racial or ethnic origin in establishing the rights and duties of the inhabitants, and, therefore, if a legal norm and/or standards, as contended for by the Applicants, were in existence and were binding upon the Respondent under the Mandate, then it would follow that Respondent's policies would be in conflict with such a norm and/or standards.

Consequently, the only matter on which questions of fact now arise regarding Submissions 3 and 4 is the alleged existence of the norm and/or standards and their alleged applicability to South West Africa.

I have already indicated broadly the object of the oral testimony which will be directed to this question. It is, if I may put it briefly again, to demonstrate that there is no international custom evidencing a general practice by which a norm and/or standards, as contended for by the Applicants, are accepted as law, and that there is no support for the existence of such a norm in the principles of law recognized by civilized nations. In other words, it is directed in that sense, at paragraphs *(b)* and *(c)* of Article 38 (1) of the Statute of the Court, that is, the Applicants' case sought to be made under those heads.

In particular, Mr. President, I can indicate very briefly that we want to show, firstly, that there is no evidence of a general practice accepted as law, in accordance with the norm and standards contended for, but that, in truth, there is a very substantial amount of practice to the contrary.

Secondly, we should like to explain by this evidence the underlying considerations which in certain circumstances render it desirable to apply policies and practices which differentiate between persons on the basis of membership in a group, race and so forth, and to demonstrate, Mr. President, that the application in such circumstances of a norm or standards as contended for by the Applicants, would not only militate against peace, order and good government, and thus also against the whole concept of promotion of well-being and progress to the utmost, but also, in effect, strike at the very concepts which underly the principles of law recognized by civilized nations, namely the concepts of reason, equity, justice, and so forth. In other words, we want to show that the standards, in so far as there may be any standards existing in the world today suggesting the application of such a norm, have not been tested in practice and we want to show that if they should be tested in practice then the need for revision and reversal would become manifest in respect of particular parts of the world.

This, Mr. President, would, in our submission, therefore, assist to demonstrate how impossible it is, in fact and in law, to regard activities

in international bodies, as relied upon by the Applicants, as an adequate substitute either for convention or for actual practice in the generation of international legal obligations, or as enunciative of general principles of law recognized by civilized nations.

Thirdly, Mr. President, by the means which I have already indicated plus other evidence and demonstration from available records, we want to show in what light the activities in the international bodies, as relied upon by the Applicants, are really to be seen. We want to show what influences and motivations were really at work. The evidence will tend to show that these bodies were not concerned with usages and practices which are, in fact, operative in different countries of the world and which are regarded as being binding. The evidence will show that, in criticizing and expressing condemnation of Respondent's policies and practices, these bodies did so without due regard to the particular circumstances and to the considerations underlying those policies and practices. Moreover, we shall show that the organs and the agencies of the United Nations concerned in passing the judgments do not appear to have applied a norm of the nature suggested by the Applicants but, on the contrary, rather appear to have condemned Respondent's policies on an entirely different basis, namely as being tainted with improper motives, or as being oppressive of certain groups—findings which were largely based on incorrect or distorted facts or assumptions or on deliberate misrepresentation. This will show, in our submission, that the so-called collective judgment or collective will in these bodies cannot reliably serve as standards against which Respondent's policies and practices should be measured, let alone as a norm binding upon the Respondent.

Mr. President, then, as regards the actual evidence and the witnesses concerned, inasmuch as the nature and the purpose of the contemplated evidence has changed in the way I have indicated, the position of proposed evidence of individual witnesses has also been affected. The list of witnesses which was originally filed with the Court in terms of the rules, was compiled on the basis of the issues raised in the pleadings, as we understood them, and the contemplated evidence would therefore have been directed specifically at showing that the Respondent's policies could, and should, be regarded as being designed in good faith to promote to the utmost the well-being and progress of all the inhabitants. This has now become unnecessary and, in so far as the witnesses may still refer to Respondent's policies, it will now no longer be for the purpose of showing the Respondent's good faith, of showing that the policies are so designed to promote, and are having the effect of promoting, to the utmost well-being and progress and that a reasonable mandatory government could decide upon those policies as being the best suited to the circumstances. That approach has become unnecessary and, as I have said, in so far as the witnesses may still refer to the policies, it will not be for that purpose. It will now only be for the purpose and in the context of illustrating and demonstrating the untenability of the norm and the standards relied upon, to demonstrate, for example, the need for differentiation in particular circumstances such as exist in South Africa and in South West Africa and also in other parts, to demonstrate the positive values of differentiation in such circumstances, and to demonstrate the compensations which these positive values have for adverse aspects that might exist in regard to differentiation. And the accent will particularly be on the consequences of doing away with differentiation under such circum-

stances. The impossibility of applying qualifications of the kind I postulated yesterday which arose in the discussion of the *minorities treaties*, will also receive consideration, Mr. President.

A certain number of the witnesses originally contemplated will, in these circumstances, now fall away because of the altered situation. In the case of other witnesses, some of them will omit evidence which was originally contemplated for them and they will adapt their presentations along the lines which I have already indicated. And also it has been necessary to add new witnesses to cope with particular aspects of this altered situation.

We shall indicate as we go along, Mr. President, which of the witnesses will, in these circumstances, now no longer be required. The names of most of the new witnesses contemplated have already been submitted to the Court in supplementary lists.

In view of the fact that these alterations came in the Applicants' case so late, and the need on our part to adapt ourselves very quickly and within a relatively short time to those alterations, I am unfortunately not in a position, Mr. President, to indicate definitely now that those lists are finally and necessarily complete. In fact, we are still in contact with a few potential witnesses whose names have not been submitted in lists, and it may be that we may have to pray the indulgence of the Court to add their names in due course; but I can assure the Court that we shall exert every effort to be as expeditious as possible, to notify any intention of this kind as timeously as possible, and in doing that, to obviate inconvenience for the Court as far as possible.

I can also give the Court the assurance that as we contemplate the situation at the moment, as we see it, the number of such witnesses could not be large, maybe two or three, maybe four or five; I could not see anything substantially in excess of that as at present advised, but the probabilities are that it would be less than the limit I have indicated. That matter will, however, have to be dealt with if and when it arises.

Now, Mr. President, the Court will recall that in earlier discussions there was a contemplation of indicating a broad classification of witnesses, that is, witnesses falling into particular categories dealing with particular subjects. Before I deal with that, may I first indicate that all the witnesses can, broadly speaking, be classified as experts, in the sense that by reason of academic qualifications or special study, and/or years of practical experience in particular fields, they are competent to express opinions on certain aspects relevant to the issues before the Court.

It is not intended, Mr. President, that the witnesses should establish facts which are dealt with in the Respondent's pleadings. Such facts, as the Applicants have intimated to the Court, are not disputed by them.

The witnesses may, in the course of their testimony and probably will, refer to facts which are already on record, but they will do so only as a basis for expressing their opinions or for the purposes of illustration, or the like. In so far as they may in the course of their evidence testify to facts which are not already on record, they should be regarded also as witnesses of fact.

Therefore, Mr. President, we contemplate and suggest, with respect, that each of the witnesses be regarded as coming within the dual capacity of witness and expert, and that therefore both the declarations prescribed at Article 53, paragraphs 2 and 3, of the Rules of Court, ought to be taken by them.

Therefore, in so far as we speak of witnesses in this context, we intend to refer to them in their dual capacity as witnesses and experts, and not only as witnesses in the distinctive sense intended in the Article.

Now, with regard to the question of a scheme of presentation of the evidence, Mr. President, here also our earlier ideas have been affected by the change which has come about. We thought formerly that we could have the witnesses in particular categories; that is, general aspects of Respondent's policies, and particular applied aspects thereof in the spheres of political life, economic life, education, and so forth.

Now, that again has largely been affected, as I say, by the altered circumstances and the altered nature of the issues. We propose, therefore, to make only one broad classification, and that is to divide the witnesses into the two groups of those whose testimony will be of a general nature, and those whose testimony will relate to a particular, more specific field such as, for instance, education, influx control, or something of that kind, which will be dealt with for illustrative purposes and the other purposes I have already indicated.

We shall present the witnesses on the general aspects first. Broadly, that will be the scheme; but for reasons which will be obvious to the Court, it will not be possible to adhere strictly and absolutely in every case to this division.

I can mention some of those reasons: in the first place, there are a few witnesses whose testimony will fall in both of these compartments; in other words, they will present testimony of a general nature, but also concerning particular subjects. Secondly, Mr. President, the witnesses come from all over the world—we have to make practical arrangements with respect to their availability at particular times, arrangements also about travelling and accommodation, and although these are planned in advance, they are sometimes upset by unforeseen circumstances and we may have to adapt ourselves to that. Then, in the third place there is also a complication which arises from the fact that there will have to be special interpretation in the case of witnesses who do not speak either French or English, and the sequence in which such witnesses are to be called has therefore also been affected—it will have to depend on the arrangements that have been made, or will be made to have interpreters available for those witnesses. That is a practical arrangement to which attention has been given, but it can also to some extent affect the order of presentation.

We shall, however, Mr. President, adhere as far as we practicably can to this order of presentation, and in so far as it may become necessary for us to depart from the scheme in relation to a particular witness, we shall in advance inform the Court accordingly.

Then, Mr. President, there is one further matter to which reference may be made at this stage, and that is the suggestion earlier made by my learned friend on behalf of the Applicants—the possibility of adding testimony by way of written depositions rather than oral testimony. We have again given consideration to this suggestion, but for the reasons which we indicated before, it seems to us that we cannot agree to that proposal as a general course; but we are still giving consideration to the possibility of availing ourselves of such a procedure in perhaps a few particular cases, and if we decide accordingly, we shall raise the matter in Court after discussion with the representatives for the Applicants.

Now, up to this point I have dealt with the matter of evidence only

with regard to the issue now before the Court in respect of the Applicants' Submissions 3 and 4. In regard to their Submission No. 5, concerning alleged unilateral incorporation, the Applicants have hardly addressed any oral argument to this Court, as the Court will recall, and in view thereof and of the fact that the Applicants do not dispute the statements of fact contained in our pleadings, we do not intend to adduce any oral testimony in regard to these issues raised under the Applicants' Submission No. 5.

I have virtually finished this, Mr. President. If you could give me, say, two or three minutes more I could finish it before the adjournment.

With regard to Submission No. 6, that is, militarization, the Applicants, although accepting for purposes of these proceedings the statement of fact contained in our pleadings, persist in their charge that Respondent has established military bases in South West Africa, but here also they advance only very brief argument to the Court in these Oral Proceedings.

We propose to adduce expert testimony of only one witness in support of our denial of the Applicants' charge regarding militarization of the Territory. The evidence will be very short, and it will consist of the expression of expert opinion on the question whether any installations in South West Africa are of the nature of military bases. It will be given by an expert witness who is in any case called to testify in regard to matters which arise under the Applicants' Submissions 3 and 4.

The Applicants' final Submission No. 9, which concerns modification of the terms of the Mandate, rests entirely of course on charges made by them regarding their other Submissions 3, 4, 5 and 6, and therefore no separate testimony will be adduced by us concerning issues raised under Submission 9. But the evidence led in regard to 3, 4 and 6 will of course then indirectly serve also as an answer to the Applicants' Submission No. 9.

Then, Mr. President, after the oral testimony has concluded we shall, in accordance with the directive of the Court, present our address to the Court with regard to the issues raised under the Applicants' Submissions 3, 4, 5, 6 and 9, and as I have said before, we may then supplement the record, in so far as it may be necessary, with a reference to documentary sources which are in any event available to the Court.

22. HEARING OF THE WITNESSES AND EXPERTS

AT THE PUBLIC HEARINGS OF 18-23 JUNE 1965

Mr. MULLER: Mr. President, as indicated to the Court yesterday, by my learned friend, Mr. de Villiers, the first witness for the Respondent will be Dr. Eiselen. His evidence is relevant to the issues raised under Applicants' Submissions Nos. 3 and 4, that is, whether a legal norm of non-discrimination or non-separation and/or standards of that nature, do exist, and apply to South West Africa. The points to which his evidence will be directed will be the following: the particular circumstances and considerations which influence governmental policies and practices in territories such as South Africa and South West Africa, which are inhabited by different population groups, the objects of the policy of separate development and whether, in the interests of the inhabitants, it would be reasonable, just and equitable to require that a norm and/or standards of the nature suggested by the Applicants, should be applied in South West Africa.

Further, Mr. President, in particular, the witness will deal with the subject of education.

May I, Mr. President, call the witness and ask that he be allowed to make both the declarations prescribed in Article 53 of the Rules, that is, sub-paragraphs 2 and 3.

The PRESIDENT: I will be glad if Dr. Eiselen will come forward and make the solemn declaration of witness and expert, as provided for in the Rules of Court.

Mr. EISELEN: Mr. President, and honourable Members of the Court, in my capacity as a witness, I solemnly declare on my honour and conscience that I will speak the truth, the whole truth and nothing but the truth. In my capacity as an expert, I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.

The PRESIDENT: Mr. Muller—you may keep your seat if you prefer.

Mr. MULLER: I shall later. Thank you Mr. President. Dr. Eiselen, your full names are Werner Willi Max Eiselen. Is that correct?

Mr. EISELEN: That is correct, Mr. President.

Mr. MULLER: I shall state your academic qualifications and ask you to say whether I have correctly stated them. You hold a Bachelor of Arts degree of the Pretoria University. Is that not so?

Mr. EISELEN: That is correct.

Mr. MULLER: Master of Arts degree of the Stellenbosch University?

Mr. EISELEN: Correct.

Mr. MULLER: And a Doctor of Philosophy of the University of Hamburg.

Mr. EISELEN: Correct.

Mr. MULLER: What was your special field of study, Dr. Eiselen?

Mr. EISELEN: My special field of study, Mr. President, was African life and languages, linguistics and social anthropology as well as physical anthropology.

Mr. MULLER: What office do you hold at present?

Mr. EISELEN: At present, I hold the office of Commissioner-General for the Northern Sotho ethnic unit in the Republic of South Africa.

Mr. MULLER: What are the functions of a Commissioner-General of one of the ethnic groups in South Africa—very briefly stated?

Mr. EISELEN: Mr. President, the function of the Commissioner-General is, in that area, to be the representative of the Government that has to receive from territorial authorities existing for that ethnic unit such submissions as they wish to bring to the notice of the Government of the Republic—he has to convey those to the Government of the Republic of South Africa. Beyond that, it is expected of a Commissioner-General that he sees to the fostering of good relations between the Government of the Republic and the emergent government of the ethnic unit, and in that capacity he has to meet various deputations from these people, see, and try to understand the difficulties that are placed before him, and to act as their adviser in all the fields of the contemplated development.

Mr. MULLER: Am I right, Dr. Eiselen, in stating that you have a particular and intimate knowledge of the Bantu peoples of South Africa?

Mr. EISELEN: Mr. President, in reply to that question I would say that I have spent really the whole of my life in the service of the Bantu people of the Republic of South Africa, I have endeavoured to obtain an intimate knowledge of the circumstances of the people there, and my life's work has been devoted to helping the people, the Bantu people of South Africa, in their efforts to attain a higher standard of civilization.

I do not know whether I should at this stage give you a full résumé of the various contacts which I have had with the Bantu people; they begin with my early youth as I was born as a son of a missionary and, as a matter of fact, on my mother's side as a grandson of a missionary, and I grew up among the Bantu people, speaking the language of that particular section, as whose Commissioner-General I have been appointed by the Government, speaking their language from early youth. I have, in taking an interest in the work of my father, of course learnt to deal with both sections of the Bantu community—both the Christian section of the community and the heathen community—so that I should be in a position to know something about the people, their particular circumstances, their ambitions, their desires, and such development as they have been successful in making during my lifetime.

Mr. MULLER: Dr. Eiselen, you have already explained to the Court what your particular field of study was as a student. Now, after obtaining your doctorate, what appointments did you hold in South Africa?

Mr. EISELEN: Mr. President, after coming back to the then Union of South Africa, I was appointed to a post in the University of Stellenbosch after a short time as a teacher in various high-schools; I was appointed to this post in Stellenbosch with a special task of building up there a department of African life and studies. You would perhaps know, Mr. President, that it was pretty late in the day before we started paying a great deal of attention to the circumstances of our Bantu people from the scientific point of view. That is to say, in our universities at that time, there existed no chairs for that particular study, for anthropology, or for African languages; just before the chair in Stellenbosch was established, there was one in Cape Town a little earlier, but those were the first two that came into being in this country for the purpose of doing research work into and doing tuition work on the question of the way of life, the

problems, and so forth, of the Bantu people, of Africa in general, and of those of the Republic, then Union, in particular.

Mr. MULLER: What position did you eventually hold at the University?

Mr. EISELEN: I started as a lecturer, working in both directions, in the field of teaching Bantu languages and doing social anthropology. As the department grew I was able to withdraw from the linguistic side and to concentrate on the line of social anthropology, and in due course I became Professor in that subject, and held that chair from 1933 to 1936.

Mr. MULLER: What position did you hold after 1936?

Mr. EISELEN: Mr. President, after I had been at the University of Stellenbosch for almost ten years, doing work in the academic field, I felt very strongly that I might be of more use to my country if I gave my attention to some more practical work; it was just at that time that various people who had given this matter consideration, various educationalists, propagated very strongly their idea that the education of the Bantu people was not receiving as much attention as it should receive, because it was always being dealt with by the same persons who were attending to the education of the white people, and being white people themselves, they sometimes tended perhaps to pay less attention to the second part of their task, and it was, therefore, contended that it was in the interests of the Bantu people that education should be handled by people who would have no other task, but whose task would be entirely that of trying to put the education of the Bantu people on a sound footing and to take all the necessary steps for its development. At the invitation of these people, I undertook to take upon myself the post of organizing and directing this effort in the Province of the Transvaal.

Mr. MULLER: Dr. Eiselen, just before the adjournment you were explaining to the Court there were certain reasons why you left the University of Stellenbosch to take up another appointment. Do you wish to add to the reasons given, or will you just tell the Court what appointment did you assume?

Mr. EISELEN: Mr. President, the appointment that I assumed was then known as that of the Chief Inspector of Native Education. The real reason why these posts were established was that advisers of the Government in this respect, among whom Dr. Loram ranked highly together with many educational experts, were of opinion that what we required in the Republic for the Bantu population, as elsewhere in the world for the younger nations, were people grounded in the particular circumstances, the way of life and the language of these people to take charge of education, and, as I said, I did so at the special invitation of Dr. Loram whose name may perhaps be known, because he was afterwards called to a Chair of International Race Relationships in one of the foremost U.S.A. universities.

Mr. MULLER: In your capacity as Chief Inspector of Native Education in the Transvaal, did you come into close contact with the Native peoples, the Bantu people, of the Transvaal?

Mr. EISELEN: Yes, Mr. President, I came into very close contact, especially with those who had already received education—that is to say, the teaching personnel of the various schools, but I also came into contact with a great number of church people who were at that time conducting the schools as managers, and perhaps more important than that, I was able to come into contact with many of the people whom we

were trying to persuade to make the necessary arrangements for the schooling of their children, namely the chiefs and the tribal aristocracy, so that I think that during that period of my life I made contact with various, all the more important, categories of the Bantu population in that area of South Africa.

Mr. MULLER: For how long did you hold the appointment of Chief Inspector of Native Education?

Mr. EISELEN: I held that appointment for 11 years, from 1936 to 1947, and perhaps I should explain why I turned away from Bantu education. That was owing to some sense of frustration. You will notice, Mr. President, that the date was 1947, and that was shortly after the Second World War had come to its conclusion and there were a number of new ideas in regard to the further development of the coming young nations of the world. With these ideas, I may say here, I was in complete sympathy, but I felt that in South Africa they were being applied in the wrong way, and that we did not get the opportunity—I, in my particular office—of building on those foundations which had been laid, but that there was a tendency to break away from that firm foundation basing your educational efforts on the needs, on the circumstances, on the talents, on the gifts of the people, and turning from that evolutionary process into a rather revolutionary process of making the education serve not the needs of the people so much, but serve the education trends and the needs, of an ideology, namely the ideology of integrating the Bantu people as soon as possible—of making them accept the values of a culture, of a people, not their own—a way of life not their own—without allowing them the necessary time or the free choice whether they wanted to do so; and it was for that reason that I handed in my resignation and returned to the University, in this case the University of Pretoria, where I occupied the Chair for Social Anthropology.

Mr. MULLER: How long were you at the University of Pretoria?

Mr. EISELEN: I was at the University of Pretoria only for two years. As I was no longer in direct government service at the university I had ample opportunity of expressing my views, writing articles on the situation, writing articles on the development of the Bantu people, on the whole question of the policy as between the various sections of the population in South Africa. I made full use of those two years and at the end of those two years I was called away from that post and asked by the Government—there had been a change of Government at that time—to undertake the task of Native affairs. I was made Secretary, that is to say, Head of the Permanent Department of Native Affairs in the then Union.

Mr. MULLER: How long did you hold that position?

Mr. EISELEN: I held that position for 11 years, until I retired on reaching the age limit.

Mr. MULLER: In what year?

Mr. EISELEN: That was in 1960. In 1960 I retired and that was after I had been able to extend the knowledge which I had in particular of the northern part of the then Union of South Africa to various other parts, to all the parts of the Union. In the course of my visits to the various offices of my Department and visits to the various population groups in the Bantu areas of the Union, I could build up closer contact in practice with those other portions of the population whom I had not known so well, not from youth upwards. And I also had the opportunity then of

visiting several times the Territory of South West Africa, and of visiting the various population groups there.

Mr. President, it is on the strength of such experience that I have had that I venture to say that I should be expected to know a little about the Bantu people and their particular circumstances in the Republic of South Africa.

Mr. MULLER: In addition to the positions held, as described to the Court, have you served on any Commissions relative to Bantu affairs or Bantu education?

Mr. EISELEN: Yes, Mr. President, in 1945, at the invitation of the British Government I became a member of a three-man Education Commission for Basutoland. The Chairman of that Commission was a well-known man, Sir Frederick Clark, who had been Professor in his younger years in Cape Town, then at one or two universities in Canada, and after that at the University of London. It was at the request of Sir Christopher Cox, with whom I had contacts and who knew a lot about my work in the Union of South Africa as educationist, that I was invited to serve on this Commission which visited Basutoland and spent some time there in 1945, and also published its report on *Education for Basutoland* in the same year, making various recommendations, recommendations which I still today believe were very sound and on the lines of which the education in Basutoland was reorganized at the time.

Mr. MULLER: Did you serve on any other Commissions in South Africa itself?

Mr. EISELEN: In South Africa itself, while I was still Professor at the University of Pretoria, I was asked by the Government to serve as Chairman of the Native Education Commission, to investigate the question of the history and the development of Bantu, of Native education, as it was called at that time, in the Union of South Africa and to report to the Government whether, in the opinion of our Commission, we would recommend changes, changes to make the education process more effective than in the past. The Commission sat from early in 1949 and worked on this project off and on until 1951 when the report was published. The report was quite well received by the Government, debated in Parliament, and most of the recommendations were accepted, although it took some time before the Government was able to act on the major recommendations.

Mr. MULLER: Dr. Eiselen, I will ask you questions later relative to education as a particular subject, but before doing so I would like you to deal with the policy of separate development applied in South Africa and South West Africa.

First of all, with regard to South Africa, will you tell the Court whether there are particular circumstances which have to be appreciated in order to understand the policy of separate development and to evaluate it.

Mr. EISELEN: Mr. President and honourable Members of the Court, I have the firm belief that in South Africa, in the present Republic of South Africa and also in the Territory of South West Africa, we have those particular circumstances which make it necessary to have a definite policy, should I say an educational policy in a broad sense, of leading the black people, the Bantu people, to a higher stage of civilization: that we have those particular circumstances which I would like to put to you, Mr. President, in a little more detail, explaining why we refer

to our country as a multi-community country. We have a number of different communities living within the borders of the Republic of South Africa and the Territory of South West Africa. I shall presently return to this matter and say why we rather insist on not calling our country a multi-racial country, but speak of our country as a country whose inhabitants form a plural community, or form a number of communities.

Perhaps I must say, at this stage, that of course race means very little to most of us, very little that can be proved or disproved. We can see with our eyes that certain people are dark, certain people are a lighter colour, yet we know very little about any connection of these racial characteristics with their mental make-up. That is why the existence of various races in South Africa does not interest us over much, but what is of very great concern to us is that the people living in South Africa, the white people and the Bantu people, have a different way of life, that they have different traditions, that they have different customs, and so forth.

I would like to say, first of all, that we call these people, all of them together, Bantu people—the black people of South Africa—that is because they all speak a language belonging to one and the same family of languages, which have the same kind of morphology, the same kind of syntax, and also to a large extent the same vocabulary. Once one has got used to applying their laws of sound shifting which come into play, then you can readily recognize that their vocabulary comes from a common source. These languages are very different from the Germanic, Romanic, Indo-Germanic languages that we are used to, they belong to the agglutinating languages (with a prefix pronominal structure of the sentence, with no grammatical gender and an entirely different concept of the use of the verb), but I am not going to weary you, Mr. President, with such details, I merely want to say that they all speak languages belonging to that type and which are very different indeed from English or Afrikaans spoken by the white people. It would interest you, Mr. President, and Members of the Court, that these languages are, looking at them from an objective point of view, very much more involved languages than either English or Afrikaans, they require far more study—one would almost say they require more intelligence if you want to speak them properly.

I want to say this, that they are not primitive languages at all and that I think is very important. I want to stress right from the beginning that we look upon the Bantu people in South Africa not as speaking an inferior language, or as being naturally inferior people, but, on the contrary, we simply know that they are different and that, in this particular connection, they speak a very fine type of language, a very well developed and, from our point of view, difficult language, the Bantu type of language.

Now there are certain other things which are common to all the Bantu people. They all have their subsistence economy, hoe culture and animal husbandry; they all have their patrilineal structure of society (I am speaking of the Union of South Africa, now the Republic of South Africa—as regards South West Africa I will presently have to add something to that); furthermore, it is common to the Bantu people that their political life is linked with respect for their aristocracy and the chief as the head of the aristocracy, and also linked with their belief in fore-

fathers—the worship of their forefathers whose living representative among the people is their chief.

On the social side, those things which are common to the Bantu people are their custom of polygamy, of having more wives than one, if they can afford it; their custom of lobola, or bogadi, that is to say that instead of a bride being expected to bring a dowry, as is done in our European life, it is, on the contrary, expected of the groom that he has to give compensation for the member of the family that he takes away from another family group, he has to pay something—a large number of cattle, as a matter of fact—by way of compensation.

Then the last common factor that I would like to name characterizing the Bantu is their custom of initiation, when the people reach adolescence.

Now I have tried, Mr. President, to indicate that the Bantu people, in a way, belong together—the same branch of the human family, the same branch of the language family—but I have now to add that in addition to that, or as against that, they differ in many ways so that they cannot be regarded just as one single people. They cannot, for instance, just offhand understand the language of another population group. With your permission, Mr. President, I would like to name the various population groups which we have in the Republic of South Africa, the Bantu population groups. They are the Xhosa people in the Eastern Cape; the Zulu people in Natal and Zululand; the Basuto people in Basutoland and parts of the Free State which border on Basutoland; the Bechuana living partly in the Bechuanaland Protectorate and partly in the Republic of South Africa; then we have the Bapedi, or Northern Sotho, the people with whom I am now serving as link with our Government, in the Northern Transvaal; and then, finally, two smaller groups, the Bavenda of the far north and the Shangaan of the north eastern part of the Transvaal. All these people have their own language and a Zulu person cannot understand a Suto person any better than a German can understand an Englishman, but their languages are related in the same way. Nor can a person speaking Venda easily understand a person speaking Chuana.

I think that it is important that it should be realized, Mr. President, that we are dealing with different peoples in South Africa. I might, if it will interest you, Mr. President, and the Members of the Court, just mention certain other things in which these various peoples of South Africa differ.

I have mentioned language. The next that one sees readily is that they differ in the way in which they dress, they all have their national way of dressing.

They also have their own national way of building their houses, some of them building the beehive hut, the hut made of wattle and mud; then those that have the round hut, the rondavel, but of more conical type than the beehive.

They also have a different way of living together. Their kraals, that is the term that was applied to their villages, are very different, the Bechuana people living in sometimes big villages with up to 50,000 people living in a village, while Xhosa people in the Eastern Province you would hardly ever find living in clusters where the numbers who belong to that cluster would exceed, say, 20 or 30 families.

You furthermore have other differences, such as the preparation of

food—the staple diet is not at all the same for the various people—the way in which they store their grain, and generally in connection with arts and crafts.

But, coming now to the social and political side, I would like to say that they do not have the same laws of inheritance. As we cannot deal with all of them, I would like to quote just one example. With the Xhosa people, those are the people that are now in the Transkei who have received independent government, their inheritance and law of succesion worked on the principle of the big houses of the chief—the big house, the right-hand house, and the left-hand house—and they each came into consideration for succession if there was no descendant in the big house, but even then the matter was so involved that it was seldom before the death of the reigning chief that it was really known who his successor would be. That is because of the belief, Mr. President, that it is not a good thing to have a person designated as your successor whilst you are still alive, because he might take the necessary steps to remove you before your time had really come.

As against that, you have amongst the Basotho an entirely different practice; the successor of their chief is designated and well known to everybody long before the death of his father, because on the marriage of the young chief they drill a new fire, a new fire, in a ceremonial way, and everybody has to fetch fire from this sacred fire of theirs which represents the new chief who will reign in his father's stead. They actually call their most important woman, who is bought, to use a short term, with the money of the tribe as a whole the candle of the tribe, their representative, the one at whose wedding their sacred fire was made.

Now, I am mentioning these matters only, Mr. President, to show you the difference between these people, and that not one of them would like to have the traditions and the customs of others imposed upon him. In the same way, we have certain of the peoples with totemism—the practice of totemism—of naming their tribe after some animal usually, and regarding this animal as the emblem of their tribe, and very often as something which has to be worshipped, something that certainly must not be eaten.

Now, we do not find totemism with everybody, we do not find totemism with the Xhosa people, we find it with the Basotho people, we find it with Ndebele people; but, then again, with some it is bound up with exogamy, with others it is not, so that it is far easier to find great and important differences between these population groups than the matters in which the one resembles the other. The last one, except their ordinary history and traditions which bind the people together—I would like to mention in this connection is that the various peoples have entirely different customs of divination, the way of finding out, by way of supernatural help, what has caused certain difficulties, what has caused calamities, illness, and so forth. The Zulu do it by smelling out by the witch-doctor; Basotho people do it by using the astragali bones of their totem animals, casting them as dice and interpreting from the way in which they fall; and the Bavenda people have the ceremonial wooden bowl which is ornamented with various totem animals, in which they allow a light fruit kernel to float on water, and it will float to indicate the cause of their difficulty in connection with which the question is put to this divination apparatus.

I hope I have not wearied you with this exposition, Mr. President,

but that is how our Bantu peoples, in the Union of South Africa—now the Republic—differ.

Mr. MULLER: Dr. Eiselen, having described these differences between the Bantu groups of South Africa, there are, of course, also other groups, other than Bantu groups. Which are they?

Mr. EISELEN: In the Republic of South Africa?

Mr. MULLER: Yes.

Mr. EISELEN: In the Republic of South Africa there are white people, naturally, we also have the Indians, and the Coloureds—those are the other population groups in the Republic of South Africa, but I would like to point out that my own personal contacts have been with the Bantu people in particular.

Mr. MULLER: Now, you have already indicated that you regard South Africa as being a multi-community country, in the sense that one has different population groups inhabiting the country. Do they inhabit separate portions of the country, or do they live as one unit?

Mr. EISELEN: Mr. President, they live in different parts of the country, traditionally, and that, of course, is one of the reasons why they have kept apart in other ways too.

Mr. MULLER: Living apart. Has that come about by governmental *fiat*, or is it a matter of historic evolution?

Mr. EISELEN: That is a matter of historical evolution.

Mr. MULLER: Will you describe to the Court, Dr. Eiselen, the historical evolution which has brought about the circumstance that we do find in South Africa of the groups occupying, largely, separate areas.

Mr. EISELEN: Mr. President, if I may request the opportunity, before answering Mr. Muller's question, of just explaining why I put before you a description of the various Bantu population groups, it is because I wanted to make clear that we have, in the Republic of South Africa, a multi-community country, that while these people are also different in race, the race is not of great concern to us. We do not think that it is correct, we think as a matter of fact that it is misleading to refer to our country as having a race problem, because that always causes a confusion, because we are then confused with the countries that have *only* a racial problem. At later stages I will again probably have to refer to this, but at this initial stage I just want to point out that in the United States of America you also have African Black people living there, and they live there merely as a different race, but certainly not as a different community. They differ from the white people there not to any marked extent in their community and in their cultural life, they speak the same language, they have the same religion, they have the same belief, they have the same pursuits, and in every manner of way lead, or try to lead, the same life as the white people—the white Americans—of the United States to such an extent that, to us, it is sometimes a matter of surprise that they should still be referred to as Negroes and not merely be called Americans. But perhaps that is just unnecessary comment at this stage.

Mr. MULLER: Good. May I repeat my question, and that is will you describe briefly to the Court the historical events which brought about the circumstance in South Africa that the different population groups occupy, largely, different areas?

Mr. EISELEN: Mr. President, the area which is now known as the Republic of South Africa was not originally inhabited by the people who

now live there. The original inhabitants did not include any white people or any Bantu people; both of them are newcomers, if you take the very long view, to this part of the world—to South Africa, and curiously enough they came the one not very long after the other. Sometimes it is held that they seemed to have arrived simultaneously, but I do not think that is quite correct. I think that the Bantu people arrived in the present Republic of South Africa earlier than the white people, but they only arrived in the northern part, in the part which I would like to call the Trans-Orange part; and that happened at about the same time that both South Africa and North America were first settled by Europeans; so that while you had the Bantu people coming from the north, you had white people coming from the south.

Now the country was not entirely uninhabited. You had living in the country at that time the Bushmen and various Hottentot tribes. It is rather difficult to reconstruct the picture—one has to rely very much on guess-work in doing so; one can only judge by the various relics which the Bushmen have left in various parts of the country, in the northern part of the country, and also by various language traits which have been adopted from the Hottentot languages by the Bantu languages, showing that there must have been some type of inter-marriage, probably taking this course: that in their wars the Bantu people gradually eliminated the Hottentots, but did not kill off the womenfolk, but kept those and lived with them, added some new blood to the Bantu blood, and also adopted some of their language characteristics—the strange click in the language which we white people find so difficult to pronounce, which both the Bushmen and the Hottentots practise in their languages. The Bantu people probably came from somewhere round about the Great Lakes of Africa, and it is of course well known where the Europeans came from; the Europeans were all, more or less, of Germanic stock, West European stock. And now the interesting part is that the Bantu occupied the northern, the Trans-Orange, part and the white people gradually occupied the area to the south of that. The Bushmen and the Hottentots disappeared in various ways; there were certain of the diseases—smallpox—which overwhelmed the Hottentots in the European area, but they also mingled with the slaves who were imported at one stage into the Cape Colony, and also with white people, and formed the coloured people of today—part of the coloured people. How exactly, as I say, the original inhabitants in the northern areas occupied by the Bantu disappeared we cannot say. The important point is that neither of those original peoples living in South Africa play any important part there now—they are just a few, tiny remnants, and some larger remnants which have been preserved in South West Africa.

I should like to add something, Mr. President, about the way of occupation. If one says that the Bantu people occupied the northern part of the present Republic of South Africa, the northern and the eastern part, then one is inclined to think that they now occupied that country as a whole. But that is not so, because of their way of life, their economic pursuits, their way of subsistence. They were only interested in those parts of the country which had a fair rainfall, and which were well-wooded, because that type of country with their implements they were able to till. They were not interested in the extensive grass-veldt of the Republic; what is known as the high-veldt and the middle-veldt, and which forms by far the larger portion of the country, was not occupied

by them because they did not like that type of country. They also occupied this land in very close clusters and, because they did not produce for trade but only for their own needs, they tilled only small parts of the country; they used somewhat larger parts for their animal husbandry, but also round about those particular areas which they occupied.

And now, Mr. President, if you will look at the map of South Africa, with the present Bantu homelands indicated on that map, you will find that they are in the shape of more or less a horse-shoe following the contours of the land, along their mountain ranges, to the east of those mountain ranges, with a good rainfall, the well-wooded country; and then in the north, in what we call the low-veldt and the bush-veldt and the thorn-veldt, where they also had the type of country which appealed to them, especially with the numbers of small hillocks, mountains, which the Bantu preferred as their residential sites. I am saying this to explain that they did not occupy land in the same way as we white people are in the habit of occupying land, of occupying large tracts of land and cultivating that land, not for ourselves only but for other members of our community who live in other circumstances, who live in the towns, or even for export; that they did not, naturally, have those ideas in their primitive way of life, and therefore they occupied those areas only and, as I was trying to point out, Mr. President, these are still the areas in which they live today which are still regarded as their homelands, that is to say the areas they themselves picked on migrating into the country which later came to be known as British South Africa.

It should perhaps be pointed out here, too, that the areas which they occupied were not therefore very extensive. Furthermore at the beginning of the previous century there came about in South Africa great upheavals; while the Bantu people had before been more or less peaceful people, doing nothing much more than cattle-raiding their neighbours from time to time, you find that at the beginning of the last century a certain Zulu chief by the name of Chaka was able to set himself up as a war-lord, that he trained his people into armies, and that he made use of them to ravish the country, to exterminate his less-powerful neighbours and to make himself master of the whole country now known as Natal, and beyond that, send his armies into other areas of the now Republic of South Africa. In the course of these invasions certain of his generals also made themselves independent from Chaka himself—the one who is best known in history is Mzilikazi, who set himself up as the war-lord in the Transvaal. Well, the effect of these wars of extermination, were such that the period is described by our Bantu authors as the time of the cannibals in South Africa—cannibals because those of them who remained were often reduced to such sad circumstances that they, for the first time, adopted something which had never been a custom with the Bantu—they adopted the habit of cannibalism, of hunting down their even less fortunate fellow-men. During this area of general upheaval and inter-tribal warfare, the area occupied by the Bantu people shrank even further than those rather small parts which were occupied at an earlier date.

Now I would like to point out, Mr. President, that it was at this stage when these things were at their highest level, the high tide of inter-tribal warfare, that the white men moved in from the south across the Orange River, and they found there a people who very soon opposed them, namely on the one hand the brother of Chaka, who had taken over from him after Chaka had been murdered—he was murdered by his brothers; they

encountered Dingaan as a war-lord of the Zulu peoples in the eastern part of the country, and in the northern part of the country Mzilikazi as the war-lord of that area, and although it had been their desire, as expressed in the manifesto issued by one of the important leaders of the white trekkers to the north, by Piet Retief, to live in peace and in harmony with their Bantu neighbours, their attempts to come to terms with these two war-lords proved to be abortive. In both cases there arose very serious trouble in which, first of all, Mzilikazi on the one hand and Dingaan on the other overran a number of the camps of these trekkers on their way and exterminated, killed off, everybody in the camps.

That led to this counter-action of these white trekkers from the south, that they consolidated their strength as far as they could and they joined battle with these two and defeated them, the one fleeing the country into the Rhodesias with his followers—Mzilikazi—and the other trying to flee the country but being killed by his own people on the way out.

Well, you find then that into this sparsely populated country, ravaged by wars, never very fully occupied, the Europeans came in and they settled there and they brought into the country—and that perhaps is something that is not generally realized—peace. They brought about that those many population groups that had fled from the country returned to the country when they heard that the white man had come and that there was peace once more. They returned to the country and they took up their abode in their traditional homelands. That is how this part of the country came to be occupied in this particular way.

Mr. MULLER: Dr. Eiselen, did the European population group, on the one hand, and the Bantu groups, on the other, respect the rights of occupation of the groups to separate areas in South Africa?

Mr. EISELEN: Mr. President, as I tried to point out, the Bantu people were at that time, after their war-lords had been removed, once more residing in or returning to the areas which they had originally chosen for themselves and in which they had traditionally lived and they were left in those areas undisturbed according to the promise, given by the leader Piet Retief, that it was the desire of the European people to live with them in peace as neighbours. There were exchanges of land to some extent afterwards but in no really radical way was the occupation of the Bantu people in South Africa ever changed, except in this way that at a subsequent stage, as I will probably have the occasion to point out later on, the white people added to the areas occupied by the Bantu to a very considerable extent so that they are now, I would say, very much larger than at any time in the history of South Africa.

Mr. MULLER: At the formation of the Union in 1910 what was the position in regard to what is now known as the Transkei?

Mr. EISELEN: The position of the Transkei, Mr. President, was that it was part of the British Colony of the Cape before union and the historical events which I have described here did not apply to the same extent to them because their contacts were largely with the British people of the Eastern Province and not contacts with the trekkers, the people who set out to form a new nation towards the north.

Well, now in the Transkei the British Government had, in the course of the history of this particular area, attempted to introduce various policies, the one after the other. Those of you, Mr. President, who perhaps know a little of our South African history, will know that to the great annoyance of our school pupils they have to learn about so many

Kaffir wars. There were so many that I cannot quite remember the number, I think there were about eight, where the people who now reside in the Transkei—Xhosa people—and the British authorities in the Cape Colony clashed. That is because there was always a movement across the border. There were treaties, they agreed to certain borders being recognized in future and then in their hunger for land, and more particularly for cattle, the Bantu people would come across those borders and that would start another Kaffir war. Great Britain first tried to have direct rule. They tried to establish offices—almost military occupation—in that area and to abolish Bantu chieftainship and to run this country as a complete dependency of the Cape Colony.

Well, that broke down after some time—after one of the further wars they took the step to say they would try indirect rule now, recognize the people there as chiefs and allow them to govern themselves provided they respected the border, that they respected the treaties made. They were not successful in that either, so that at the time of the Union you find a sort of a mixture of two things in the Transkei. You will find a part of the country organized into districts run by local councils and district councils, with no chiefs, and then you find the northern part of the country with paramount chiefs, and you find both these groups—the representatives of the local councils and the district councils and the people appointed by the paramount chiefs—together meeting as an authority for that whole area and being a local governing body in the whole of the Transkei.

That was the position round about 1910.

Mr. MULLER: The Transkei was then maintained as a portion of the Union of South Africa, was that not so?

Mr. EISELEN: It was a portion of, was looked upon and regarded as a part of, the Union of South Africa.

Mr. MULLER: At the time were any other portions, occupied by the Bantu at the time, excised from the area which became the Union of South Africa?

Mr. EISELEN: Mr. President, in answering this question we now come to a very important stage in the development of South Africa and in the development of the concept of Bantu homelands.

The PRESIDENT: I think we will come to it on Monday, at 3 o'clock in the afternoon. Before we adjourn, Mr. Muller, I wonder whether it is necessary to go into all the detail that you have extracted from Dr. Eiselen. I am sure the Respondent's regard this important to their case but we are, after all, concerned with South West Africa, and I am wondering whether it is necessary to go into all the detail that we have heard so well expressed by Dr. Eiselen this morning.

Mr. MULLER: With respect, Mr. President, I did not expect so much detail myself but it can be considered to be shortened in so far as South Africa itself is concerned.

[Public hearing of 21 June 1965]

Mr. MULLER: Dr. Eiselen, just before the adjournment on Friday I had put to you a question which then remained unanswered. I will repeat the question to you. At the time—this is 1910, the time of the Union—were any other portions occupied by the Bantu at the time excised from the area which became the Union of South Africa? You then indicated

that you would be answering the question, and as a result of the adjournment it is to be answered now.

Mr. EISELEN: Mr. President and honourable Members of the Court, at the time when the Union of South Africa was established, three Bantu areas were excluded from the Union of South Africa, namely Basutoland, Bechuanaland and Swaziland. Those were areas which were clearly inhabited almost solely by Bantu, with very few Europeans, and the traditional chiefs were running these countries in their own way. It was therefore the intention of the British Government to allow these particular areas to remain without the Union, outside the Union, until such time that the Union would itself have made up its mind in regard to the other areas—Bantu areas—in the Union. It was suggested that in due course they might again be handed over, but always on the mutual understanding that they would nevertheless remain independent Native areas.

Mr. MULLER: What was the policy applied, after Union, with regard to the areas occupied by the Bantu in South Africa?

Mr. EISELEN: After the Union of South Africa had been established, the first Government, fully representative of the new South African nation that had been built up, was formed and this Government wasted no time in applying its mind to the question of the South African traditional policy, to which I have referred previously, and how the Bantu areas and the Bantu people should be dealt with. Accordingly, in 1913, legislation was passed to set apart those areas actually occupied and traditionally in possession of the various Bantu population groups, as inalienable property of those Bantu people. At the same time, an undertaking was given that the Government of the Union of South Africa would endeavour to extend the area of these territories. So you had the Government of South Africa following the lead given by Great Britain and setting apart these homelands for the Bantu people, really consolidating the position as it existed in practice, but promising to extend the areas.

Mr. MULLER: Could you tell the Court, very briefly, what was done in practice to implement the policy just described?

Mr. EISELEN: A Commission, known as the Beaumont Commission, was appointed, Mr. President, to go into the question of how these Bantu areas could be extended. Unfortunately, the First World War intervened and, for the time being, this matter was shelved. After the First World War had come to an end, there was a change of government in the Union and the new Government had the desire to make this extension of the Bantu territories part and parcel of comprehensive legislation. It was not at first possible to obtain the necessary support in Parliament—a two-thirds majority being required—so the matter did not come to fruition until the year 1936, when legislation was passed to set aside very large additional areas—seven-and-a-quarter million morgen. Then at the same time this was embodied in other legislation, forming part of what was then called the policy of segregation. Provision was made for the development of these Bantu areas, not merely the fencing off of those areas, but real development of the areas, and therefore a Native trust was set up to undertake this work, as well as a Native development fund into which all the monies which accrued to the Government from Native taxation were paid. I just want to make this point, Mr. President, that the monies required for buying the additional land were voted direct by

Parliament from ordinary State funds, but that the monies used for the development came at that time from Native taxation, the whole of which was handed over to the trust and to the development fund.

Mr. MULLER: How was this programme affected by the Second World War?

Mr. EISELEN: Unfortunately, three years later we had the Second World War, and again the whole process was held up. Very much land had already been bought, but not nearly the required acreage; various development projects had been begun, but had by no means come to finality; and then, after that, came the all-out effort during the Second World War, so that once again the programme was held up for a long time. As a matter of fact, we only reached the next stage in this story in the year 1948.

Mr. MULLER: Will you please explain to the Court the next stage of development?

Mr. EISELEN: The next stage, Mr. President, was when, after the War—as so often happens after wars—a new Government took over and this government decided to apply seriously the whole legislation of 1936, to make it quite clear that it was going to continue to improve the Bantu homelands and to give to the Bantu people a development of their own. As a matter of fact, they set out their policy in a statement which I would like to quote to you, Mr. President, and which I have therefore translated into English. It states, *inter alia*, that the policy of the Nationalist Party, which then came into power—

> "... has as its objective the preservation and protection of the indigenous race groups as separate ethnic communities, entitled to develop in their own territories as self-supporting ethnic units, and to foster national pride and self-respect which, in turn, will lead to mutual respect of the various races of the land".

And it goes on to say that it offers to the Bantu—

> "... full opportunities of development and self-realization in their own areas, obviating any clash of interests, and guaranteeing that the development and progress of any one group will not be regarded as a potential danger and threat to any other group".

Mr. MULLER: What were the particular objects of the policy just stated?

Mr. EISELEN: The particular objects of this policy, which was then called the Apartheid Policy, were to give the Bantu people the opportunity of parallel development, that is why this policy was further called the Policy of Distinctive Development. This has been very much misunderstood, especially the name "apartheid", and therefore I think I should just say a few words, Mr. President, about the question of terminology.

What is quite clear from this statement which I have read to the Court is that it was the object of the Government to initiate in South Africa a development which would enable the different population groups—the different communities—to live side by side in peace, coexistence with friendship, in the same country, and it is unfortunate that so much has been said about separation and so little has been said about their development programme, because it was obviously the intention to indicate by the new name that the Government wished to go further than was done under the previous name of segregation, and to

enable the Bantu neighbours to become independent, self-respecting, self-supporting communities, with the help of the white man.

Mr. MULLER: Can you tell the Court, briefly, what legislative measures were enacted to implement the policy which you have described.

Mr. EISELEN: Mr. President, the first steps which the Government took, after it came into power, was to appoint two commissions—the one to go into the question of the education of the Native people, because it was realized that in order to become bearers of a culture, of a development programme above all education was required; the second commission which was appointed was a socio-economic commission to investigate the viability of the Bantu homelands, and to go into the question of how this could be accelerated. The various enactments, to which Mr. Muller referred just now, were first of all the Act on Bantu Authorities, which was passed in 1951—that was after the Government had examined the recommendations of the Education Committee—which was to give form and shape to the local authorities of the Bantu people in their homelands. As I have explained, these homelands were ruled by tribal aristocracy, and the feeling of the Government was that the tribal authority had to be modernized, had to be brought into line with, and had to be harnessed to, a programme of development, and that the old traditional authorities should therefore be reorganized in such a way that they could take a real and a progressive part in shaping the future of their areas.

Then the second law which was passed was the law on Bantu education, in 1954. I shall not deal with the contents of that because we will be coming to that later on, Mr. President. Then in 1957, there was the Bantu Investment Corporation Act to enable the Government to invest monies in the pump-priming of the development of the Bantu areas. In the year 1959, we see a very important announcement made by the Prime Minister in which he stresses that the Government is prepared to go the whole way in allowing the Bantu homelands to become free, self-ruling, self-supporting countries developing to, if possible, entire autonomy, and then, perhaps, forming part and parcel of a South African commonwealth of peoples.

And that was followed by a further law in the same year, 1959, namely the Law on Promotion of Self-Government for the Bantu Homelands.

Mr. MULLER: Has the law on self-government of the Bantu homelands been applied to any portions in South Africa itself?

Mr. EISELEN: Very soon after that the Transkei Territorial Authority, meeting in session, asked the Government to act in accordance with its promises and to give it independence. The Government granted this request and in co-operation with the Transkei Territorial Authority the necessary documents and legislation were prepared and, in due course, passed by Parliament so that the Transkei is now an independent part of South Africa, still belonging in certain ways to the Republic of South Africa but independent in most ways; and, of course, having the right to claim still further independence also, in respect of those matters in connection with which it still finds it more profitable, at the moment, to remain under the wing of the Government of the Republic.

Mr. MULLER: Would you state shortly what is being done in regard to the development of the Transkei as a Bantu homeland?

Mr. EISELEN: The Commission to which I referred a few minutes ago, Mr. President, the Socio-Economic Commission, produced the voluminous report making many recommendations and asking the Government

to spend great sums of money on the development of these areas. The Government accepted this, in principle, and in 1960 drew up a five-year plan for the development of the Bantu areas, both the Transkei and other Bantu areas and this has now been under way for the best part of five years, and very substantial sums of money are being spent on the pump-priming of the development of schemes, programmes, projects in Bantu areas, and in this connection I feel it should be said, Mr. President . . .

The PRESIDENT: I recognize the representative for the Applicants.

Mr. GROSS: Mr. President, with deference and reluctance to intervene while the testimony is being presented, the Applicants regard it as necessary to record in open court, the objection to the testimony now being presented, and would be prepared, with the President's permission, to make a brief statement as to the basis of the objection.

The PRESIDENT: *If you will state, Mr. Gross, the grounds of your* objection.

Mr. GROSS: The Applicants would first respectfully reaffirm the letter of 20 June 1965 to the Deputy-Registrar [1], to which the honourable President has referred, as reflecting their views as now in the record of the Court. In conformity with the general objection set forth in the letter, also now reaffirmed in Court for the record, the Applicants find it necessary to object to the presentation of evidence as to which due notice has not been given in advance concerning the identity of the witness, with particularity the nature of the evidence sought to be adduced, and with reasonable clarity the scheme upon which the Respondent proceeds in presenting a particular witness for a line of evidence as to which more than one witness or expert may be led to direct his views. Furthermore, the specific testimony now being presented—and this is the immediate reason for the intervention by the Agent for the Applicants—has no colourable connection so far as the Applicants perceive, with respect, to the allegation of the violation of Article 2 of the Mandate and Article 22 of the Covenant in accordance with the application and the pleadings before the Court.

For the rest, Mr. President, the Applicants would respectfully reaffirm and stand upon the considerations reflected in paragraphs 3, 4 and 5 of the letter of 20 June 1965 which are likewise reaffirmed in open court and these reservations and observations relate not only to the testimony now in progress, but to other witnesses that may be called under the same conditions. Thank you sir.

The PRESIDENT: Mr. Gross, in the transcript of Friday last, the points to which the evidence of Dr. Eiselen is to be directed, at page 88, *supra*, are stated by Mr. Muller to be:

> "The points to which his evidence will be directed will be the following: the particular circumstances and considerations which influence governmental policies and practices in territories such as South Africa and South West Africa, which are inhabited by different population groups, the objects of the policy of separate development and whether, in the interests of the inhabitants, it would be reasonable, just and equitable to require that a norm and/or standards of the nature suggested by the Applicants, should be applied in South West Africa."

[1] See Vol. **XII**, Part IV.

In what sense is it that you seek to indicate to the Court that that was not sufficient information as to the nature of the evidence to be given by the witness?

Mr. GROSS: Mr. President, with respect, the first element to which objection would be taken, and strenuously, is the characterization of the testimony proffered, whether as witness or as expert, which includes the reference to the phrase "norm and/or standards of the nature suggested by the Applicants"—I quote that language, Mr. President, from page 88, *supra*, to which the honourable President has referred, from this verbatim. A primary objection perceived by the Applicants to the scheme or line of evidence which is sought to be adduced by the Respondent under this characterization, is what the Applicants respectfully had in mind in referring, in their letter to the Deputy-Registrar, to the characterization or reformulation by the Respondent of a position or theory said to be advanced by the Applicants, in connection with evidence purported to be adduced thereto.

That, with respect, has been further confused by references repeatedly made in the course of the Respondent's oral argument, which again purported to characterize and reformulate the Applicants' true theory and position. This formula, both in the letter of 16 June from the Respondent's Agent and in the statements made by the learned counsel for the Respondent, is a mere reflection or echo of the reformulations erroneously presented to the Court by the Respondent. That, therefore, is the first point of objection and specifically, as I say, the proffering by Respondent of evidence which purports to be directed toward a norm and/or standards of the nature suggested by the Applicants, which are *not* of that nature.

Secondly and finally, very briefly, Mr. President, with your forbearance, the influence or considerations which purport to influence Government policy with respect to South Africa are *not*, in the Applicants' respectful submission, relevant to the complaint or applications now before this Court.

Thirdly, with respect to South West Africa, the Territory in question here, the circumstances and considerations which are said to influence governmental policies and practices in the Territory are, with respect, regarded by the Applicants as having been placed before the Court in the evidence in the written pleadings. The case is before the Court; it has been submitted by the Applicants on the basis of decisively relevant facts which are not in dispute between the Parties, and which, as has been repeatedly pointed out by the Applicants, consist of laws and regulations and methods for their implementation, the existence of which is conceded by the Respondent and which are the basis of the Applicants' case. These are the considerations upon which the objections are based and upon which the rights of the Applicants are reserved.

The PRESIDENT: Mr. Gross, so that the Court may fully understand precisely the grounds on which the objection is taken—the Court is aware of the norm and standards which have been put forward by the Applicants, so we are not concerned—in determining relevancy—what interpretation is placed upon your presentation of the case by the Respondent. There seem to be two positions from which it can be seen —the question of the admissibility of the evidence. The first is whether it does, in any way, bear upon the question of the establishment of an international custom evidenced by general practice which has been part

of the Applicants' case under Article 38 of the Court Statute; and it also has to be considered from the point of view of the case which has been sought to be made out by the Respondent. The Respondent has argued that Article 2 of the Mandate must be construed so as to give it a discretion and that there can be no breach of it on its part unless it has been exercised *mala fide*, or for a purpose other than Article 2 of the Mandate. The Court would first have to determine as between those two contentions, among other things, which, if either, would be accepted by the Court and that would be a matter which could only be determined upon its final deliberations. Are you able to say, or do you say, that the evidence which is presented is not relevant to either the Applicants' case or to the Respondent's case?

Mr. GROSS: Mr. President, may I take the second point first, by your leave, Sir? The Applicants would see no reason for interposing an objection either of relevance or materiality or propriety with respect to any evidence which the Respondent considers it necessary to lead for its own case or in support of its own theories or legal positions. When, however, the evidence is proffered—whether expert or other evidence is proffered—on the basis of a purported interpretation of the Applicants' case, the Applicants have regarded it, respectfully, as their duty to make certain that, by their silence, there is no acquiescence in the formulation or reformulation of their case, of their theory or their position. It has been noticeable to the Applicants, with respect, that in the presentation of oral argument by Respondent's learned counsel, when references were first made to the case as presented by the Applicants, there were numerous statements made which purported to interpret, to define, to reformulate the Applicants' theory. It does not seem necessary to burden the Court further with this reservation in view of the honourable President's statement that the Court indeed is able to appreciate the contentions of the respective Parties, but there was a sense of duty which impelled the Applicants to register this point lest there be any question of acquiescence by silence in the course followed by the Respondent in presenting evidence on the basis of the purported reformulation of the Applicants' case. And, Mr. President, with respect to the first point, if it was understood correctly by the Agent for the Applicants, the testimony with regard to the generation of a legal norm (in the sense of Article 38) does perhaps involve questions of factual predication upon which legal conclusions are based. There is a problem which is respectfully and candidly presented to the Court, a problem which arises in the Applicants' mind, concerning the line, if any, to be drawn regarding so-called expert testimony which, regarding the existence of a rule of law, may be more in the nature of argument by counsel or perhaps by legal experts.

But the situation with which Applicants are confronted arises in large part—and part of the difficulty, with respect, which I exhibit in responding to the honourable President's question also arises—from the fact that the very general method by which the Respondent has presented its scheme does raise serious questions concerning where questions of issues of law begin and issues of fact end, where the witness is speaking as a witness concerning fact or as an expert concerning legal theory, for example, as to whether or not a rule of international law has actually been generated in the sense of Article 38 (1) and various sub-sections. It does, therefore, underscore, in the Applicants' respectful submission, the

added necessity of sharp clarity and timely notice with respect to the scheme of testimony proffered.

Finally, Mr. President, if I may tax the patience of the Court for just a very few more moments, we do not as yet know what witnesses, if any, are to follow Mr. Eiselen. We have a tentative list. We do not know from day to day the identity of the witnesses and, as the experience of last Friday shows, we are called upon to respond immediately, automatically, and in a precautionary sense in order to preserve our rights on the basis of statements made by learned counsel regarding the very basic scheme of their testimony, and it is for this reason, with respect, that the Applicants, regretfully concluding that the best course in the circumstances, in order to avoid the possibility of the construction of a waiver in the premises by reason of silence, addressed a letter to the Deputy-Registrar which has now been reaffirmed in open court.

It would, therefore, be urgently submitted and requested that the Respondent be directed forthwith to set forth a list of witnesses it now proposes to call with a comprehensible scheme of the points, legal or factual, to which their testimony is to be addressed and, with reasonable particularity, the evidence which it is proposed that they present, so that the Applicants can give studied consideration to these matters at least 24 hours before.

The PRESIDENT: Mr. Gross, the last observation that you have made is probably for consideration by the Court and will be dealt with.

Mr. GROSS: Thank you, Mr. President.

The PRESIDENT: Mr. Muller, would you indicate to the Court how the evidence which you are presenting is relevant to the issues in this case?

Mr. MULLER: Yes, with respect, Mr. President. As already explained by my learned colleague, Mr. de Villiers, the Applicants' case, as interpreted by the Respondent, is one that there is in existence a norm and/or standards against which the Respondent's obligations with regard to South West Africa should be measured. Respondent contends that no such norm is in existence or applies to South West Africa. In disproving the existence of such a norm and the application thereof to South West Africa, we contend that evidence of the nature given, for instance, by Dr. Eiselen, is relevant. In so far as the evidence concerns the practice in South Africa, we say, Mr. President, that that is relevant in so far as practice and usage generally in the world may be testified to, to show that there is no such norm in existence. Moreover, in so far as concepts of reasonableness, equity, and so forth, must play a part in the formation of any norm, we contend that evidence as to the purposes of the policy which is applied and—on this Dr. Eiselen will be asked ultimately to testify—his opinion relative to the application of a norm and/or standards suggested by the Applicants and to the effect that that would have in South West Africa, are relevant.

We contend, therefore, with respect, Mr. President, that the evidence which is before the Court is relevant to the issues before the Court.

The PRESIDENT: Mr. Gross, I think the better course to pursue is to permit the evidence to be given. The objection of the Applicants is noted. The Court at the appropriate time will consider the relevance of the whole, or any part, of the evidence given in its deliberations.

Mr. GROSS: Thank you, Mr. President. May I make one further observation most briefly with respect to one rather puzzling feature of the proffer (which has been referred to in the letter as well). I think it is

sufficiently important to call to the Court's attention at this point, for whatever consideration the honourable President and Members of the Court see fit to give to it. It is the reference in the letter of 16 June which, as yet, the Applicants do not understand (I am referring to the verbatim of 18 June 1965, at pp. 83-84, *supra*). Respondent's counsel referred to "the activities in the international bodies"; a special reserve must be taken until further clarification is given with regard to the intendment of that suggestion and the nature of the evidence which is proposed to be advanced in regard thereto, because that does involve, or so it seems to the Applicants, the interests of international bodies which are not represented at this time before this honourable Court.

The PRESIDENT: That is another matter, Mr. Gross, and the objection then is to be taken at the appropriate time when we reach that stage in the evidence.

Mr. GROSS: All right, Mr. President.

The PRESIDENT: The witness will proceed.

Mr. MULLER: Dr. Eiselen, you were dealing with developments in South Africa, particularly with regard to developing the Bantu homelands. Have you finished your answer to that question or do you wish to add anything to it?

Mr. EISELEN: There was one observation that I wished to make, Mr. President, and that is that very substantial monies that were being used for the purpose of developing the homelands all came from the State Treasury, and that it was not required of the Native population itself to make a contribution. Obviously, the hope does exist that, if this initial help has been given by way of pump-priming, in due course the economy of the Bantu areas will be sufficiently advanced that they themselves will be able to continue with less support than at present.

The further and final observation with regard to the development of this policy from the more or less negative policy of segregation to a dynamic policy of development is this, that it is not something that has been thought out by any one particular statesman, as it were, but that it follows a long line of historical development, of acting on the saying which I have already quoted which one of the leaders of the trekkers used when he said that: "we move northwards where we wish to reside in peace and friendship with the Bantu as our neighbours." All policy in South Africa has been built up on that original concept.

Mr. MULLER: I wish to ask you certain questions relative to policy in South West Africa. You have indicated that South Africa itself should be described in your view as a multi-community country. How would you describe South West Africa?

Mr. EISELEN: Mr. President, the term "multi-community" applies to an even greater extent to the Territory of South West Africa. When we spoke of South Africa we were able to speak of the presence in South Africa only of the Bantu—the various population groups of the Bantu—the Coloured people, the Indians and the White people, but in the Territory of South West Africa there are many more population groups and they differ far more widely than the population groups in South Africa. You have, in addition to the closely related White people related to those of the Republic, Bantu in South West Africa who are not of the same type. They do not belong to the same type. There also exists a great difference between the Ovambo and the Herero in their social structure and in many other respects.

The Ovambo people belong to a matrilineal society, which I take it, Mr. President, is a well-known form of society and everybody knows that it means something very different from a patrilineal society; not that the one can be regarded as inferior or superior, but it merely means that people who adhere to the one cannot get on so well with people who are used to the other kind of social structure.

But the difference between the Bantu and the other groups is even greater. I spoke of some of the remnants of the original inhabitants of South Africa, still existing in fairly considerable numbers in South West Africa. These are the Hottentots and the Bushmen. The Hottentots are generally known now by the name of the Nama, and belong to a people speaking a different kind of language, speaking a Hamitic language, not a Bantu language, and being racially very different from the Bantu, a yellowish people not a black people, not having the same form of life as the Bantu people of the Republic but living from animal husbandry only.

Then, last but one, you have the Bushmen, who belong to the Stone Age in their culture in this way, that they have even to this day remained hunters and collectors of food; who have never settled down, who have never endeavoured to produce, but live merely by collecting, who are physically very different from the other people and also in their social structure, in their traditions, in their way of life. They are resembled to some extent by a black people, not of Bantu origin, called Dama or Bergdama. The latter are also of small stature, very much like the Bushmen, but resemble the pygmies of Central Africa more closely, physically, than the Bushmen. These Bergdama are the only ones who have given up living as an independent people because they were enslaved, partly by the Hottentots and partly by the Herero.

So, Mr. President, these are the various indigenous groups of South West Africa. There is another group which is not indigenous but which moved up from the Cape Province during the nineteenth century, known as the Basters of Rehoboth, being a mixture of Hottentot and European stock, who have lived there for a long time and who call themselves the Nasie, a separate entity speaking not a Native language but speaking a type of Afrikaans.

You will appreciate therefore, Mr. President and honourable Members of the Court, that in South West Africa we have all those same factors, only much more pronounced, that we have described in South Africa which have given rise to the policy there; and it therefore stands to reason that when the Union of South Africa in 1920 undertook to be the Mandatory of South West Africa, it obviously proceeded along the same lines, because it recognized a similarity and of course at the same time the greater difficulty confronting it in connection with building up a progressive scheme of development for the indigenous people of South West Africa.

Mr. MULLER: At the time when the Mandate was assumed, Dr. Eiselen, how were the different groups occupying South West Africa? Would you briefly describe it to the Court.

Mr. EISELEN: Mr. President, you will remember that during the period when the German Empire was governing South West Africa as its colony or protectorate it did not have a very free hand to proceed along a definite line of action, because there were constant wars between the then Government of the South West colony and various tribes, particularly the Herero and the Nama. Eventually, these wars came to an end.

the German Government put it this way, that the revolts had been suppressed and by way of punishment or retaliation it took away the homelands from the Herero people, and also took away their cattle from them, and to some extent the areas occupied by the Nama people were reduced. So that when the Union of South Africa took over as Mandatory, first as military Government in 1914 and then as Mandatory in 1920, it found a position where the people were partly very much unsettled and partly had never been touched by the German administration at all. Those that were badly unsettled were the Herero and the Hottentots, the Nama, and together with them the Dama people. Those that had hardly been affected in any way, on whom no impression had been made by the German Colonial Government, were the various Ovambo tribes in the northern area and also the people in the Caprivi strip.

The very first step which the Government of the Union took, therefore, was to restore peace and order by giving back, in as far as possible, what could be established to be their old homelands to the Herero people and to the Nama people, and to define and demarcate the areas to which the various peoples were entitled.

Mr. MULLER: How were the areas demarcated for the various groups developed?

Mr. EISELEN: The same scheme that was thought out for the Union was applied in South West Africa too, but the difficulties there, Mr. President, are very much greater than in South Africa.

The land is very dry, great parts of it are semi-desert, and you require people who are able to deal with that type of country to tame it, to make it habitable. It was for that purpose, in order to ensure employment, labour, and the possibility of earning money, that white immigrants from the Union were encouraged to go there and to help to develop the area. That was to improve the economic life in general, but in addition to that special steps were taken to "make water", as they call it in South West Africa, in the Bantu areas; to enlarge those areas where necessary; to help with the introduction of the preservation of water by dams and irrigation schemes; and, on the other hand, by fencing into camps all the pastoral areas of the Herero and the Nama people. A branch of the Native Trust was established in South West Africa to assist the Bantu people in this matter.

Mr. MULLER: To what extent has the policy of separate development been applied in South West Africa?

Mr. EISELEN: The policy of separate development was applied in South West Africa by giving to the people there local authorities which were given the right to run their various areas, they were called Tribal Authorities in the compact Ovambo area in the northern part of South West Africa, while they were usually given the name of Welfare Committees in the smaller Reserves for the Herero, for the Nama, the Dama, and the Basters and the Bushmen. I must say, Mr. President, that in respect of the Bushmen, no great strides were made in making them development-conscious and they still remain much as they have been ever since we came to know them centuries ago. They do not take kindly to leading a settled life and to becoming a productive people.

Now the development of the areas in South West Africa was undertaken by the Government without imposing any taxation; the money was not collected from the Bantu people, but was given freely by the Government for that purpose, and so, during the past 40 years, considerable

progress has been made in that area although this progress has not come up to expectations because the people, more primitive than in the Republic of South Africa and less inclined to change in the direction of higher standards of civilization, responded very slowly to the efforts of the Government to develop their areas—they clung to the customs of their forefathers in that respect—so that, while there has been progress, it has been exasperatingly slow in South West Africa; not because the Government would not prefer it otherwise, but because the people themselves had not yet become culture-conscious in this sense of higher civilization.

Mr. MULLER: What is the most recent development with regard to the Bantu areas, the Native areas, in South West Africa?

Mr. EISELEN: The most recent development is that the Government appointed a Commission, called the Odendaal Commission, which had to go very carefully into ways and means of making the Bantu areas in South West Africa more viable, more productive, and of making the people participate to a greater extent in the efforts to make the country, as a whole, move forward.

This report, which has been published and which was debated in the South African Parliament, is a very, very voluminous report, but, briefly, it recommends that the methods which have been applied successfully in South Africa should be applied to South West Africa in the same way and, unlike South Africa, South West Africa would require a greater percentage of the funds for this purpose from the white Government as they themselves were as yet not far enough advanced to make these substantial contributions.

But beyond that, of course, the Odendaal Commission made further recommendations as to developing the government of the areas giving the Bantu people a far greater share in the development of their areas towards ultimate independence. It was realized that the progress could not be as rapid as in South Africa, but that in certain parts, in particular the area of the Ovambo, which is also the most densely populated, a definite beginning could be made at this stage.

Mr. MULLER: Dr. Eiselen, having dealt with the policy of separate development in South Africa and South West Africa and its application there, I want to put to you certain criticisms that have been levelled against the policy and I want you to answer very shortly whether such criticisms are justified.

In the first place, it has been said that the policy of separate development is based on the concept that certain groups are inherently superior and others inherently inferior.

Mr. EISELEN: Mr. President, I have endeavoured to explain that differences which exist as between the various population groups have not been imported into South Africa by Government action, but they have existed from time immemorial; that it is part and parcel of the South African Bantu policy to respect the culture and the traditions of these people, to respect their different way of life, but certainly not to regard it as irremediably inferior as against that of the European. And if we did so, if we did regard the people themselves as irremediably inferior and the culture which they have produced as to be inferior for ever and ever, then we would not take all the trouble of trying to allow them to develop on the foundation of their own mores, their own traditions, their own social structure, their own culture.

Mr. MULLER: Dr. Eiselen, is there any substance in allegations that the object of separate development is to discriminate against the Bantu people?

Mr. EISELEN: Mr. President, I can see no substance in that allegation, because what the policy tries to bring about is that the Bantu people and the other indigenous population groups of South West Africa should have the same deal as the white people wish to have for themselves, that of being able to build on their own traditions, on their own way of life, on their own culture and to become an independent people not subservient in any way, and to become wholly respected neighbours of the white people in South Africa and in South West Africa.

Mr. MULLER: What would your reply be to an allegation that the policy of separate development fosters tribalism?

Mr. EISELEN: Tribalism, Mr. President, is something which exists at the moment; it is not something that, for the white man, has any particular meaning, but it means a great deal to the Bantu people and to the other indigenous population groups, and it is not something that could be discarded; *therefore the efforts of the Government are not* directed towards fostering tribalism, but to make tribalism, in as far as it still has to be reckoned with, a progressive force instead of being a retarding factor, as it was in the past and as I shall perhaps have occasion to explain when we deal with education.

Mr. MULLER: I want you to state to the Court your opinion relative to the application in South West Africa of a rule and norm or a standard which would prohibit the allotment of rights or duties on the basis of membership in a group, race, or tribal or ethnic group.

Mr. EISELEN: Mr. President, I find it rather difficult to answer this question in a reasonable way, because I do not fully understand what is meant by this term; to me, non-separation seems to be a vague term. What strikes one as a layman, immediately, is that it should be in a negative garb. Now, to me it has these possible meanings: that you must not take to pieces a natural whole, because that would obviously be a separation; but as no such natural whole has ever existed in South West Africa, as Ovambo and the Herero, the Dama, the Bushmen and all the others have never formed a natural whole, this cannot surely refer to taking to pieces a natural whole. Therefore it is perhaps the next possible meaning of this concept, namely to allow to come together again those who have been separated by historical events, who did form a unit at one time or other. In this respect I can think of, say, the Ovambo, of whom a portion live in Portuguese Angola and another portion—perhaps the major portion—in South West Africa; these people were at one time a unit, and they have been taken apart by action of the so-called colonial powers, but it is not something in which the South African Government could take action unilaterally, although everybody would of course be pleased to see that, if these people so desired, they could *once again form a whole. Similar questions have arisen in regard to*, say, the Somali people, who I understand are living in various portions of Abyssinia, Ethiopia, and in what used to be British Somaliland, in Italian Somaliland, and they have been separated. One could agree with the idea that it is not right to let them remain apart if they desire to be united once more. These things come about as a result of wars, when the conqueror takes, probably, more than his share, and in that way people are separated. We know that that has led to the trouble

about minorities even in Europe. Looking at the alleged norm from this angle one can understand it very well, but this plays no important part in South West Africa at all; the only way in which action could be taken would be in collaboration with the Portuguese Government in respect of the Ovambo.

But then there is apparently this third possible meaning: that you must not allow units who in the opinion of people of greater wisdom should form a unit to remain apart, although they had never formed a unit before—that apparently is the meaning of this alleged norm in regard to South West Africa: that the population groups should now become a unit, apparently because they had been included in one area by the people who carved up Africa in the time of colonial expansion; that the Herero, the Ovambo and others had been included in the same area and were therefore, by virtue of that action of the colonial powers, now expected to become a unit; that they would not have the same right as people who had not been so included to have an independent future of their own. That, Mr. President, is something that seems to be entirely against the feelings not only of the Government, but something that would definitely not be welcomed by the people.

Mr. MULLER: What would be the effect of enforcing such an object of measure in South West Africa?

Mr. EISELEN: It is very difficult to visualize what would happen. If one speaks in terms of the majority, the people who are unfortunate enough to be the smaller groups would in forming a new unit—an artificial new unit—be obliged to accept the precept and example of the most numerous group. For instance, if everybody were given political rights—the vote—in the same way in South West Africa, then the Ovambo people would, by being the vast majority in that area, obviously be the people called upon to form the Government, and I take it that their language would become the official language unless they would choose to make English or Afrikaans the official language, which does not seem to be very likely. To the other tribes, the Herero for instance, whose name is perhaps better known than that of any other people of South Africa but who are numerically only about 12 per cent. as strong as the Ovambo, this would mean a terrible thing that they, being a proud people, should now be forced to live according to the ideas of the Ovambo people.

There is this other possibility, of course, that you would say, well, give them all equality by taking away the rights which the Europeans have—which the white people have—the political rights and the right of government which they have, and make them all equal in that way and govern them from a central place, that is to say, from the capital of the Republic—from Pretoria—but in this connection one has to remember that, even now, the white people in South West Africa do not form a legislative council for the whole area of South West Africa, they govern only that portion which is inhabited by the Whites, and they have jurisdiction and power over the white population only; all the Bantu areas are governed directly from Pretoria by the Department of Bantu Affairs, so that to a certain extent you already have that position there now, but it is being handled by people who have experience of helping people, developing people who have not had the same opportunities to make their way towards civilization, which would not be the case if the vote was given to every single inhabitant of South West

Africa in the same way. Therefore, we consider it to be a far better scheme of things if you give to them the vote to each in his own community, to each in his own part of the country, so that they can there practice and learn the art of government and administration.

Mr. MULLER: In addition to the effect in the political sphere, what is your opinion with regard to the effect of applying such a norm and standards in other spheres, for instance, the economic sphere?

Mr. EISELEN: Mr. President, in the case of the economic sphere, it is very difficult to think that anything could result from this except chaos. I have tried to put before the Court information in regard to the state of civilization—the state of advancement—of the various population groups in South West Africa, and to explain that they have not so far responded very well, and that applies particularly to the field of economics where, on the one hand, they have shown great reluctance to depart from their own primitive customs in agriculture and animal husbandry, and where, on the other hand, they have shown no initiative so far in developing commerce and industry in their own areas, but have relied in all these matters upon the initiative of the White people. It requires training of the people to prepare them for a life of independence.

That is the course upon which the Republican Government has now embarked and which, in the way which has been recommended by the Odendaal Commission, it desires to guide the further progress of the people and to give the material help which they will require; but to give to them immediate power as a government chosen by the people of South West Africa just on the strength of their numbers, to give to such a government the power of dealing with substantial achievements in the economic sphere, in the mining sphere, in the fishing industry, in the diamond industry, in the wool industry, the meat industry, and so forth, would be asking for trouble.

There is this, Mr. President, that the policy of non-separation which is advocated in certain quarters can be put to the test and has been put to the test as an evolutionary measure. We used to call it integration, and it was practised both by the French Government in its colonies and by the Portuguese Government, as it is still being done today, namely encouraging people who were prepared to come over the line, who had discarded their own traditions, their own culture, their affinities with their own people, and had become what is called in the Portuguese terminology "assimilados", who had been allowed by the Portuguese to come over and to be integrated into the society of the white people there. That was a possible way of doing it, an understandable way, but a way which is not in keeping with the temper of the times at all, because no evolutionary measure is desired but integration, integration not evolutionary but revolutionary.

Mr. MULLER: Thank you Dr. Eiselen. I want to go over to the particular subject of education. Will you tell the Court whether there has ever been in South Africa or South West Africa an integrated school system, that is, a school system in which the Europeans, the Bantu and the other population groups attend the same schools.

Mr. EISELEN: Mr. President, we have never had, neither in the country now known as the Republic of South Africa nor in South West Africa, an integrated system in which all the various groups participated, having the same syllabus, the same courses of training, the same buildings in which they attended school: they have always been dealt with separately.

In this way, the European part of the population was naturally educated in the same way as their cousins in South Africa, in Germany and Great Britain, the countries from which they had come, because this was the system to which they had been accustomed, in which they believed, in which they could be educated in a reasonable way, working from the background which they had because of their being members of the European community.

Now with our indigenous population groups the position was entirely different. Education was, of course, in the initial stage, something entirely unknown to them. We had among them initiation schools in which they were taught when they became young men and young women to know what was expected of them as grown-up people of the various communities, but the whole idea of teaching them in a school was something new to them and it was brought to them by the mission people who had come to convert, to convert the various African population groups to Christianity, and they had to use for that purpose an instrument, a means, which the people would understand. They had to use their home language, the vernacular of the people.

Therefore the missions were the first people in the field who reduced their various languages to writing and, because they were in practically all the areas much earlier in the field as Protestants than as Catholics, they considered it very important that their disciples should be able to read the holy scriptures themselves, and in their own language, because they would not be able to worship in the real true sense of the word if they had to do so through the medium of a foreign language. Because of this desire of the mission churches to bring Christianity and the knowledge of the scriptures to them in this way they had to establish schools. And therefore we find everywhere that the missions were the first people to establish schools, which of course is nothing really foreign even to our way of thinking because the Church, after all, for a very very long time was even in European countries the source and fountainhead of all education; so we merely had a natural repetition of that history—that the European education could be handled by the Government, by the administration but, on the other hand, the education of the indigenous population group could not be handled by the Government but could be handled by the people who had learnt the languages, who had devised an orthography and a way of writing those languages, and who had seen to the translation of the Bible and religious books into the languages concerned.

Mr. MULLER: Did the State later share in the responsibilities of the education of the Bantu people?

Mr. EISELEN: As the number of children in the schools increased the cost naturally became greater. The church which served as the school building at the same time could no longer fulfil that purpose: additional classrooms had to be provided, additional teachers had to be found, and the cost became ever greater, and therefore the mission bodies asked for help from the Government, which was readily given. The schools were then called registered schools and subsidized schools. The money paying for the salaries and the books usually came from the provincial administrations or the Colonial Governments, but in the initial stages this subsidization was subsidization in the true sense of the word, in that the Government never paid the whole account. But that was gradually changed in South Africa and also in South West Africa, so that in

due course the Government footed the whole bill, paid for everything, but the control of the schools was nevertheless left with the mission churches.

Mr. MULLER: Did the system as now described work properly, in the sense that the control was with the mission stations and the Government supplying the necessary funds by way of subsidy?

Mr. EISELEN: Mr. President, it naturally developed in a particular direction, in the sense that the missionary and his congregation always formed a sort of opposition party within the community, an opposition party to the Chief and the tribal aristocracy. As I have explained in my evidence previously, the Chief depends for his authority very much on the idea that he is representative of the forefather gods within his particular population group, and that does not go very well with Christianity, so that you find that by and large the Chief and aristocracy of the tribe remained outside the sphere of mission influence.

The schools became congregation schools and they were never community schools. They did not serve the community as a whole: on the contrary, they gradually developed into instruments for making it possible for individuals to escape from their community instead of staying with their community and building up their community. That was one of the disadvantages of this mission control. It was a system which was easy to apply by the governments, because here they had people who knew and who were on very friendly terms with the Bantu population, who spoke their languages, who had initiated the whole school system and who were therefore naturally the people who could manage these schools much better than government officials, and that is why this system from that angle, the easy administration, was welcomed by the provincial authorities and by the administration in South West Africa as well.

Mr. MULLER: Were the mission schools eventually taken over by the State in South Africa?

Mr. EISELEN: It came about in this way, Mr. President: that when the new, dynamic approach of our Bantu policy, our Native policy, in South Africa took shape it was felt that your Bantu people could not function properly, could not take part properly, could not develop a dynamic approach unless they were given the opportunity to take part in the processes of administration of schools, of controlling education, of controlling the teaching personnel, and therefore the Government thought it wise to appoint the Education Commission which has already been mentioned to go into this matter and to say how the defects in the system could be remedied.

Mr. MULLER: Before you proceed, Dr. Eiselen, is the Commission to which you refer now, called the Eiselen Commission?

Mr. EISELEN: That is that Commission.

Mr. MULLER: Of which you were the Chairman?

Mr. EISELEN: That is correct, Mr. President.

Mr. MULLER: Would you proceed.

Mr. EISELEN: This Commission, Mr. President, found that main defects in the education of the Native people was, on the one hand, that locally the school was not a community school, that there was locally no interest by the parent population as a whole, but that the schools were controlled by an outside body.

It was furthermore found that the control by various provinces of

Native education was not in the interests of that education for the simple reason that the monies required were not provided by the provincial authorities but by the central Government.

Now what happened was this, Mr. President, the provincial administrations did not take any live interest because no money of theirs was in danger of being misappropriated or spent in an extravagant manner, or not for the right purpose, therefore Native education was hardly ever debated by the provincial councils. On the other hand, neither was the education of the Native people debated in the Parliament of the Union, because they had, after all, handed over this matter together with the necessary funds and they now expected the provinces to get on with the job, and so Native education fell between two stools with nobody giving the proper attention.

That is in the field of control. The local control by the mission manager retarded the participation of the Bantu community as a whole and the central control by the various regional administrations retarded the development, the building up of the whole system by Government agencies, because no Government department took that live interest which was necessary.

Mr. MULLER: What recommendations did the Commission make with regard to control, both central control and local control, of Bantu education?

Mr. EISELEN: The Commission made these recommendations. That the central control should be handed over by the provincial administrations to the Union Government at that time and to the department which was, in any case, dealing with Native development as a whole, because the Commission regarded education to be just one of the aspects of development, of the broad development in all the spheres of life, of a backward community.

Mr. MULLER: With regard to local control, what recommendations were made?

Mr. EISELEN: And in regard to the local control the recommendation was that Bantu bodies able to deal with these matters be set up. Now your tribal rule, in the old sense of the word, did not make provision for that kind of thing because the people themselves were not educated. As I have ventured to explain, they stood aloof from the whole project of education by the missions and so, in dealing with this matter, the Commission proposed that special boards be set up—school committees, school boards—which would be elected by the parents in the case of school committees, by the school committees in the case of school boards, but that they would function in close co-operation with the bodies which the Government now brought into being by its Bantu Authority Act. I could perhaps just revert, once more, to the criticism that this policy was fostering tribalism. On the contrary, what was needed for the policy was a progressive tribal rule and not a retarded, not a stagnant, tribal way of ruling; so it was not fostering tribalism, but gradually harnessing them to progressive co-operation by making them take part in the control of schools, helping them or by appointing a number of educated members on the schools committees and school boards. The Government took the very essential step to make the school not one for the Bantu people, but one that was really of the Bantu people, belonging to them and that, of course, applies not merely to the Republic of South Africa but also to South West Africa.

Mr. MULLER: Do the parent communities under the system of Bantu community schools play a meaningful part in the education of their children?

Mr. EISELEN: The parent communities, which under mission control had very little say in these matters, now play quite an important part. Obviously not in the teaching process as such, but they have to see to the provision of the buildings, to the equipment of the schools, to the appointment of the teachers and they now find themselves in the position of appointing teachers who are not brought to that school just because they belong to any particular denomination, but because being of the same language group or the same culture group, they understand the people, and can act as a real representative of the parents in bringing in a new education, a new form of education, built on the background, the historical background, of the Bantu people and the other indigenous groups respectively.

Mr. MULLER: Did the Commission make recommendations relative to the use of mother-tongue in the Bantu schools?

Mr. EISELEN: The Commission was very much concerned about the use of mother-tongue in the schools because that had been neglected.

I have explained that the missionaries themselves were anxious to introduce a vernacular for the sake of their religious teaching and that, therefore, in the initial school years the vernacular also played an important part but that was dropped very soon because, beyond regarding it as a vehicle for religious instruction, the mission bodies, by and large, favoured the introduction of their official languages as early as possible, that is to say of their own languages—that is a system which they found easier to apply.

There were differences, of course, what one would call the foreign missions, who came from countries like Finland (the Finnish missionaries working among the Ovambo) and German missions working in South Africa, you found that they were far more enamoured of the idea of carrying on in the vernacular because the official languages were not their own languages either. But, in the case of the majority who had English as their own home language a rapid change-over from the vernacular to the European language, and in particular English, was favoured and this had a rather detrimental effect on the schools in this way that we found the holding power of the schools to be very weak; the pupils just completed two or three years in the school and then they left the school. They lost interest because very often they did not know what was really going on in the school. One almost got used to speaking of the Bantu schools as sub-standard schools, because as soon as the children had absorbed the sub-standards they would move away from the school and, more often than not, very soon lose the knowledge which they had acquired during this very elementary tuition that they had received.

Mr. MULLER: What are the advantages, very briefly put, of mother-tongue education?

Mr. EISELEN: Mother-tongue education, Mr. President, is, of course, basic.

You will nowadays not consider teaching people in any other but their own home language if you really want them to understand and to follow what the teacher wishes to convey to them. Otherwise, we very often find that what they do achieve is merely a certain parrot-way facility of repeating the terms that they have heard in school without knowing

what they really mean. To ensure education you must employ the home language of the pupils because that is also the link with their background, with the way of life of the people, with the respect in which they should hold their elders, and, in any case, it is the only way to get them interested. That is not an opinion which only a few of us hold, that is not an opinion which is only held in South Africa, it is an opinion which is held very strongly by Unesco which has trained teams all over the world to bring education to the people who have been left out, and have remained, educationally speaking, in the dark up to the present moment.

You will know, Mr. President, that it is not only the experience of South Africa but of all the countries in Africa that the school has not proved very attractive in the past. If you examine the attendance figures, the enrolment figures, in the schools in South Africa, and the enrolment figures in the schools in other States of Africa, you will find that the enrolment figures in South Africa are very much higher than elsewhere. That is not only because education has been going on for perhaps a longer period but, particularly, because the home language is being stressed and because the pupils now have learned to stay longer in the schools. They know what is going on, they understand and they acquire a knowledge which enables them to make judgments of their own, to act in a reasonable way which develops their powers of intellect because they need not learn two things at the same time, the contents and a foreign language. That is where they so often failed because they only learned certain words which conveyed no particular meaning instead of following the lesson itself.

Mr. MULLER: Are there any difficulties with regard to the use of the mother-tongue in Bantu schools arising from difficulties in terminology, bibliography?

Mr. EISELEN: There are no great difficulties, Mr. President, in the primary schools. I think I have already spoken about the Bantu languages being very versatile languages. I would not say that in regard to, say, the Bushmen language, but the Bantu languages are very versatile languages, have a very big vocabulary and the words can easily be used for a certain purpose if a certain meaning is assigned to them, or new words can be coined. Obviously, that has to be undertaken by expert bodies and under our education system such expert bodies have been appointed, various language boards which draw up terminology to be used in the schools, and they have made fair progress in that respect. I do not think that the teachers, on the whole, have much difficulty in teaching the whole primary course through the medium of the home language.

Mr. MULLER: Does the Bantu education system provide a separate syllabus for the Bantu schools?

Mr. EISELEN: The Bantu Education Commission did not really provide a separate syllabus. I have referred to some of the weaknesses in the system which were changed on the recommendations of this Commission and you have perhaps noticed that I did not refer to the syllabus in particular because after all the people who had, under their provincial regime, drawn up those syllabuses for the Native schools knew fairly well what they were doing. They were mostly experts in the field. As a rule their syllabi presented joint efforts of the Government offices and of representatives of the various mission societies who acted as advisory boards to the provincial administration. And so they had drawn up

syllabuses which were quite useful but this was changed to some extent by the recommendations of the Education Commission which were accepted by the Government. I would say that the syllabuses were changed in this way, that more stress was laid on the home language as a medium of instruction. Curiously enough, religious training in christian civilization, for the first time, became a compulsory subject because previously when the missions controlled education they could not agree as to a syllabus and so it was never possible to really conduct inspection and examination in religious training, while that at the present moment is being done.

In regard to other matters, the teaching of the ordinary subjects, there was no real change; I hold that there was nevertheless improvement as the central government, its education department; now had the benefit of all the experience of the various provinces to build on, and that out of this pool of knowledge they built up a syllabus which has been described by various experts as one of the best of its kind in the world. I take it that Mr. Muller has asked me this particular question because the fact that Bantu education brought about rather radical changes in control and administration, has not been attacked very much, that has not been made the butt of criticism to any extent. We have been subjected to criticism in an entirely different direction, criticism not deserved. We have been criticized for trying to bring the Bantu people an education which would condition them for subservience, for being servants, an education which would make them inferior for all times, and that was the thinking behind the term "Bantu education", as though here was something completely new, different from education elsewhere.

Now, Mr. President, I would like to put it this way, that after all education over the whole world does not differ as regards principles of education. We speak of French education or German education, of British education, not because we have a different way of educating people in those countries but merely because you use the universal principles and apply them to those countries and in the application to the particular circumstances they naturally require a colour of their own. If you were to make the practice the same everywhere, then of course you would violate the principles. We could easily illustrate that by referring to the position in South West Africa. If you were to say, well, we have to give to them their true education, that is to say, the best education that we know of, in their most modern and highly developed language that plays a part in that area, namely the English language, then if we were to give them English education, if we were to import a syllabus from England into South West Africa, then we would be doing a ridiculous thing because the human right of the English-speaking pupil is respected in this way, that he is allowed to learn through his own language, that is the basic principle. He is given the opportunity of acquiring knowledge readily because it is presented to him in his language. This is true of South Africa also that you can only present subject-matter successfully by applying the same principle as applied by the French, by the German, by the British, namely by applying the universal principles adapted to the circumstances of their country and of their community.

Mr. MULLER: Dr. Eiselen, will you explain to the Court whether the pattern of development of Bantu (Native) education in South West Africa has been very much the same as in South Africa?

Mr. EISELEN: The pattern, Mr. President, in South West Africa is very much the same, only there is this important difference, not in regard to principles but concerning the stage of development, because we started much later in South West Africa; after all, it was only in 1920 that serious thought was given to these matters by the Government of South Africa. We encountered exactly the same problems in South West Africa. We had the same mission schools there, and the training of the white children was being conducted by the local South West administration, which had no power over the Bantu areas, of course.

Now, as I have stated, there are so many different languages in South West Africa, and there were fewer workers; there was a very sparse population; the cost of producing books in the vernacular is very high, because the population groups are relatively small. So it was much slower progress to the stage where mother-tongue tuition above the lowest standards could really be effectively applied. There has been an Education Committee in South West Africa which has gone into these matters, and which has recommended that the same basic approach be adopted as in the Republic, and that the production of books, literature, be accelerated so as to make it possible for the children of all the groups to enjoy that which every white pupil takes to be his birthright, and which many Bantu people in the Republic have also now come to regard as their birthright, namely to receive their education through the medium of their home language.

Mr. MULLER: Dr. Eiselen, will you express your opinion on the application in the educational sphere in South West Africa of a rule, or a norm, or a standard which would prohibit differentiation between the population groups?

Mr. EISELEN: Mr. President, I take it that when we deal with this norm in regard to education, it is really a combination of the two, non-separation and non-discrimination, which have both been so frequently mentioned. If we were to do away with what is called differentiation in the schooling of the children in South West Africa, then we would encounter enormous difficulties. We would do things that were entirely unfair by trying to do something good for the population as a whole, because we would then again have to adopt a procedure of taking one of the languages as medium and as a main dish of instruction and schooling, and it would be difficult to decide whose language was to be taken, whose background was to be taken as a starting point for educational development.

Mr. MULLER: Would it be realistic at all to apply such a rule, norm or standard?

Mr. EISELEN: I think it would not be realistic because, as I pointed out in the political sphere, if you were to make the language of the Ovambo people the official school language, the Herero people, who do not even know the Ovambo people, or if they do know them, regard them as very inferior people to themselves, although they speak a Bantu language and for that reason could be expected to regard such an innovation with less suspicion and less aversion than the others would nevertheless not accept this change. But if you were to pass on from that to the Nama, speaking partly Hottentots' language, partly Afrikaans, and if you were to suggest to them that in future they should not remain separate, there should be no differentiation, that they should now adopt the language of the majority—then these people would rise up in revolt,

and I think everybody has great sympathy with that attitude, because after all that is what was promised to them by South Africa when South Africa was appointed Mandatory of South West Africa; that was one of the promises that they gave them, that they said: "We have been instructed by the League of Nations to see to it that all the minorities get their rights, that none of them are suppressed." And if we were to go back on that, and to say: "No, we now think that because you live in a country which was put together in this way—because it happened to be put together in this way, not by a people who had given the matter serious thought but who were merely acting in their own selfish interests —therefore we are now going to force you to give up your minority rights and to bow to the majority", they would definitely think that we had gone back upon our promises and broken our word. The other alternative, and the alternative which most people would probably think of, would be to abolish all the Bantu languages and to use one of the European languages—by preference, of course, the one which is a world language, that commands the greater respect in the world, namely English and not Afrikaans. But, Mr. President, would that not, more than anything else, prove that we regard these people as inferior, that we regard the contribution which they have been able to make so far to the civilization and to the culture of the world as entirely negligible, as something that could be removed with nobody being harmed? That may be the view of many people, but I take it it is not the view of the people concerned. It has surely always been looked upon as a good and an honourable code of behaviour to honour your past, to respect your traditions, and it would be a strange thing indeed if we had to say to the people now: "You must give up these things; you must accept our way of life, our civilization, which is a superior civilization." Now, Mr. President, I would like to say in this regard that really this norm of non-separation, the norm of non-discrimination, has a very small percentage that support it.

Mr. GROSS: Mr. President.

The PRESIDENT: Mr. Gross?

Mr. GROSS: May I be permitted to be heard? Mr. President, it will be apparent that in this Court rules of procedure and of evidence are not as easy to come by as in municipal courts; the line that is sought to be drawn between cross-examination, objection and comment will therefore present serious difficulties which may be prejudicial to the Applicants. With respect, it seems to the Applicants that it is above all necessary in this Court that counsel in leading witnesses do not confront opposing counsel with the necessity of constant interposition, if permitted by the Court, with respect to testimony, which reflects opinion and insinuation, and which is of doubtful relevance at best because of the difficulty of understanding the ground upon which it is laid. In view of the difficulty of comprehending the nature of the norm and or standards, as described, the Applicants have respectfully recorded a general objection to the relevance of this evidence, but are now impelled to add to their objection the fact that (without clarifying whether testimony on a particular point is being given by the witness as an expert, as a non-expert regarding facts or as a Government official) Respondent has led insinuations with regard to the case of the Applicants, implications with respect to benefits or otherwise of certain policies on the basis of opinion, which bear no relationship perceptible to the Applicants to facts of record, to say noth-

ing of allegations truly made by the Applicants. It is therefore with the utmost respect that the Applicants add to their previous objections with respect to the evidence adduced by this witness, an objection to the unsupported opinions and to the insinuations with regard to allegations or complaints made by the Applicants, and with regard to the attitude (or professed or purported attitude) of unidentified individuals, organizations or groups.

The PRESIDENT: Mr. Gross, the procedure before this Court is not greatly different from any other court. The counsel direct questions to the witness; either their question is a leading question, in which event objection can be taken to the question, or the answer of the witness is not responsive to the question which is put, in which event again objection can be taken to it. If, on any particular matter, the witness who is giving an expert opinion has not qualified as an expert, again objection can be taken to it, and it seems to the Court that there is no prejudice to either side in the way in which the evidence is taken before this Court. It is not possible, it seems to me, for a witness who has been sworn as an expert and also as a witness of fact to, as he goes along, indicate: now I am speaking as to fact, now I am giving an expert opinion; and it is inevitable that the person who is giving evidence as an expert will both deal with facts and also express his opinion upon the facts. It is not easy, particularly in a case such as this, and that is recognized. There is, moreover, no reason why that person should not give evidence as an expert, notwithstanding the fact that he happens to be a governmental official. That may bear upon the weight to be given to his evidence, but it does not bear upon the admissibility of his evidence. At the moment I see no reason at all for the Court to intervene, in the giving of Dr. Eiselen's evidence. The general nature of your objection *in toto* to his evidence of being inadmissible or irrelevant is one matter and has been noted, but the question as to whether the particular point at which you interject—you take the exception, as you are very properly entitled to take the exception—that that portion of his evidence was in any way different from any preceding portion of his evidence is a matter which at the present moment the Court does not see, but it will have a look at it over the evening.

Mr. GROSS: It is understood, Mr. President, then, that the Applicants respectfully reserve rights to object on the general line being pursued on the basis of improperly laid foundation for the evidence now being adduced?

The PRESIDENT: Most certainly, Mr. Gross—those matters are understood, and as I indicated earlier, it is for the Court ultimately to examine the admissibility and the weight of any evidence which is given in the course of this hearing, and your general objection will be noted, and there will be no need to take the general objection again.

Mr. GROSS: Thank you, Sir.

The PRESIDENT: The Court will now adjourn until three o'clock tomorrow afternoon.

Mr. MULLER: I am sorry, Mr. President—may I indicate that I have no further questions to ask the witness, and that the next witness to be called tomorrow would be Professor van den Haag.

The PRESIDENT: Mr. Muller, I think that it is important to indicate to the Applicants as early as you can the point or points to which the evidence will be directed; I think that the Court will have something

more to say upon the question of this subject-matter tomorrow, but since you are calling another witness tomorrow, I think you should overnight indicate to the Applicants the point or points to which his evidence will be directed.

Mr. MULLER: As the Court pleases, that will be done, Mr. President.

[Public hearing of 22 June 1965]

The PRESIDENT: The hearing is resumed. Would Mr. Eiselen take his place at the podium, please.

Mr. Muller, I understand that you have completed your examination in chief?

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

The PRESIDENT: I call upon the Agent for the Applicants to ask him whether he desires to exercise his rights to cross-examination.

Mr. GROSS: No questions, Mr. President.

The PRESIDENT: Certain Members of the Court desire to ask questions, and I call upon Judge Jessup first.

Judge JESSUP: Mr. Eiselen, please correct me if I make any misstatement in trying to repeat extracts from your testimony.

On 18 June you spoke of your functions (this is at p. 89, *supra*, of the transcript) as Commissioner-General, and spoke of receiving such submissions as the people in your territorial area wished to pass on to you. Could you give the Court two or three examples of such submissions—what kinds of matter they dealt with, and the nature of them?

Mr. EISELEN: Mr. President, they meet as a territorial authority at the present time, and they have an agenda, of course; offhand I could remember that one submission was that they desired the Government to hand over to the territorial authority a number of farms on which they could themselves now carry on experimental work, because they said that the work done by white agricultural officers did not carry the same weight; that work, if it were carried on under the auspices of the territorial council and by Bantu officers, would carry with these people.

Another submission that I remember, Mr. President, is in connection with the language. As I said yesterday, certain boards have been set up by the Education Department, and one of the tasks of the Education Department is to prepare proper terms in the vernacular language. Now, one of the weaknesses of the Bantu languages is that they have a great deal of difficulty in expressing figures; they have got a roundabout way of expressing figures, even more roundabout than the old Romans, and the experts on the board have seen fit to use shortened terms for the figures used in arithmetic and mathematics, and there were objections; they required the Government to set up, or to get permission themselves to set up a committee to go into this matter, and I may say that both these requests were submitted and granted.

Judge JESSUP: May I ask you, Mr. Eiselen, to whom you convey these submissions—to what official or department?

Mr. EISELEN: I convey these submissions, Mr. President, to the Minister of Bantu Affairs.

Judge JESSUP: Mr. Eiselen, would there be the same kind of procedure and machinery in South West Africa for conveying submissions to governments?

Mr. EISELEN: Mr. President, I take it that the procedure would be exactly the same.

Judge JESSUP: And in each case you attach a recommendation with the submission, either for or against?

Mr. EISELEN: Mr. President, the experts of the department do that. My function is merely to transmit those submissions to the Minister of Native Affairs. I will say this, Mr. President, that I do have discussions with the executive of the territorial authority beforehand, and I will then give them my opinion and advise them in what way they should put their submissions to the Government, but once they have passed a resolution formulating their submission, I do not alter that, nor do I add any comment, but merely transmit.

Judge JESSUP: You spoke, Mr. Eiselen, of serving on an educational commission for Basutoland, I believe, and also as chairman of a committee which bore your name, to consider educational problems in South West Africa.

Mr. EISELEN: Mr. President, may I just correct this—not a commission for education in South West Africa, but the Republic of South Africa.

Judge JESSUP: I am sorry, but I would still like to ask whether your analysis of the educational problems and your recommendations for the solutions of those problems were by and large identical for the two cases.

Mr. EISELEN: Mr. President, they were by and large the same, but this was some years later, and I had in the meantime had the opportunity of seeing something of the educational work done in the Rhodesias, in what was then called Tanganyika, Kenya, and the Belgian Congo, and we learned there quite a great deal about the functioning of the various Bantu authorities set up by the governments responsible for those areas; and in that way I would say, Mr. President, that we went further in our report, recommending greater powers for the local Bantu authorities.

Judge JESSUP: Another question if I may, Mr. Eiselen. I understood from your comments on 18 June (I am referring to pp. 95 and 96, *supra*, of the record of 18 June), I understood you to express the view that the peoples of the areas in which the native Africans were living—I quote here: "They would not like to have the traditions and the customs of others imposed upon them." I got the impression here and elsewhere that you felt that they desired to remain in their own traditions and customs and did not wish to share in the traditions, customs, or practices —what you referred to once, I think, as the "white civilization". May I ask you whether you personally know, or know of, any Native Africans who personally desired to leave their customary habits, traditions, tribal life, if you will, and would prefer to join in the "white civilization", if I may use that expression?

Mr. EISELEN: Mr. President, what I wished to convey—I may not have put it into the proper words—was this, that they certainly had no wish to have imposed on them anything of the culture, or the traditions, of other Bantu population groups. I think that all the Bantu people do desire to adapt themselves in very many ways to the civilization of the white people. Now, one might, when speaking of civilization, differentiate between what we call culture, in the ordinary sense—that which belongs to a definite people—and the present-day industrial, technological, commercial civilization, which is universal, which belongs to all the civilized people together. It is the latter which they all desire, but they

would not like to shed that which they consider to have been their own particular contribution to the growth of culture so far; but I would, in reply to the second part of the question, Mr. President, say this, that there are obviously quite a number of African people whom I know who would like to shed entirely everything that is African and to become completely European.

Judge JESSUP: And this would not be possible at the present time?

Mr. EISELEN: It would be possible, as far as they themselves are concerned they could in everything become just as European, with this difference, that they would not be really happy, they would not be accepted by the Europeans in that area, but more important from the point of view of our Government is this, that the good services which could be expected of them would be lost to their own people.

Judge JESSUP: Thank you, Mr. President.

The PRESIDENT: Judge Koretsky.

Judge KORETSKY: I shall speak to you in English. It might be more convenient for you. You have mentioned in your answer that the questions from the Respondent's Agent have some trends in political life in South West Africa and my question is such—what is done and has been done for the development of political institutions in South West Africa in which the people of South West Africa irrespective of their race have taken and take part on an equal basis in these institutions in order to be prepared for self-government or for self-determination? Thank you, Mr. President.

Mr. EISELEN: Mr. President, the attitude of my Government has throughout been that the most promising way of taking a share in the running of a country as a whole, is to prepare youself for that task by first of all running your own particular population group. That is to say, that if you belong to the Herero, for instance, that you should first of all within the Herero community, have that right of participating fully in the local or regional government of that population group, learning the ways of administration, learning the progressive ways, learning to understand democracy, because what they practise today is democratic in a certain way, but not the democracy which is practised by the Western Powers. As to the democracy practised elsewhere, Mr. President, I am afraid that I have not sufficient knowledge in that regard to say how they would be able to adapt themselves to that ideology. Then, passing on from that, Mr. President, it is the policy of my Government that the people, once they are able to express themselves and to state their views and wishes clearly, should have the right to say of their own free will whether they desire to join in a larger whole, and to govern that, no longer as separate bodies but as a united people of South West Africa, but the question would be that liberty would be given to them at a stage when they could be expected to make their choice fully knowing what the implications of such a choice were, and not merely by being compelled, being called upon on a certain day to make a cross somewhere or another sign behind some picture, or some sign to indicate what their desires were, but fully understanding what the question was that was really put to them.

The PRESIDENT: Judge Sir Louis Mbanefo.

Judge Sir Louis MBANEFO: My question links up from the answer you have just given, and I would like first to refer you to your statement on 21 June; at page 111, *supra*, of the record, you stated:

"But beyond that, of course, the Odendaal Commission made further recommendations as to developing the government of the areas giving the Bantu people a far greater share in the development of their areas towards ultimate independence."

I take it, that you are talking of political independence.

Mr. EISELEN: That is correct, Mr. President.

Judge Sir Louis MBANEFO: And then, you continue:

"It was realized that the progress could not be as rapid as in South Africa, but that in certain parts, in particular the area of the Ovambo, which is also the most densely populated, a definite beginning could be made at this stage."

And then, further on, you said:

". . . what the policy tries to bring about is that the Bantu people and the other indigenous population groups of South West Africa should have the same deal as the white people wish to have for themselves, that of being able to build on their own traditions, on their own way of life, on their own culture and to become an independent people not subservient in any way, and to become wholly respected neighbours of the white people in South Africa and in South West Africa". (*Supra*, p. 112.)

That is your evidence, your statement. Do you mean by that, that they become neighbours, when ultimately they obtain independence they become independent states, living side by side with white South Africans, white settlers, in South West Africa?

Mr. EISELEN: Mr. President, the example that we have before us and that guided our thoughts and deliberations in regard to this matter was the shape and form the British Commonwealth had taken, on a much larger scale than here, but we thought that in this country of ours with its many communities, we should attempt as a microcosm of the bigger British Commonwealth to build up a commonwealth of different communities in South Africa, each being independent, but belonging together, having largely the same interests, especially in the economic field.

Judge Sir Louis MBANEFO: Let us be quite clear about it—you mean independent States of the Commonwealth?

Mr. EISELEN: Yes.

Judge Sir Louis MBANEFO: How many states do you allege to have in South West Africa?

Mr. EISELEN: That, Mr. President, would be very difficult to say, some of the units are very small. Unfortunately, the smallest one of the indigenous ones is also the most primitive, namely the Bushmen, so that it would be difficult to think in terms of such groups being viable communities if they once become independent.

Judge Sir Louis MBANEFO: I am sorry to interrupt. You see, the question of viability does not come into it yet—you are talking of states, states which have independence within their own unit so that as a political unit they are states. Whether they are viable or not, and they decide to join the neighbouring states—that is a separate issue, and even if they join, they will become sovereign states—is that what you have in mind, or are you thinking of a glorified local government?

Mr. EISELEN: Mr. President, the policy in regard to the further development of South West Africa with a number of these small units has not

been so fully worked out yet by the Government that I am in a position to give a definite answer to this question. My own personal view is, of course, as I was saying, that you would hardly be able to think of Bushmen or the Dama or even of such people as the Herero as being independent states. Therefore, one does think—and now I am speaking of my own personal views only—that it would be good and proper if these people who have been thrown together, although they have so very little in common, should, in due course, of their own free will, decide to form a larger whole. I am afraid that is all that I could at this stage say, Mr. President.

Judge Sir Louis MBANEFO: You see, yesterday you were very categorical in your statements. What I understand you to say now is that you really do not know where it is going to lead you to.

Mr. EISELEN: Mr. President, I may have been categorical, I am, of course, not free here to speak so long on every point. If I had had the time and opportunity I would then probably have given this same further explanation of what I meant by what I said in regard to the independent development of the various population groups in South West Africa.

Judge Sir Louis MBANEFO: The last question I would like to ask, Mr. President, is this: now, I do not know if you are familiar with Article 22 of the Covenant of the League of Nations. Paragraph 1 of Article 22 reads:

> "To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant."

Do you accept that the authors of the Covenant in that statement were thinking of the Native inhabitants of South West Africa when they created the Mandate—the Ovambos and the Bushmen that you talked about—and not the comparatively few white settlers who happened to be there?

Mr. EISELEN: I believe, Mr. President, that they had in mind all the different population groups—the Bushmen, the Ovambo, the Herero, the Dama, the Nama, the Rehoboth Basters, and the whites also.

Judge Sir Louis MBANEFO: And when you talk of independence, the policy that you have explained to us—is it envisaged that the territory of these people would ever as one territory have a sovereign, independent status in which all groups will participate fully in the government?

Mr. EISELEN: Mr. President, with respect, may I ask whether this question could be repeated, because I am not quite certain whether I understood it correctly—to mean what I think the League had in mind, or what the Government of the Republic has in mind?

The PRESIDENT: Well, I hope you will not try and tell us what the League had in mind, because no-one will know that.

Judge Sir Louis MBANEFO: I will put it shortly. Does the policy of separate development as understood and expounded by you envisage that a territory would ever attain full sovereign status, independent of the Union—a status in the government of which all the peoples of

the territory, irrespective of race or colour, would freely participate?

Mr. EISELEN: Mr. President, in answering this question I must again say that I can only express a personal opinion, and that is that it would of course be possible, and in view of the wide-flung areas in which the various population groups live, that they would remain together and that they would not be deprived of those people—the geese that really lay the golden eggs at the moment, the whites there—so that it would be, to my mind, a very excellent thing if the whole population of that country, including the whites, were to form together a definite unit which might either become completely independent, or otherwise seek to become a part of the Republic.

Judge Sir Louis MBANEFO: Do I understand by that answer that it is the ultimate goal that they should have that status?

The PRESIDENT: The ultimate goal of—?

Judge Sir Louis MBANEFO: The Republic of South Africa.

Mr. EISELEN: I would not go further, Mr. President, than to say that the ultimate goal of the Government is that this question should be shelved, and it should be considered at the time when each of the component parts of this artificial unit of South West Africa is sufficiently advanced to express an opinion with reasonable clarity, and of its own free will.

Judge Sir Louis MBANEFO: Lastly, I suppose it would be difficult for you to say in point of time when it is envisaged that this situation would be reached when that decision could be taken?

Mr. EISELEN: Mr. President, I cannot venture a guess in that respect; I can only say that the Government has embarked now on a programme of accelerating the process of making the people in South West Africa culture-conscious, and has voted very considerable sums of money for the implementation of development programmes, so that, as far as the Government of the Republic is concerned, it wishes to bring that day closer—as close as possible; it will largely be in the hands of the various population groups and their response to this to determine when that day will arrive.

The PRESIDENT: Does any other Member of the Court desire to put a question to Dr. Eiselen? If not, I have one question, Dr. Eiselen: as between the various groups that you have spoken about, what are the media of intercommunication, and what steps have been taken to develop those media?

Mr. EISELEN: The media of intercommunication in South West Africa, Mr. President, are at the moment English and Afrikaans. Afrikaans, I think I am correct in saying, has been given preference in the past because the majority of the white people in that area are Afrikaans-speaking, but it is prescribed that both languages should be used in the schools. Now, going beyond the schools—when the Government officers visit those areas they speak either in English or in Afrikaans, and they still have to make use of interpreters. One may assume that if they want to make direct contacts, not through Government officers, they will use either of those two languages. There is this to be said for the English language—that it is a more universal language, a very much more universal language; there is this to be said for Afrikaans—that it is the home language not merely of most of the white people but also of two of the non-white groups, of the coloured people and of the Rehoboth Basters.

The PRESIDENT: I call upon Mr. Muller to call his next witness.

Mr. MULLER: No further questions. May I ask, with respect, Mr. President, that Dr. Eiselen be excused from further attendance?

The PRESIDENT: I will let you know after the recess, Mr. Muller. I do not desire to ask Dr. Eiselen anything in reply.

Mr. MULLER: As the Court pleases. With the Court's permission, Mr. de Villiers will introduce the next witness.

The PRESIDENT: I call upon Mr. de Villiers.

Mr. DE VILLIERS: Mr. President, I should like now to call Dr. Ernest van den Haag. As we notified the Applicants yesterday, in response to the directive issued by you, Sir—I quote from our letter:

> "We wish to confirm that Dr. Ernest van den Haag will testify *tomorrow, 22 June 1965. Dr. van den Haag is a Professor of Social* Philosophy covering psychology and sociology. He has conducted extensive research into the subject of human group formation, group relations, group reactions, relations between individuals and groups, the phenomenon of prejudice, factors tending to increase or decrease prejudice, and merits and demerits of separation or attempted integration in particular circumstances. On the basis of such researches and general principles recognized in his fields of study, he will testify to the effect that a norm and/or standards of non-discrimination or non-separation as contended for by Appplicant are not applied in some parts of the world and could, if attempted to be so applied, lead to unfavourable results for the well-being and progress of the peoples concerned."

So far the letter, Mr. President. I may say that the subject-matter corresponds a great deal with that dealt with in Chapters VIII-XI of Part III, Section E, of our Rejoinder, V, pages 400-461, although the testimony will extend beyond the limits of what is dealt with there, and will not serve to repeat what is stated. I may say also, Mr. President, that as a matter of order of presentation we would have preferred to call Dr. van den Haag after Professor Bruwer and Professor Logan had testified more particularly as to the circumstances in South West Africa pertaining to the various population groups, but unfortunately, as a matter of practical arrangement, it was necessary for us to call Dr. van den Haag now because he is a teaching professor and he will not be available to us later.

Professor van den Haag will refer in the course of his testimony to a certain number of books and articles which are not yet on record. He will in each case make available after his testimony to the Registrar either a copy of the book itself or a photostatic copy of the entire article concerned. In addition, Mr. President, I may mention that after consideration it seems unnecessary that Dr. van den Haag take the declaration as a witness in accordance with Article 53 (2), and I suggest that it will be sufficient for him to take the declaration as an expert under Article 53 (3) of the Rules of Court.

The PRESIDENT: Mr. de Villiers, I think it is convenient, when you propose to refer to material which has not previously been before the Court, at the same time as you inform the Applicants as to the nature of the evidence to be given by your witness, you should inform the Applicants of the particular documents to which your witness intends to refer; that practice should be followed in the future.

Mr. DE VILLIERS: Certainly, Mr. President.

The PRESIDENT: I recognize the Agent for the Applicants.

Mr. GROSS: Mr. President, in accordance with the instructions of the Court I should like to enter an objection for grounds which I should like to state. Whether or not to do so prior to the making of the declaration of the witness, or immediately thereafter, I would request guidance from the honourable President.

The PRESIDENT: That depends, Mr. Gross, what is the nature of the objection—if it goes to the witness's evidence, you can hardly object before he makes his affirmation.

Mr. GROSS: I should like to reserve the right to make a statement of objection following the swearing of the witness.

The PRESIDENT: Certainly. The witness will make the affirmation

Mr. VAN DEN HAAG: In my capacity as an expert, I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.

The PRESIDENT: I call upon Mr. Gross.

Mr. GROSS: Mr. President, the basic objection of the Applicants to the proffered testimony now to be adduced by this witness in accordance with the statement of the counsel for the Respondent goes to the improper foundation laid for the testimony of this witness, which is couched in terms set forth in the letter dated 16 June 1965 from Respondent to the Deputy-Registrar (which has been read into the record of the Oral Proceedings of 21 June 1965[1]), specifically, the statement which I quote from the letter as follows:

> "The testimony of all the witnesses to be called will be directed solely to the questions whether a norm and/or standards such as contended for by Applicants exist and are applicable to South West Africa."

Secondly, in the Applicants' respectful submission, such a foundation for the proffered testimony is unintelligible, illusory and argumentative.

Thirdly, the testimony offered, or adduced, on such a foundation is prejudicial to the rights of the Applicants to fair, timely and intelligible notice of the nature and purpose of the evidence actually sought to be introduced and to the presentation of the theory of the Respondent's case, upon which such proffered evidence is based, rather than upon an ambiguous and erroneous formulation by the Respondent imputed to Applicants as their case.

Fourthly, in the Applicants' submission, such an improper foundation is not only inherently confusing to the witnesses, to the Applicants, and, with respect, to the Court itself, by purporting thus to direct evidence at a position falsely attributed to the Applicants, but Respondent thereby evades and conceals the basis upon which its own theory and position rest, and the purpose of the evidence sought to be adduced in support thereof, if any.

Fifthly, cross-examination cannot adequately be prepared when the foundation upon which the evidence is proffered is illusory, ambiguous and obscure.

Sixthly, in the Applicants' submission, such error and obscurity not only arise from the fact that the evidence is based upon an unintelligible

[1] See **XII**, Part IV.

misrepresentation of the Applicants' theory and position, but also from the fact that there is complete lack of clarity in the scheme or plan upon which evidence is proposed to be introduced and a failure, both of timely notice and of substance, in respect of the point, or points, or the issue, or issues, in respect of the evidence to be proffered.

Seventh, the Applicants submit that they have been, and are further, prejudiced by reason of the fact that the qualification of this expert to express an opinion with respect to "the existence of a norm" is a statement of legal theory and legal conclusion more properly the subject of argument than of testimony, and, from what has been stated by counsel in introducing this witness, the witness has not been qualified as a legal expert nor has he been presented as a member of the delegation to present legal arguments in support of the existence or otherwise of a rule of international law.

Finally, the question of the applicability, and again I quote "the applicability of the rule of international law contended for by the Applicants to the Mandate of South West Africa" is a conclusion of law, and not a matter of evidence, as to which this witness has not been qualified as a legal expert, or otherwise competent, to address himself.

For these reasons, the Applicants are constrained to object generally to the line of questioning, which may be adduced or led, or any line of response which may be offered by the witness based upon such a foundation, which, for the reasons which have been mentioned, prejudice the rights of the Applicants in the circumstances. Unless the Court directs otherwise, Mr. President, this general line of objection will be considered by the Applicants as relevant to all questions propounded to this witness, and all answers made by him, reserving, however, with the permission of the Court, the right to comment upon the testimony given at an appropriate time without waiving the objections to relevance thereof.

Thank you, Mr. President.

The PRESIDENT: Mr. Gross, before you resume your seat, could you make clear to the Court the reasons that you advance why no evidence can be given in relation to practice, in terms of establishing, or refuting, the existence of the customary rule of law evidenced by practice in terms of Article 38 *(b)* of the Statute. Do I understand you to say that no evidence whatever can be adduced before the Court in relation to the general practice existing in other countries?

Mr. GROSS: Mr. President, the Applicants' answer to the President's question is that the Applicants have not taken such a position, but that the Applicants have not understood from the evidence proffered by counsel that the questions to be addressed to this witness, or indeed to any other witness, relate to questions of practice or other facts that are, if I may again quote, as part of the response to the honourable President's question, "whether a norm and/or standards such as contended for by Applicants exist". The existence of a legal norm, or legal rule, or rule of international law, is the question—and sole question—to which these witnesses are said to be offered for evidence of an expert nature. This is in addition to, and cumulative of, the objection by the Applicants based upon the fact that the questions are being led on the basis of a false and inappropriate foundation, which does not state the Respondent's theory of its case or legal position but states, without specification—and from what we have observed from comments made by counsel

during oral proceedings misstates, and misrepresents, the Applicants' true position. It is the confusing aspects of the latter which are of particular concern to the Applicants and which they feel to be prejudicial. If the Respondent desires to proffer evidence based upon, and in support of, its own theory or contentions in the case, it is the Applicants' respectful submission that it should state its theory, and indicate with clarity the points which tend to support its theory. But it is, with respect, evading that responsibility by a line of evidence said to be responsive to a theory and position falsely attributed to the Applicants, which is misunderstood by the Applicants themselves.

The PRESIDENT: Well, Mr. Gross, the witness has taken the affirmation as an expert. I think we first should hear the qualifications of the expert and then, as the evidence is produced, it will be open to you to indicate to what extent you find the questions put unintelligent, unintelligible, argumentative, or embarrassing to the Applicants, by the nature of the question which is put and in relation to the issues in this case. I think that is the proper course to pursue. We first should hear the qualifications and then Mr. de Villiers can, before he goes on to ask any questions in relation to the case, indicate again to the Court, in reply to the observations made by Mr. Gross, the relevance of the evidence.

Mr. DE VILLIERS: Dr. van den Haag, you are an American citizen resident in New York, but you were born, and you grew up, on the continent of Europe. That is correct?

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: Were you born of Dutch nationality?

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: And did you spend the best part of the first six years of your life in Germany?

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: Did you thereafter move with your parents to Italy?

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: Did you study in Italy?

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: At school and at the university?

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: Which universities did you attend?

Mr. VAN DEN HAAG: The University of Naples and the University of Florence.

Mr. DE VILLIERS: And did you obtain a law degree?

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: Did you thereafter study at the University of the Sorbonne in Paris?

Mr. VAN DEN HAAG: Yes, for about a year.

Mr. DE VILLIERS: And then you went to the United States, did you?

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: What further studies did you pursue there?

Mr. VAN DEN HAAG: I studied sociology at the University of Iowa and at New York University; received a degree of Master of Arts at the University of Iowa and Doctor of Philosophy from New York University.

Mr. DE VILLIERS: After the law degree you obtained in Italy, your studies were confined to the social sciences were they?

Mr. VAN DEN HAAG: Sociology, and later on also psycho-analysis.

Mr. DE VILLIERS: And your professional activities for the last 15 years have been entirely in the field of sociology and psychology, together referred to as social philosophy. Is that correct?

Mr. VAN DEN HAAG: That is correct.

Mr. DE VILLIERS: Now you are what is termed a "full professor" in the United States?

Mr. VAN DEN HAAG: At New York University.

Mr. DE VILLIERS: Would you explain to the Court what is meant by a "full professor".

Mr. VAN DEN HAAG: There are, in American universities, instructors, assistant, associate and full professors. Full professor is the highest academic rank to be obtained.

Mr. DE VILLIERS: And you are Professor of Social Philosophy at New York University?

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: Do you teach elsewhere too?

Mr. VAN DEN HAAG: I am also Lecturer in Psychology and Sociology at the new school for social research in New York.

Mr. DE VILLIERS: Have you taught elsewhere?

Mr. VAN DEN HAAG: I have taught in a number of universities in the United States; I have taught at the University of Minnesota, at the City College of New York, Brooklyn College (in the graduate division), and at a variety of other places, usually as a guest professor, but my normal occupation is as a Professor at New York University.

Mr. DE VILLIERS: Also outside the United States?

Mr. VAN DEN HAAG: I have taught at the American Seminar in Salz burg, Austria, and lectured in Munich and other places.

Mr. DE VILLIERS: Have you delivered lectures as a guest lecturer?

Mr. VAN DEN HAAG: Yes, I have lectured at Harvard University, Yale University, the University of Chicago, Columbia University, and quite a number of others.

Mr. DE VILLIERS: Besides teaching, on what else are you engaged?

Mr. VAN DEN HAAG: I am engaged in the private practice of psycho-analysis.

Mr. DE VILLIERS: Psycho-analysis; and do you write?

Mr. VAN DEN HAAG: I think I do, yes, I have written about 40 articles in the last ten years.

Mr. DE VILLIERS: And you are engaged upon research?

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: Could you give the Court an indication of what you have written?

Mr. VAN DEN HAAG: I have written three books: *Education as an Industry*; *The Fabric of Society*, which deals, as the title indicates, with what causes a society to function well or badly; and *Passion and Social Constraint*, which deals with the conflict between social order and individual passion, and the effects this may have on group formation, and I have written a number of articles in sociological and psychological journals, both in the United States and abroad. If you wish I can list a few.

Mr. DE VILLIERS: The work called *The Fabric of Society*, is that used as a textbook?

Mr. VAN DEN HAAG: Yes, sir. It was meant as a treatise but is also used as a textbook rather widely.

Mr. DE VILLIERS: By universities?

Mr. VAN DEN HAAG: Yes, sir. It is used at Harvard.

Mr. DE VILLIERS: Have you written the articles called "Genuine and Spurious Integration" in the anthology *Psycho-Analysis and the Social Sciences*?

Mr. VAN DEN HAAG: Yes, sir. May I mention that this refers to integration among the social sciences—not of people but of concepts.

Mr. DE VILLIERS: And did you also write "Creativity, Health and Art" in *Psycho-Analysis and Contemporary American Culture*?

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: That was a publication in 1964 by Ruitenbeek?

Mr. VAN DEN HAAG: Yes.

Mr. DE VILLIERS: I believe you have also published articles in a number of journals, may I mention some to you: *The British Journal of Sociology, The American Sociological Review, The American Journal of Psycho-Analysis, Harpers Magazine, Law and Contemporary Problems, Diogenes, Daedalus, Encounter, Annals of the American Academy of Political and Social Science,* and *Science*?

Mr. VAN DEN HAAG: All of these, yes.

Mr. DE VILLIERS: Have you contributed to encyclopaedias?

Mr. VAN DEN HAAG: Yes, sir. I have written the article called "Sociology" for the *Cowles Encyclopaedia* and I have contributed to other encyclopaedias occasionally.

Mr. DE VILLIERS: On what research are you at present engaged?

Mr. VAN DEN HAAG: Well, I have several projects but my major project, which is sponsored by New York University, deals with an attempt to measure the effects of integrated and segregated schooling on Negro pupils under conditions when all variables are controlled, all other circumstances are equal, except for the presence or absence of White co-pupils. This study is undertaken in New York and surroundings, that is in a place where there is no traditional segregation, but the only segregation which exists is *de facto* rather than *de jure*.

Mr. DE VILLIERS: You have for a long time given special attention to a subject called "minority problems", is that not so?

Mr. VAN DEN HAAG: Yes, I teach courses on this subject.

Mr. DE VILLIERS: What does that subject comprise?

Mr. VAN DEN HAAG: In effect, although conceptually it of course applies to all minorities, that is to all groups other than the dominant one in any given society, in effect, in the United States, it deals largely with the problem of relationships between the Negro minority and the White majority.

Mr. DE VILLIERS: Do you belong to a professional society?

Mr. VAN DEN HAAG: I am a Fellow of the Royal Economic Society, and a Fellow of the American Sociological Association, and a number of professional societies.

Mr. DE VILLIERS: Have you appeared as an expert in court on matters concerned with segregation in the United States?

Mr. VAN DEN HAAG: I have appeared in the last two years three times in United States Federal Courts, and once or twice in New York state courts as an expert.

Mr. DE VILLIERS: That concludes the qualification of the witness, Mr. President.

The PRESIDENT: Mr. de Villiers, without repeating what you stated

this morning, would you indicate in reply, shortly, your answer to the observations made by the Agent for the Applicants.

Mr. DE VILLIERS: Certainly, Mr. President. I must confess, with respect, to being completely puzzled. My learned friend, Mr. Gross, has fastened on to an expression used in a letter written by our Agent on the subject of witnesses to be called. That letter was written after I had been addressing the Court for some days, in answer to his contentions advanced to the Court under Article 38 of the Statute. I made perfectly plain our position as to the manner in which we would set about answering the Applicants' case as we understood it; and we made it perfectly plain that in so far as the Applicants rely upon a suggested practice of States so as to establish a rule of customary law, in terms of Article 38 (1) *(b)* of the Statute, we considered that to be a matter of fact to which evidence could be directed.

In the particular letter in which we notified the Applicants yesterday of the matters to which Dr. van den Haag's testimony would be directed, we used this expression:

> "He will testify to the effect that the norm and/or standards of non-discrimination or non-separation, as contended for by Applicants, are not applied in some parts of the world."

This is a pure question of fact pertaining to matters of practice of States. And carrying on, Mr. President, on this theme which I explained to the Court before, and which I contended to the Court would be relevant to the inquiry, that if attempted to be so applied it would lead to unfavourable results for the well-being and progress of the peoples concerned. That still remains the gist of the evidence which we propose to tender and I do not know how we could make that plainer.

My learned friend raised two other matters. He raised a number of them but I shall concentrate on these two, and I want to make it plain that I really do not understand what the position is and that I should very much like to have clarity. Perhaps we could then co-operate so as to have a minimum of interruption and objection.

One is, Mr. President, on the suggestion that we are presenting the suggested norm and/or standards of non-discrimination and non-separation to the Court in an erroneous and distorted way. We are in truth doing our very best to understand, from such formulations as we have on record by the Applicants and their representatives, what it is they are contending for as being the content of the suggested norm and/or standards. We are taking their own definitions as they give them. We happen to differ with them as to the appropriateness or otherwise of the descriptive name given to the content of the norm, that of non-discrimination and non-separation, but we have emphasized that that is a question of nomenclature. The important thing is, what is the content which they seek to assign to the norm? And we have looked at their own definitions in their own formal submissions to the Court tendered on those submissions and in the informal explanations given in Court.

We emphasized to the Court why we considered that according to those definitions the norm related to an absolute question of non-differentiation in the allotment of rights and obligations on the basis of membership in a group, race or class; but then, having regard again to certain aspects of the contentions addressed to the Court in the course of argument, it would seem that Applicants possibly have in mind some qualifi-

cations. We were not clear on the qualifications: we did our best to abstract what they could possibly be, and so we suggested to the Court that we would deal with the matter on the dual basis, first of an absolute norm or standard of non-differentiation and, in the alternative, also on the basis of the norm subject to the qualifications. That is the best we can do.

We have to address our evidence to the case which is being made against us and I do not understand my learned friend when he says that it is impermissible for us to address our evidence to what we understand the case to be which is being made against us. Surely, if we have to address our evidence to anything, it is exactly to that case and not to the type of case which we would have liked the Applicants to make or which we suggest is the only one the Applicants could have made, when they make it perfectly clear that they do not make such a case.

If, Mr. President, I suggest with respect, we could find some time to clear up this situation it might possibly help.

The further factor which I do not understand is my learned friends' continuous reference to their difficulties which they have with our scheme and with prior notifications. I can understand questions of that kind being raised when I know that I am dealing with opponents who want to exercise a right of cross-examination. Then I can perfectly understand that, and then we should be pleased to co-operate, Mr. President, even by giving more time as notice as far as we possibly can, subject to the practical difficulties we have in that regard, as to which witnesses we are going to call and on what subjects. We shall be perfectly willing to do that, but I have understood my learned friend to say categorically on several occasions that he does not intend to cross-examine at all. That is why we are, in that respect also, somewhat nonplussed by the attitude taken. However, that, Mr. President, in brief, is why we suggest that the evidence in general will be relevant and, in particular, the evidence of Dr. van den Haag along the lines that I have indicated.

The PRESIDENT: Mr. Gross, it seems to the Court that there are no difficulties placed in your way and, at the moment, I do not see the embarrassment which you claim to exist. It does not assist very much to say that certain matters are unintelligible or that they are embarrassing, one wants to know in what sense they are unintelligible or embarrassing. The case of the Applicants was based upon a norm which they claim exists, and which they assert does not require or admit of any factual evidence at all beyond that which the Applicants themselves have placed before the Court. The case for the Respondent, on the other hand, is that it cannot be held liable for a breach of the Mandate unless its activities were directed to an alien purpose—a purpose alien to Article 2 of the Mandate—or unless their powers were exercised *mala fide*. The evidence of this witness seems to be directed to both issues; one, to establish in terms of practice in other parts of the world that there is no such customary norm, as is contended for by the Applicants; that it is not supported by general practice; and then it also appears, on the face of it, to be relevant to the question whether such a norm could be consistent with the welfare of the people, and, if it were not, the Respondent would say that that would go to indicate that the exercise of their powers was not *mala fide*. Now; on either of those grounds do you say that the evidence which is being foreshadowed is inadmissible?

Finally, it is not possible, it seems to the Court, that an applicant should

be told in detail what a witness's evidence is going to be. It is not the normal practice. So long as they are given sufficient notice of what the nature of the evidence is, in what way are the Applicants prejudiced?

Would you deal with the question of admissibility first, that is on the two grounds that I put, namely (1) whether you say that under no circumstances, on the Applicants' case or the Respondent's case, evidence of general practice can be given, and (2) that no evidence can be led to establish that the alleged norm, if applied in South West Africa, would be inconsistent with the welfare of the people.

Mr. GROSS: Mr. President, I shall attempt to deal with the question with due awareness of the fact that the arguments have been lengthy and complete and that the Applicants have rested their case subject to their reservations under the Statute and the Rules, and, therefore I shall refrain, to the best of my ability, from re-arguing or even summarizing the arguments which the Applicants have addressed to the Court. With that assurance, I should like to ask the forbearance of the Court if an attempt is made to respond to the honourable President's question in the following terms.

The Applicants' case is, in the Applicants' submission, not accurately or fairly reflected in the Respondent's summary thereof or description thereof, as to which the evidence is proffered by Respondent. The phrase which is used and attributed to the Applicants, and described by Respondent in repeated references in the Oral Proceedings (to which citations will gladly be offered by the Applicants if permitted or requested), does not correspond to the fundamental theory of the Applicants' case.

There are two major branches of the Applicants' case. One relates to standards of interpretation which have been applied by competent international organizations as part of the scheme of the Mandate. This involves the standard of interpretation, of a content described by the Applicants, in relation to the supervisory organ responsible for the supervision of the Mandate, and also involves the relationship between that administrative agency and the Court. This branch of the case, therefore, reflects and is based upon a legal theory which involves the mandate jurisprudence, which involves the clear, explicit and virtually unanimous pronouncements and judgments of the competent international organ which the Applicants submit, for reasons which have been set forth in detail, should be accepted by the Court as authoritative interpretations of the Mandate. It is *apartheid* we are talking about. If this witness or any witness address himself as an expert or otherwise to the questions of discrimination and separation which are implicit in and reflected in the undisputed facts of record in this case, there would be no question of admissibility of such evidence so directed by competent witnesses with respect to that branch of the Applicants' case.

And, secondly, Mr. President, with respect to the norm, the rule of international law for which the Applicants contend in terms of Article 38 of the Statute—that, as the Court will well be aware, has been presented to the Court as an alternative and a cumulative, or supplemental, argument on the basis that the practice of States and the views of the competent international organs are so clear, so explicit, and so unanimous in respect of the policies against discrimination, that such standards have achieved the status of an international rule of law, as a legal conclusion based upon the application of Article 38.

These are the branches of the case. When the evidence is proffered

indiscriminately with respect to the formula, "norm and/or standards as contended for by the Applicants", reflecting and echoing a description thereof in the Oral Proceedings which bears no resemblance to that contended for by the Applicants, either as a standard of interpretation or as a rule of international law, the Applicants have respectfully submitted that such a proffer based upon such a premise or foundation is (with respect, the word used, Mr. President, was "unintelligible" and it may not be "unintelligent") but it is incomprehensible as to what this witness, or any witness, asked to testify with respect to such a formulation, is really addressing himself to.

Now, finally, Mr. President, again with apologies for this lengthy response, as to the question of practice of States—if this or any other witness is competent to testify with respect to the practice of States, citing the official laws and regulations which, in his view, do constitute discrimination or separation by reason of group without regard to individual merit or capacity (which is the contention of the Applicants as to the content and nature of the norm and standards), I should think that it would be perfectly easy for learned counsel for Respondent to explain precisely the standards for which he contends, as standards of interpretation of this Mandate—of Article 2 of the Mandate—to which witnesses are to address themselves. And, with respect to the norm, Mr. President, there is no question in the minds of the Applicants, nor has any question been raised, with respect to the relevance of evidence concerning the practice of States, by witnesses competent with regard to laws, regulations, or official practices which are contended, or analysed as, embodying discriminatory practices, in the actual sense found by the competent organs here.

I should like, with the permission of the Court, to question the witness concerning his qualifications, unless indeed there are further questions with regard to the material I have just . . .

The PRESIDENT: That is an entirely different matter altogether. Have you finished the observations?

Mr. GROSS: I have, Mr. President.

The PRESIDENT: Well, I think the Court will hear the evidence. As we indicated yesterday, the Court is quite competent to value evidence and admissibility. At the moment the two contentions are advanced, on the one side, by the Applicants, and, on the other side, by the Respondent, as to the interpretation to be placed upon Article 2 of the Mandate. The Court will probably not be able to determine completely all questions of relevance of evidence until it comes to its final adjudication. I think the evidence should proceed.

Mr. Gross, you indicated that you desire to cross-examine the witness in respect of his qualifications as an expert. He has qualified as an expert upon his testimony and the proper time to do it will be in cross-examination.

Mr. GROSS: Thank you, Mr. President.

The PRESIDENT: Mr. de Villiers.

Mr. DE VILLIERS: Mr. van den Haag, have you ever lived in the Southern States of the United States?

Mr. VAN DEN HAAG: No, sir.

Mr. DE VILLIERS: Where have you lived thus far? In which parts?

Mr. VAN DEN HAAG: I have lived in New York, in the Middle West, in Iowa City when I studied there, for a brief time in Chicago and for a

brief time in Philadelphia and mainly again in New York. I have never been beyond the Middle and the Far West except for two or three days at a time.

Mr. DE VILLIERS: Now you have told the Court that you have made a special study of minority problems and particularly Negro-White relationships. Could you tell the Court, in general, where you stand as a matter of sympathy, as far as the Negro cause, or as one might call it, the Negro question, is concerned; where does your sympathy lie?

Mr. VAN DEN HAAG: Well, I would guess sir, I would say, it lies with both sides. I am interested in an arrangement that would be satisfactory both to Negroes and to Whites and, in this respect, I have maintained for many years, that in the United States and particularly in the South of the United States, but also in the North, negroes quite illegally and sometimes through the instrumentalities of state laws and at least, practices, have been deprived of rights that they should have, both constitutionally and in regard to generally accepted principles of humanity. I am not—let me add this—fully in agreement with the policies presently pursued to bring about a better arrangement because I think the means will not be very suitable to the ends, but as far as the ends themselves are concerned, namely to bring about a state of equality, of opportunity, between Negroes and Whites, I certainly am in favour of that.

Mr. DE VILLIERS: How did it come about that you specially interested yourself in the Negro question?

Mr. VAN DEN HAAG: Well, it is one of the most prominent social problems now in the United States and I am a sociologist and interested in the social problems that affect the society in which I live. I think it is even a world-wide problem, as these particular proceedings certainly demonstrate.

Mr. DE VILLIERS: Now in your approach to the subject as a sociologist, have you any assumptions or major premises on questions of racial superiority or the like concept?

Mr. VAN DEN HAAG: This concept of racial superiority or inferiority, has always seemed unintelligible to me, for if we were to admit, and I am willing to grant, that the different races both as defined biologically and perhaps as defined socially do probably have different physical and perhaps correlated with that, different psychological qualifications, this last point in parentheses, this last point may I mention, is an open question. There are numerous geneticists who feel that there is probably no correlation between the differential distribution of physical characteristics and the differential distribution of psychological ones. Others feel that there is, and I do not myself feel competent to testify on this point, not being a geneticist. However, whatever they may be, suppose it were to be found that, to illustrate, Negroes on the whole are able on the average, or more frequently, are able to run faster than Whites and Whites, again by way of illustration, are able to jump higher than Negroes, it would not follow that one is superior to the other or the other inferior to the first. It would merely follow that they are different. That there are differences is fairly clear by visual inspection. To attribute qualities of superiority or inferiority means to make a value judgment which, in effect, says that this particular quality, blonde hair, white skin, jumping higher, or running faster, is of great importance and gives superiority or inferiority to the person who lacks it or possesses it. That

is a value judgment which is entirely outside the scope of science and, by the way, a value judgment that I personally reject.

To answer your question more briefly, I reject the idea of racial inferiority or superiority, though I am willing to accept the idea of racial differences.

Mr. DE VILLIERS: Could you indicate whether there is, in that respect, a difference in the approach of the sociologist to questions of group relationships, a difference from that of say a geneticist?

Mr. VAN DEN HAAG: Yes, a geneticist would, of course, be concerned with whether there are inherently different characteristics, whatever they are, and whether these characteristics are genetically inheritable. A sociologist, such as I am, would not be interested really in the existence of these differences, except in a marginal way. He would be interested in their perception and their cultural elaboration, that is, he would wonder whether one group is perceived by another group as different, and how and what the effects of that may be; he would not ask himself so much: is it different? but rather, what are the social causes that lead to the perception as different? and what may be the effects? and if it constitutes a problem, what can or should be done about it?

Mr. DE VILLIERS: So, as a sociologist, for that purpose would it be correct to say that your assumption is a neutral one as far as various genetic theories may be concerned?

Mr. VAN DEN HAAG: I do not think I am competent to decide on them, and I do not think for my purposes it is even necessary to make an assumption.

Mr. DE VILLIERS: Now could you explain, as a sociologist, what you regard as a human group?

Mr. VAN DEN HAAG: Sociologists give a specific meaning to social group—we distinguish it from a mere aggregate of persons. By a social group we mean basically an aggregate that feels as a group, that is bound together by a feeling of group solidarity usually based on the perception of similar characteristics, on a sharing of values, on, possibly, common historical experience; in the past such groups were very largely formed on the basis of religion—the very word "religion" comes from "religare", to bind together—and the group usually supposed itself to be like a family who have originated from a common parent. Today religion has become somewhat less important in this feeling of group solidarity, and through the rise of nationalism, common language, both in the direct and in the metaphorical sense, common historical experience, common enemies, common friends, common values and so on have played a greater role. Let me illustrate: we have, for instance, in the case of the Jews, a case where the group feels largely as a group because of common experience which has occurred in a number of countries, and this feeling of community or group solidarity became strong enough to lead this tribal and religious group to form a new nation. In fact, I would say that nations are groups held together by cultural values that are perceived as common. Now let me add that this mutual identification of group members seems to me, and I think to most sociologists, the foundation for law-abidingness. For the group members, having common customs, tend to accept a common organization and to obey common laws—certainly it is true that laws are fortified by sanctions against violators, but laws work only because few people are tempted to violate them, and the sanctions are required only against a few people, and most

people tend voluntarily to obey the laws precisely because these laws spring from shared and common values and customs within the group in which they prevail.

Mr. DE VILLIERS: So that is a factor of importance for you, as a scientist—to observe the existence of a group, of a sense of solidarity, the factor of law-abidingness and of abiding by customs which have not attained the force of law. Are there any other factors to which you would have regard in order to ascertain this sense of group solidarity?

Mr. VAN DEN HAAG: Well, I should think that it is in a sense somewhat tested by various manifestations other than mere obedience to law; group members, for instance, are usually willing to make unrequited sacrifices in such cases as war and various emergencies; I should think that this would be impossible unless there is a previously established feeling that the members of the group have enough in common so that each member is willing to at least bear the risk of sacrifice, injury and even death, if necessary. I think I was a little vague on the reasons for group formation, and the reason I am a little vague is that no-one has really been able to show exactly what is required—a group becomes a social group if it feels and acts like one, and it feels and acts like one for any of the reasons that I have given. Now there are cases where there is no common language; there are cases where there are rather few common customs, but perhaps a common enemy, or something like that; but in all such cases, what one may say in a most general sense is that the group is held together by a common culture which includes the feelings, perceptions, attitudes, values and disvalues of the group.

Mr. DE VILLIERS: Now, these common groups—may they grow up historically?

Mr. VAN DEN HAAG: Yes.

Mr. DE VILLIERS: The common bonds, I mean—you have said religion could play a part—what about ethnic assimilation?

Mr. VAN DEN HAAG: Well, as I said, there is a perception of similarity in the group members; they often originally regarded themselves as children of the same family most of the time—for instance, religiously speaking, God is referred to as a father, and the group members feel as the children of the same father. Now, as we are well aware, religions were originally tribal in nature, so that the members of one group felt solidarity to some extent also by identification with his fellow members and de-identification with non-members, and this sentiment of identification and de-identification was based on cultural matters, but also I would say on ethnic matters—I use the word "ethnic" to mean both culture and biological origin, or at least as a perception of biological similarities and dissimilarities, including such things as various physical characteristics.

Mr. DE VILLIERS: Perhaps we could get it clear if we ask you what distinction would you draw, if any, between an ethnic group and racial distinctions?

Mr. VAN DEN HAAG: Generally speaking, an ethnic group is a sub-group of a race—you will speak of, say, the Jews as an ethnic group being part of the Caucasian race, for instance, but these terms, let me point out, are used in a variety of ways by a variety of people, and I do not think that I want to legislate on what their use should be; but, at least in American usage, "ethnic" refers to a sub-group of a larger grouping which is called "racial", but some anthropologists in America now, since the word

"race" has fallen into disrepute, try to avoid it and use the word "ethnic" as a more general term.

Mr. DE VILLIERS: For you, as a sociologist, that feeling of identity, those common bonds—they are the major factor?

Mr. VAN DEN HAAG: That is the essence of a social group, yes.

Mr. DE VILLIERS: And it could partake of these different forms you have mentioned?

Mr. VAN DEN HAAG: Yes.

Mr. DE VILLIERS: Now, do all people within one geographic area necessarily or always form one group or share the same culture?

Mr. VAN DEN HAAG: Certainly not; for a variety of reasons that is very often not the case, and again let me point out, historically speaking, in many cases the sovereign has felt it desirable—we have, for instance, cases where the sovereign felt that in his dominion only one religion should prevail, wherefore he would then sometimes eliminate, with rather drastic measures, all religions other than the one he would regard as useful to group solidarity, but in many cases now we have larger groups including a number of smaller groups, and in some cases we have more or less compatible groups living together in the same state (area).

Let me point out that a variety of ways of dealing with this has been found. One, very simple, is, for instance, to throw out or kill the group that belongs to a different ethnic or cultural division. I could mention a number of such cases, for instance, the division of India and Pakistan led to the exchange of about eight million population, also, an exchange that certainly was not easy on the Indians in question. In some cases, again India and Pakistan is one case, partition was also involved. If you look at what happened after the Second World War you will find that territories that were ceded, or at least occupied, by Poland and Czechoslovakia had been inhabitated by ethnic Germans, and that the Polish and Czechoslovakian Governments immediately insisted on these ethnic Germans leaving what had now become Poland and Czechoslovakia. Incidentally they had no choice, that is, it was not possible, say, for a German farmer in this situation to say, well, I am willing to become a Polish citizen, or something like that. He was *manu militari* compelled to leave the territory because apparently the Polish Government felt that his ethnic Germanness would introduce an element of dis-solidarity into the Polish State, or Czechoslovakian State, and so on.

If you wish me to illustrate this further I will: there are quite a number of such cases.

Mr. DE VILLIERS: Yes, I should like you to mention some more, but I should also like you to give attention to this factor, whether in these instances of which you speak the action, by whatever authority it was, was to be seen merely as having a negative effect of separation, or discrimination, or what have you, or whether it was also perceived of as having positive value.

Mr. VAN DEN HAAG: Well, the best people to ask about that would be the participants, but I think in many cases—let me take the case that I have just mentioned, of the migration of people of German origin from territories now Polish and Czech—I think in the short run this involved considerable suffering and sacrifices. I rather feel myself that in the long run it probably eliminates problems that in the future might have led to considerably more suffering than has now been experienced by these minorities. And again, the partition of India and Pakistan, as

I said, was certainly hard on many of the people involved, but I am not sure that in the long run it may not lead to less suffering than would have occurred had there been no such partition. There was certainly a greater danger of communal clashes, clashes between the various self-identified groups, and perhaps partition was the best way of preserving, in the long run, the peace among them.

Again, you may refer to the case of Israel. The State of Israel was founded, giving finally a homeland to the Jews, which they had long been promised, but of course that also led to about eight hundred thousand Arabs leaving the country, not quite voluntarily, in most cases, and still hanging literally around its borders and no doubt undergoing great suffering.

So the question you are asking me is a little hard to decide in a purely scientific sense: we have suffering and reasonable interests on both sides. I should think that, in the long run, sometimes I would certainly want to recommend partition, sometimes I would want to recommend an attempt at separate existence under the same government, and sometimes I might want to recommend an attempt at integration or assimilation of the minority, and that would depend on the circumstances that would be involved in each case.

Mr. DE VILLIERS: Would it be correct to say that it would involve a balancing of various values?

Mr. VAN DEN HAAG: That is correct, yes.

Mr. DE VILLIERS: In each particular case?

Mr. VAN DEN HAAG: Yes.

Mr. DE VILLIERS: Are you acquainted with a case of what was formerly called "Ruanda Urundi" in Africa?

Mr. VAN DEN HAAG: I have been there, as a matter of fact, but only for about one day, so my acquaintance stems more from the literature. This was formerly a Belgian Colony and the two countries you mentioned were administered as one colonial unit. As the Belgians withdrew the country, upon the desires of the inhabitants, was divided into two, one Ruanda, one Urundi. However, this division, although the two countries are so small as to be scarcely viable, I would say, from an economic viewpoint, this division, nonetheless, was not enough.

In one of the countries, Ruanda, there lived two ethnic and culturally distinct groups, the Bahutu and the Watutsi; the Watutsi are very tall, in fact the tallest group of people in the world, I understand. The Watutsi had for a long time subjugated the Bahutu and as the Bahutu in the newly divided territory, Ruanda, acquired power, partly because they constituted the majority, they used this power to quite literally kill as many of the Watutsi as they could, and compelled the others to flee to neighbouring countries. In fact, I think it was the United Nations that helped in giving refuge to a number of these displaced Watutsi. So here we have a case where I think the separation, though economically quite unviable, in my opinion, nonetheless was indicated for reasons of group conflict but where I think it was not sufficient, and the events that I have described took place. Indeed, in the area in question there is still turmoil and the matter has by no means been settled, because the Watutsi are certainly eager to reconquer the territory from which they have been chased by force.

Mr. DE VILLIERS: Do you have further instances of forced re-location of one ethnic group by another?

Mr. VAN DEN HAAG: Well, I think there are quite a number: let me mention a few. There is certainly one, well known in Russia, where in 1943 the so-called "Volga Germans" were as a group, and against their wishes, transferred to Siberia because the Russian Government, feeling that it was already at war, or going to be at war, with Germany, did not feel that these people, being ethnic Germans, could be trusted to be loyal to the Russian side, and therefore they wished to place them out of harm's way and transferred them to Siberia.

I must say that a similar case occurred in the United States where—I would rather refer here to a book if I may—the Japanese were forcibly relocated from the West Coast where they had been located before, and compelled to enter various relocation centres. It is rather interesting. Many people, including myself, were very doubtful on the constitutional reason for that, but the United States Supreme Court has decided three cases (and I have with me photostats which I will offer for the record), and in these cases it has found that the President had the power to provide for this possible relocation of people who were distinguished from other United States citizens merely because of their Japanese origin.

Let me point out that these people were United States citizens, often of four generations; that the Japanese were certainly not the only group in the United States that was ethnically related to an enemy alien group, so were the Germans, no doubt, and the Italians. But the Germans and the Italians were not forcibly relocated and for that matter were not placed in any camps. Now the reasons for the relocation, some of them, at least; I may quote General De Witt, who was the military commander who undertook, by the authority of the President, this relocation. Being questioned before a Congressional Committee, he said the following:

> "The Japanese race is an enemy race, and while many second and third generation Japanese born on United States soil possess United States citizenship, and have become Americanized, the racial strains are undiluted, he is 'still a Japanese and you cannot change him by giving him a piece of paper'."

Perhaps I should quote a comment that Professor Eugene V. Rostow, Professor of Law at Yale University, made on this. He said as follows:

> "The original programme of relocation was in no way required or justified by the circumstances of the war, but the Supreme Court in three extraordinary decisions has upheld its main features as constitutional."

And he goes on to say that these Supreme Court decisions have given the authorities, in effect the President, a weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

Mr. DE VILLIERS: Professor van den Haag, we need not go into the controversial aspects of the decisions themselves, but the Supreme Court decided on the basis of emergency powers justifying this particular decision, did not they?

Mr. VAN DEN HAAG: Well, yes, except that the emergency is always self-declared. Let me put it this way. No showing occurred before the Supreme Court that any of the Japanese relocated had shown disloyalty. What was being said was simply that the authorities were unable to find out whether they might not be disloyal, and they suspected on the basis of their racial or ethnic ancestry that there was this possibility and therefore they relocated. They felt that as far as the Germans were concerned

they could make individual distinctions. But as far as the Japanese were concerned they felt that they had to confine the group as a whole.

As you say, correctly, this decision has been opposed by many people, but it is a decision that is still valid, that is the constitutional interpretation has not been overthrown.

Mr. DE VILLIERS: In other words, the line of demarcation, your point is, was the ethnic line?

Mr. VAN DEN HAAG: No other.

Mr. DE VILLIERS: It was that, and the circumstances there, viz., the circumstances of emergency, were found to justify that line of demarcation in the particular circumstances?

Mr. VAN DEN HAAG: Quite so.

There are other instances, with regard to the United States. I may point out that we have still such lines of demarcation in a number of parallel practices. For instance, if we look at our present immigration laws, it is generally admitted that these are based on purely ethnic, or racial, if you wish, distinctions.

Let me illustrate this point very briefly, and I am referring to immigration laws as they now exist—the last codification of the immigration laws occurred in 1952 and that is the one, the so-called McCarran-Walter Act . . .

Mr. DE VILLIERS: Will you, please, mention the name of the book for the record purposes?

Mr. VAN DEN HAAG: Certainly. This is Brewton Berry, Professor at the State University of Ohio, and his book is called *Race and Ethnic Relations*. I am quoting from the 3rd Edition (p. 337); it is a commonly used textbook. What he states is that "the quota system, based upon national origins, has remained intact". And we see this. If you will look at the quotas you will find, for instance, that people born in Germany can emigrate to the United States in the number of 25 thousand and some hundreds, in Great Britain 65 thousand and some hundreds, in all of Africa 3,200, in all of Asia 3,290. In other words, the quota for all of Asia and the quota for all of Africa is a few thousand, whereas the quota for Great Britain, Germany, and, generally speaking, the northern European countries, is out of proportion. Let me point out, further, that these quotas are strictly not (as they are sometimes called) by political or juridical origin but really by racial origin. For instance, Orientals suffer a very special type of discrimination *qua* Orientals even though they may be naturalized citizens, for instance of Great Britain, such as some of the Hong Kong Chinese are—they do not come under the quotas of their Western nationalities but are placed under the quota of Orientals, that is, immigration is limited to 3,290 per year. This policy was first codified in 1920 and, as I said, recodified in 1952. I may point out, since I would feel somewhat disturbed if it were to be believed that America is alone in this, that this practice is also followed, in effect, in Australia.

Mr. DE VILLIERS: We have dealt with that, Dr. van den Haag. We need not go into the details. You have read the portion of our Rejoinder, V, pages 196-197, dealing with the cases of Australia and New Zealand, the United Kingdom and Canada. Have you read our exposition?

Mr. VAN DEN HAAG: I certainly have, I must say my recollection is not altogether clear, but I can summarize it very briefly by pointing out that in a number of nations, that for instance in Australia, the total number of Coloured citizens is 1 per cent. or something like that of the total popula-

tion which certainly would not have come about were it not that immigration is racially restricted.

In Great Britain, I may point out (and this is, of course, in recent memory; I must admit I do not recall that I read it in your brief), had a policy of quite free immigration from its various dependencies. This policy has recently been changed as more and more Coloured people, attracted by economic opportunity, no doubt, entered Great Britain. As a result, the last Conservative Government imposed some restrictions which were bitterly opposed by the Labour Party which called them hypocritical, if I recall correctly, but as the Labour Government came to power it, contrary to its promise, did not change these restrictions. So what we have here is that Great Britain, though it has not relocated or confined its Coloured citizens to any particular place in Great Britain, has found it much easier simply to confine them to their locations, or origin, by not permitting them, in great numbers, to enter into Great Britain. The reason given, very largely, was that owing to cultural and ethnic differences, it would be very hard for the population to absorb a great number of these aliens—felt as aliens although politically and juridically they are of course not aliens.

Mr. DE VILLIERS: For the good of the population as a whole?

Mr. VAN DEN HAAG: Undoubtedly, although I am sure that the people in Jamaica may not agree.

Mr. DE VILLIERS: You had, I think, a quotation in regard to Canada which you wanted to add to those we have given to the Court?

Mr. VAN DEN HAAG: Yes, I have. This is from the *Canada Yearbook*, an official publication, which in 1932 (and I am interested in the differences in language) stated: "Canadians usually prefer that settlers should be of a readily assimilable type, already identified by race or language with one of the two great races now inhabiting the country."

The official *Yearbook* for 1963 makes the same point, but in a language which is perhaps a little bit more diplomatic, by saying it has been the policy of the Canadian Government to stimulate the growth of population "by selective immigration. Efforts are made to choose immigrants of prospective adaptability to the Canadian way of life." Now, this is a rather vague phrase but my feeling is that it means quite what was meant in 1932 though it put it a little bit less bluntly.

Mr. DE VILLIERS: Now, I will ask you later on questions of comparisons or the possibility of comparing at all—drawing comparisons between a situation in the United States and, say, in Africa, but, before we come to that, we ought to have clarity on some aspects of the situation in the United States. Do you know of examples, other than by federal action, of official action or legislative action making racial distinctions in the United States?

Mr. VAN DEN HAAG: Let me make two points in my answer. First, in addition to the federal acts that I have mentioned, there has been a considerable degree of voluntary regulation. The whole Republic of Liberia was, after all, founded very largely by American Negroes deciding to leave the country and in Africa found their own separate country in which, in effect, they tried to make it hard for Whites to settle. As a matter of fact, if I am correctly informed, a White person cannot own real estate in Liberia and this at the present time. Now this, of course, was of use only to a rather small group of American Negroes, but throughout the history of minority relations in America you find that among the

Negro population there have been a number of groups that have insisted on separation of the Negroes from Whites. Perhaps, the most important, or at least the most numerous, of such groups was the Universal Association for Negro Improvement formed by Marcus Garvey and which flourished very much in the 1920s when it was said to have two million members—these figures I would not want to vouch for because these are the figures that the Association itself gave and they have certainly not been checked. But it is entirely true that it was a major political force, that it filled at its congress Madison Square Garden, which is quite a big place, and was financially and otherwise quite powerful. Its major aim was the return of Negroes to Africa. It did not achieve its purpose and I think it could not, but it certainly did indicate that there was such a quite voluntary movement afoot. I may say, incidentally, that they also influenced official authorities and on American usage, for instance, the word "Negro" is always spelt with a capital N, and the major reason for that is that this association insisted on that and persuaded the Board of Education of New York to adopt this spelling which then spread all over as a symbolic tribute to the dignity of the Negro race.

Such movements have been many. There are at the present time about 70 such groups. The most important perhaps is one headed by a man named Elija Muhamet who has founded a group called "The Nation of Islam". The purpose of that group is to persuade, or force, the United States Government to relocate Negroes in the United States by giving them a territory of their own in which they would have a high degree of sovereignty and in which Whites would not be permitted to settle. The programme is not altogether clear to me, and, again, the membership of this association is not altogether certain but it does play a considerable role and such writers as James Baldwin, for instance, certainly, and rightly, taken seriously, have expressed extremely high regard for the movement and its protagonists and have pointed out, I think quite correctly, that the members of the movement are distinguished from many other Negro citizens of the United States by their better deportment, their abstinence from alcoholic beverages, and various drugs, their exemplary family life, and generally what you would speak of as integration of personality.

Now that was one point I wished to make—that is, there are a number of unofficial, voluntary movements.

Mr. DE VILLIERS: Now, before you leave those, is it not sometimes suggested that leaders of a movement like this Moslem movement you have just referred to—are rather eccentric or fanatical?

Mr. VAN DEN HAAG: I rather think they are myself but that I think is usually the case with the founders of either new religions or new political movements of this kind. They are often proposing something that seems utterly impractical but sometimes their very existence and the prophesies they have made has led to its own fulfilment, so I would certainly not vouch . . .

Mr. DE VILLIERS: The question I wanted to ask you was about these other 70 national movements you mentioned. Are they equally extreme or do they show various shades of moderation?

Mr. VAN DEN HAAG: There is an enormous amount of shading; I may add, just to avoid giving a wrong picture, that the major Negro movements in the United States are certainly not the ones that I have mentioned. These are important but, at the present time, I think the National

Association for the Improvement of Coloured People and others that are taking a much more moderate line are probably more influential among Negroes as a whole. They are certainly regarded as more influential by the United States authorities who tend to deal with them to a greater extent than to deal with these groups.

Mr. DE VILLIERS: But still advocating some form or other of voluntary relocation?

Mr. VAN DEN HAAG: Certain groups I mentioned do. The National Association for the Improvement of Coloured People I do not think does.

Mr. DE VILLIERS: Those then, as far as the voluntary movements are concerned.

Now to come back to my question about official action. Do you still find examples of official action within the United States which have the effect of differentiating between groups, particularly this instance of between Negroes and white American citizens?

Mr. VAN DEN HAAG: Well, certainly if you mean by official action by governmental authorities, many governmental authorities below the federal level (state authorities and so on) persist in undertaking such official actions even though most of these actions have become, owing to the Supreme Court's decision in *Brown* v. *Board of Education* and a number of subsequent decisions, to say the least, of dubious legal standing. But it seems, particularly in the southern states, the local authorities are not willing to throw in the towel and give up the battle, but rather they persist in ever-renewed actions trying to maintain some degree of segregation—sometimes directly, sometimes by closing the facility that the Court has ordered them to desegregate, sometimes by imposing measures not overtly aimed at segregation but having this effect. I think you are quite right in your supposition that the Court's decision, though certainly now legally established, has not led to any remarkable social change in the southern states. I should think that, in fact, the numbers say of Negro school children who go to desegregated schools in the southern states is still extremely small and I do not really foresee that there is any chance that it will greatly increase in the next ten years because there is an enormous local resistance that, now the decision is more than ten years' old, has not been overcome to any large degree; victories have been obtained in the courts, but, as the Negro leaders are the first ones to point out, these court victories have not really led to much practical change. Indeed, there is some reason to say that in many cases, particularly in the north, there is more segregation now than perhaps there was ten years ago. There are numerous economic and other factors that contribute to that. I would not say it is necessarily deliberate, but Negro leaders are the first to point out that desegregation has made very little practical progress. Whether one approves or disapproves of that, this is a fact.

Mr. DE VILLIERS: Now to revert to the action still taken by certain of the state authorities. Would you in all cases say that they are of a repressive or oppressive nature?

Mr. VAN DEN HAAG: Well, this leads into—

Mr. DE VILLIERS: I should not like you to go into detail, I just want to know whether you would classify them all as being for oppressive purposes, whether some are—

Mr. VAN DEN HAAG: No, I would not so classify them. I think one has to make a distinction between segregation and discrimination, although

these two words in the dictionary sense mean about the same, and I would say that I would like to use the word segregation to mean separation, which, of course, need not require or be connected with oppressive measures, but can be so used in the same way a knife may be used to cut a roast or can be used for murder. It is not in the nature of the knife that it must be used for illegitimate purposes, it is not in the nature of segregation, I think, that it has to lead to discrimination if by discrimination we mean, as I propose we ought to, placing someone, or placing a group, at a disadvantage that is not warranted by any relevant element in the situation in which the group is found.

Let me try to explain. When I teach my classes I will give grades according to the performance of the students in the examinations. That is a form of distinction, and you may call it discrimination. The ones that get good grades have certain advantages and the ones that have bad grades get certain disadvantages, but this would be called legitimate because I have, and I hope I always will, applied a relevant criterion. Now if I were to give these grades according not to scholastic performance, but, say, to sex, or religion, or attractiveness, or size, or any other irrelevant criterion, then I think one would call it discrimination.

Now, to return to your question. When the segregation does not involve hardship for either of the segregated groups, or if it does involve a hardship the hardship is due to relevant criteria such as qualifications, say, if one person is hired for a job and the other person is not, if this is due to differential qualifications I do not regard it as illegitimate or unwarranted discrimination. If on the other hand, it is due to irrelevancies and prejudices on the part of the hiring agency, then I would so regard it.

But to return to your question. Segregation may be used for purposes of oppression, deprivation, and placing at a disadvantage, but it need not be so used.

Let me also point out, incidentally, that non-segregation can very well be connected with oppression.

In many universities, for instance, in the past particular groups were not segregated from the rest of the students, but there was a *numerus clausus*, that is, only a certain number of them were admitted whereas others were admitted entirely according to their academic qualifications; there are quite a number of cases where—well, of course, the one that is very clearly in our memory I suppose: that of the Jews in Germany, who were certainly slaughtered (discrimination is not enough); yet there was no segregation of any length preceding this slaughter, which I think indicates, on the one hand, that segregation is not necessary to oppressive measures and that non-segregation does not necessarily make for such group relations as would avoid hardships. (I am still trying to answer your question; I hope you will forgive my lengthiness.) I would regard the instrument of segregation as a neutral one; the effects will depend on the circumstances, and purposes, of the user. It can certainly be used to damage and to oppress the group segregated, but it need not.

Mr. DE VILLIERS: My question is, how is it used, in fact, as you see it, by the southern authorities? Would you say that it all falls into one category or the other?

Mr. VAN DEN HAAG: No, I would not quite go so far, but certainly in the past segregation in the south was used as a disguise and as a device to deprive the segregated group, in effect the Negroes, of advantages that were yielded to the White group.

Now, let me say once more, it does not follow, in my opinion, that this is a necessity; it is a historical event and a historical event must not be confused with a logical or historical necessity. But, certainly I do not think it can be denied that historically, in the past, segregation in the south was used to deprive the segregated group.

Mr. DE VILLIERS: Now I ask you whether that was invariably so, or is still today invariably so?

Mr. VAN DEN HAAG: Now, at the present time? Well, the only way in which I could answer that I would have to pass in review quite a number of things that are now happening and some cases that are still so used, or at least that is the intention—

Mr. DE VILLIERS: I do not want you to go into detail. I just wanted to know whether in some cases it is not so used.

Mr. VAN DEN HAAG: In some cases it is certainly still used so as to discriminate against the segregated minority, but not in all cases. I am familiar with some cases where, in my own opinion, the segregating authority was willing (and, incidentally, this is in the records in a number of judicial proceedings) to spend just as much per pupil and to pay even higher teachers' salaries for Negro children, but wished to maintain segregation. In this case of course, you cannot speak of segregation being used to materially deprive the segregated group—whether there is a psychological deprivation is a matter that I want to discuss later.

Mr. DE VILLIERS: We shall come to that later. Now could you first indicate to us whether you can pass some general comment on possibilities of comparing the American Negroes with the indigenous inhabitants of Africa?

Mr. VAN DEN HAAG: Well, of course the American Negroes originally came from Africa, but I think there are very major differences. One is a purely biological one, and I merely here report what is generally accepted without making a judgment of my own. It is generally said that African Negroes, on the whole, are purer Negroes whereas it is generally accepted that there is about a 30 per cent. admixture of non-Negro genes, or blood, in the American Negro. Now I cannot vouch for these figures, they are the ones that physical anthropologists seem to agree on. That is a genetic difference.

But I think the difference on which I am more competent to speak, and which I think is also more important, is this: that American Negroes have not retained, and could not retain, a culture of their own. They were transported to the United States in such a way as to break their tribal bonds so that, say, on a slaveship there would be Negroes from a variety of tribes that spoke different languages and could not speak with each other, nor did they share common customs and so on, they shared, at most, the fact of all being coloured; and, of course, once they came to the United States and were sold again they were further dispersed. In some cases even the members of the families were separated from each other. The result of that was that they lost whatever Native culture and tribal unity they had, and acquired, to the extent to which the conditions made that possible, American culture. That is then, to put it very succinctly, the American Negro does have American culture, an American Negro sub-culture if you wish—a sub-culture just as that of say longshoremen may be called a sub-culture owing to specific circumstances of their life—but it is part of American culture and certainly not of African culture. They do not speak African languages, they have no direct mem-

ory or tradition of any tribal life, they would not know, if they were asked, to what tribe they belonged or from what part of Africa their ancestors came. In short, they are coloured Americans, but Americans still.

Let me mention Liberia. Let me point out for instance the American Negroes that did arrive in Liberia imported the English language and American usages there and, in effect, formed an upperclass Americanized elite in Liberia that has a relationship reputed to be one of oppression to the native-born Negroes there. I am not maintaining that this reputation is correct, I have not been in Liberia, but certainly one thing I can easily maintain is that the group of Negroes that came from America and formed the ancestry of the now ruling class in Liberia has an American culture as distinguished from the Native tribes; and American Negroes in America certainly do.

Now, you asked me to compare this with African Negroes. From your own documents, and from a little experience I have myself of Africa—I have visited it once—I would say that in many cases African Negroes still possess a tribal feeling of belonging and they still possess a tribal culture, tribal customs, ideals, attitudes, and so on, of their own. So that in Africa there is still a problem of what will happen to the Native culture; in America there is no Native Negro culture to be dealt with in one way or another, the American Negroes are coloured Americans who because of their colour have suffered a peculiar fate but who have no culture of their own, whereas the African Negroes certainly do—some of them more, some of them less.

I visited the Congo some time ago and I met a number of Congolese politicians and so on that were described to me as detribalized, that is, as no longer being very much connected with their tribes, but in my observation, however brief, I found this not to be the case. For instance, I enquired at one of the Ministries what led, in effect, the various civil servants and so on, to occupy positions in that Ministry and I was told that they are a part of the tribe to which the Minister belonged and that was their main qualification. In short, the tribal feeling is still very strong as certainly has also been shown say, in Katanga, in other parts of Africa where the major clashes were between tribes such as the Lunda, Baluba and what not.

I want to make it clear that this is not based on personal observation of every part of Africa, but upon the study of literature—I should think that tribal cultures are still very strong there and that would be the major differentiating point.

Mr. DE VILLIERS: Would you consider that there are positive values worth maintaining in those tribal or ethnic cultures of Africa?

Mr. VAN DEN HAAG: I would maintain that that is so, in principle, wherever there is a Native culture that has any sort of strength I would think that I would make every effort I could to maintain it, for I think that the change of culture, particularly the acceptance of an alien culture, is usually connected with so much psychological suffering, leading to social and individual phenomena of a pathological sort, that if it was necessary to bring about such a change, I certainly would want to do it in the slowest and most supervised way. May I add that the only major country which has gone about such a change in a reasonably successful way, has been Japan, but under very specific circumstances which cannot and have not been reproduced anywhere else.

Mr. DE VILLIERS: Now you are talking about . . .

Mr. VAN DEN HAAG: Change in culture—was that not what you . . .

Mr. DE VILLIERS: Yes, in the case of an Asian people. I was talking more particularly about Africa. Now, could you indicate briefly what you would regard as pros and cons involved in a destruction of such indigenous culture, of tribal or ethnic culture?

Mr. VAN DEN HAAG: Forgive me for saying so: it is a question too general to answer in any way other than a lecture which I think you do not want to hear. There are cases when the change occurs suddenly and without regulation by superior authority. Such a change can lead, both to the physical extermination of the group on which the change is imposed or which accepts a change without retarding factors and suddenly; or to its—I would say—psychological destruction, leading to such phenomena as Emile Durkheim described as *anomie*, that is, a feeling of rulelessness, a feeling, that is, of purposelessness. The English anthropologist, W. H. R. Rivers described it in Melanesia—I am going out of Africa but I will return in a moment—where he says, the rapid change in culture, actually led to the extermination of the Melanesians, not by violence, but in effect because these people, who had been head-hunters, and for whom head-hunting was the major occupation, suddenly felt that life no longer had a central purpose.

Now you find this parallel with American Indians. Of course, many material measures were taken about American Indians that quite materially exterminated them. The Government, however, ultimately tried to protect them by locating them in certain Indian Reservations where it hoped that the Native culture of the Indians would, in a self-sufficient way, maintain them both materially and psychologically. It was too late as you know, and as a matter of fact, most of the Indian population has been eliminated. The question was—would you be good enough to refresh my memory?

Mr. DE VILLIERS: Yes, now I think you have answered it—to indicate some of the positive and negative aspects which may be involved in the destruction of a Native culture, depending on the circumstances in which it occurs.

Mr. VAN DEN HAAG: I do want, if I may, to add one point. I do not want to appear to say that it is entirely impossible for one culture to accept possibly beneficial things from another culture under certain circumstances. If it is done in a reasonably slow way it can be, indeed, extremely useful. Indeed, one may say that in the history of the world, few cultures have been totally isolated, each culture has learned sometimes from other cultures, but there is an enormous difference between a technologically superior culture overwhelming one that is technologically not so accomplished, and between that last culture slowly accepting some of the benefits of the culture that is technologically more accomplished.

Mr. DE VILLIERS: Now, to revert to the position in the United States for the purpose I indicated before; you have dealt with voluntary and involuntary cases of separation, of re-location and of migration. You have indicated that those have taken place until quite recently but now, is not the judgment in the *Brown* case, to which you referred, an indication that such events will not be repeated in the future?

Mr. VAN DEN HAAG: May I ask you to repeat your question? I did not quite follow you.

Mr. DE VILLIERS: Yes, I mean you have spoken of certain events

indicating re-location on a racial or an ethnic basis, on a differential basis in the United States, voluntary and involuntary separation and so forth, official action in that direction; I ask you whether the United States is not now facing a new era in that regard as a result of the decision of the Supreme Court in *Brown* v. *Board of Education.*

Mr. VAN DEN HAAG: Well, that decision certainly would deprive of legal sanction any act of re-location that has the purpose of separating the races. It would not, I think, prevent such activities, as I mentioned before, that the "Nation of Islam" would want to bring about such a separation on a voluntary basis or possibly impose it; what the *Brown* decision does is certainly to say that state authorities, in particular schoolboards, but the matter has been enlarged in other decisions, cannot separate pupils in public facilities on the basis of race or colour.

Mr. DE VILLIERS: Now, as I understand the *Brown* decision, it overthrew the previous case of *Plessey* v. *Ferguson*; the Court seemed to rely, amongst others, on the difference in the state of psychological knowledge at the time of the *Brown* decision as compared with that at the time of *Plessey* v. *Ferguson.*

Mr. VAN DEN HAAG: Yes, the *Brown* decision, and I think I quote it correctly, says that whatever the state of knowledge was at the time of *Plessey* v. *Ferguson,* which decision maintains that separate but equal facilities would satisfy the fourteenth amendment of the Constitution that guarantees the equal protection of the laws, whatever, the Court says, was the state of knowledge at that time, "modern authority" has demonstrated that segregation is "inherently unequal" so what the Court said was in fact, that social scientists who were prominent in the lower courts in these cases, have demonstrated that even when facilities are altogether equal, the mere fact of segregation inflicts an injury on at least one of the segregated groups, and is therefore inherently unequal. That has been the court's decision.

[Public hearing of 23 June 1965]

The PRESIDENT: The hearing is resumed. I call upon Mr. de Villiers to continue with his witness.

Mr. DE VILLIERS: Dr. van den Haag, at the conclusion yesterday we were referring to the decision of the United States Supreme Court in *Brown* v. *Board of Education* and you pointed out that that rested on a scientific proposition derived from evidence given by social scientists in the lower court. As you put it here, the proposition was that even when facilities are altogether equal the mere fact of segregation inflicts an injury on at least one of the segregated groups and it is therefore inherently unequal.

Mr. VAN DEN HAAG: Yes, Sir.

Mr. DE VILLIERS: Did that proposition of the infliction of injury, relate in the particular case to the situation of Negro school-children attending segregated schools?

Mr. VAN DEN HAAG: Yes, Sir.

Mr. DE VILLIERS: Now, I should not like to go too deeply into controversial aspects of the situation in the United States for the purposes of this case but I think it would be useful if you could indicate to the Court whether that proposition, as we have now analysed it, is generally accepted

and acceptable in your branches of social sciences even in its application in the United States.

Mr. VAN DEN HAAG: No, Sir, I do not think it is generally accepted but I would like to make a distinction. Professor Edmund Cahn of the Law School of New York University and I were the first two persons to criticize the scientific evidence presented to the Supreme Court in a brief *amicus curiae* which was signed by a number of social scientists; it was prepared by Professor Kenneth Clark of the City College of New York, and Professors Isidor Chine and Stuart Cook, both of them colleagues of mine at New York University. Professor Cahn, also of New York University, and I were the first ones to criticize this. Professor Kenneth Clark, who was the main author of this appendix to the Brief of Appellants in the Supreme Court, responded to our criticism in an article which he published originally in the *Villanova Law Review* and reprinted in his book, which I have here, *Prejudice and Your Child*, in the Second Edition (which I see from your own material you did not use). In this appendix to his book he, by name, tries to counter my own criticism. In turn, I rejoined in another article in the *Villanova Law Review* which I have with me.

Since that time, 1957-1960, quite a number of social scientists have indicated that they agree with my criticism of the factual presentation. However, they do not like my conclusions and, therefore, I recall that when I printed them first I got quite a number of letters from friends and colleagues expressing agreement with what I said which, for reasons that you will see, I think is fairly uncontrovertible but feeling that I should not have published it at the time because they felt that, for other reasons, the general United States policy of integration should not be criticized.

Mr. DE VILLIERS: Could we start at the beginning? You referred to Professor Clark. Did his testimony play an important part in regard to the *Brown* decision as far as you could ascertain?

Mr. VAN DEN HAAG: Well, yes . . .

The PRESIDENT: Mr. de Villiers, in what way do you indicate to the Court that it is relevant what this professor thought, or what part he played in the court's proceedings.

Mr. DE VILLIERS: Perhaps I should not frame it that way, Mr. President. I wanted Professor Clark's testimony as a proposition which he put before the court to be identified with a view to clearing up what the witness has just said to the Court in regard to criticism offered of that proposition. That is all that I am really . . .

The PRESIDENT: Will you then please confine your question.

Mr. DE VILLIERS: Was Professor Clark a professional expert witness in the *Brown* case?

Mr. VAN DEN HAAG: In this sense: (1) the *Brown* case was consolidated with a number of other cases, one of them the *Brown* case itself, and in all these cases in the lower courts Professor Clark testified—and I will describe if you wish his testimony—and this testimony was, of course, part of the record and that record was cited by the Supreme Court in its *Brown* decision. It relied, in short, on the records made in the lower courts of which Professor Clark's testimony was a prominent part. Furthermore (2) in footnote 11 of the Supreme Court Decision, Professor Clark and all the other authorities that he himself has quoted in his brief *amicus curiae*, are quoted to support the court's contention that its decision rests on "modern authority". In other words, Professor Clark is

undoubtedly the "modern authority" on which the court rested its decision.

Mr. DE VILLIERS: Did you check on those various authorities to see what they amounted to?

Mr. VAN DEN HAAG: Yes, I did. Let me point out also, if I may—I just want to make it clear to the Court that we are dealing with the factual basis of the *Brown* decision—here is a brief comment from Professor Philip Kurland, Professor of Law at the University of Chicago. In brief he says: "Dr. Clark's study was utilized by the Supreme Court to provide a factual base on which to rest its conclusion." So there was no doubt that it was Professor Clark's evidence in question. Now, if you want me to indicate what that evidence was, I will.

Mr. DE VILLIERS: Yes, the evidence of Professor Clark?

Mr. VAN DEN HAAG: Yes.

Mr. DE VILLIERS: Yes, please, just briefly what the effect of his evidence was.

Mr. VAN DEN HAAG: Professor Clark made two series of observations or experiments. For the purposes of the lower courts he tested in the jurisdiction of the court 16 Negro children in a segregated school in Clarendon County, South Carolina, and he asked these children to distinguish between dolls that he presented to them, some coloured brown—dark brown, nearly black—and some coloured white, and, having ascertained that these children were able to distinguish colours and were able to identify the dolls as representing either Negroes or Whites, he asked the children questions such as these: Which is the nicer doll? Which doll would you like to play with? and, finally, Which doll is like you? Now, he found that a majority of these Negro children (9 and later in his testimony 10 out of 16) did decide that the white doll was the nicer doll, the doll they would prefer to play with, and, finally that they themselves, although Negro children, were "like" the white doll. From this, Professor Clark concluded that segregation causes considerable harm because it causes these children to be "confused in their identities"—*these are his very words—and that these results that he found* with these 16 children are consistent with previous results which he obtained with over 300 children, and to which I shall turn in a moment.

He goes on to say that this proof that segregation inflicts injuries upon the Negro had to come from a social psychologist, as he himself was.

Now, the interesting thing is that he undertook prior experiments which were in fact undertaken about ten years before the court cases occurred and which were published in a book called *Readings in Social Psychology* and edited by Professors Newcombe and Hartley in two editions, the last one in 1952 (pp. 551-560). I have the photostated chapter with me. Now, in this experiment, Professor Clark tested 134 Negro children in segregated southern schools and compared the results with tests given to 119 Negro children of the same age group which were in unsegregated schools in the north (precisely in Springfield, Mass.). Now, he found that, everything else being equal, "the Southern children in segregated schools are less pronounced in their preference for the white doll compared to the Northern [unsegregated] children". Professor Clark's table 4 which, again, I have here, indicates as much (p. 556).

Now I will be very brief. What this means is that when Professor Clark presented evidence on the segregated Negro children in Clarendon

County he attributed the results, namely that the Negro children identified with the white rather than with the black doll, to segregation. As a matter of fact, in prior experiments which he forgot to mention to the courts, he had found that when Negro children are not segregated their identity is more confused, that is, they prefer the white doll more often and identify—that is, answer the question "Which doll is like you?"—more often by pointing to the white doll.

So if we were to accept the general framework of Professor Clark's experiment we would have to conclude not what he concluded, namely that segregation is harmful to Negro children because it confuses them in their identity, but we would have to conclude quite on the contrary, that when they are not segregated the Negro children tend to be more confused than when they are segregated. Of course one would think that this is really common sense, because when they are together with white children the possibility of confusion and the wish perhaps to be white will become more prominent in their minds than when they are isolated and segregated. However, this conclusion does not seem to have been drawn by Professor Clark.

I called attention in the article I mentioned (*Villanova Law Review*, Autumn 1960) to this curiosity, namely that Professor Clark attributed to segregation a confusion and possible injury that occurs, according to his own evidence, more frequently when there is no segregation. After I had published my results on this and my analysis—which again I will offer for the record—Professor Clark answered (and I am quoting his passage in its entirety):

> "On the surface, these findings [which I have just discussed] might suggest that northern Negro children suffer more personality damage [they are not segregated] from racial prejudice and discrimination than southern Negro children. However, this interpretation would seem to be not only superficial but incorrect. The apparent emotional stability of the southern Negro child may be indicative only of the fact that through rigid racial segregation and isolation he has accepted as normal the fact of his inferior social status. Such an acceptance is not symptomatic of a healthy personality. The emotional turmoil revealed by some of the northern children may be interpreted as an attempt on their part to assert some positive aspects of their selves." (*Prejudice and Your Child*, 2nd enlarged edition (Boston, Beacon Press), pp. 44 ff.)

I would like to submit to the Court here that in the first place Professor Clark starts by speaking, in the quotation I just gave you, of personality damage and ends by speaking of emotional turmoil. These two terms are not the same. A person with a perfectly uninjured personality may have emotional turmoil. That is not symptomatic of an injury to personality, it is symptomatic of a temporary state. But more important, let me point to a very simple thing. What Professor Clark here asserts is, if the outcome of the experiment is that under segregation children prefer, in the majority, the white doll and identify with it, that shows injury. And then Professor Clark goes on to assert that if they again prefer the white doll under no segregation, that also shows injury, or turmoil.

Now I think it is a general rule of scientific procedure that an experiment which, regardless of its outcome, supports the same hypothesis, is not relevant at all and is obviously constructed in such a way as to be

useless in deciding the issue. But Professor Clark has interpreted his own experiment to show that under segregation the preference for a white doll shows injury brought about by segregation, and under no segregation the preference for the white doll also shows injury brought about through no segregation at all.

It follows then that Professor Clark's experiment contributes nothing to the issue, and his conclusions, as submitted to the Supreme Court, stand independently of the evidence on which they are purported to have rested. I know of no other scientific evidence cited by the Supreme Court or existent anywhere that segregation *per se* causes injury. I certainly would not wish to deny that, depending on the historical circumstances, it may cause humiliation, it may be unpleasant, it may be undesired, just as in other cases it may not be so, but I must assert that there is no scientific evidence whatsoever that segregation in the cases contemplated by the Supreme Court, and in any other cases that I am aware of, *per se* causes injury. Please allow me to emphasize *per se* because in the cases decided, in *Brown*, it was stipulated by the two parties that all facilities would be equal and the only question before the court was whether the mere act of segregation in itself was injurious, and this is what Professor Clark tried, and in my opinion did not succeed, to prove.

Mr. DE VILLIERS: Did Professor Clark rely only on these doll tests?

Mr. VAN DEN HAAG: In his own testimony yes. In the brief that formed an appendix to the appellant's brief in the Supreme Court he quoted about at least a dozen books which come to the same conclusion, but none of these books have any scientific evidence for this conclusion. This is, shall we say, a speculative conclusion, and the authors of the books themselves would not indicate that it is anything more.

Let me point out that one reason why it is very hard really to have any evidence directly on segregation is this: in the first place it is extremely hard to test whether a child has suffered an injury to his personality. I am, as I mentioned before, a psycho-analyst and as such I do not know of any test, in the sense in which this word is used in science. Secondly, if you were to find such an injury, I do not think it would be at all possible to be able to say that this injury is due to segregation or any other such large factor. There are quite a number of things that may injure the personality of a child. It may be the behaviour of his mother, it may possibly be a general prejudice existing in the community, it may be all kinds of individual factors, and I would think that such an injury has not been proved; and if I were to try to think of a way of proving or disproving it I must admit that I could possibly try to indicate whether there was some sort of injury, but I would not be able to say directly it is due to segregation or to non-segregation. My own feeling is, to make it very short, that as long as prejudice exists in the community, segregation is probably more favourable to the group against which the prejudice is directed than is congregation, for the very simple reason that as long as prejudice exists a segregated school is likely to isolate them from that prejudice, whereas a congregated school, when the majority or major group of their co-students have a strong prejudice against them, is, of course, if not necessarily harmful, certainly very unpleasant.

Here let me mention that after the Supreme Court decision two students finally entered the State University of Alabama and one of them, after two years, withdrew—his name is James Hood, the case acquired a

certain fame at the time—voluntarily, feeling and declaring publicly (I think that it appeared in the *New York Times*) that he felt that he had a foot "in both races"; that is, he felt in some way that his attending a largely White university in a fairly hostile atmosphere, and at the same time trying to remain a member of the Negro community, put him into a so conflict-ridden situation that he withdrew voluntarily after two years, although his admission had been a lengthy, difficult process, with a lot of law suits and so on.

Mr. DE VILLIERS: I just want, before we leave this subjet, to come back to this question of testing. Did Professor Clark publish material about other tests, such as colouring dolls?

Mr. VAN DEN HAAG: Yes. There is one doll test, which I have just indicated, where dolls were shown. There is another test in which Professor Clark gave a piece of paper to the children, to Negro children in segregated southern schools and also again in non-segregated northern schools, and asked them to colour a variety of things, I think an orange and other things that were on this paper, and the children did so correctly. Then he finally asked them to colour a human figure, suggesting to them that they should colour it with their own colour. Now he found that in the segregated southern schools 80 per cent. of the Negro children coloured the human figure on the piece of paper that they had been given brown, that is with their own colour, but only 36 per cent. of the Negro children in the de-segregated northern schools did so. The remainder of these children either coloured the figures with what Professor Clark called an irrelevant colour, such as green, or something like that, or tried to colour these dolls white, by using a white crayon.

Again, he concluded, of course, that the failure of these children to colour the drawings with the colour that would be correct, according to what they had been asked to do, indicated a personality injury.

Mr. DE VILLIERS: Now, as you have said, those results, taking them at their face value, would appear to support the opposite contention to that of Professor Clark. Could you tell the Court what you think of the intrinsic merit of those tests?

Mr. VAN DEN HAAG: To be frank, very little. The reason for which I would think very little of these tests is very simply this, that I think children's choice of colour may be determined by things that have absolutely nothing to do with segregation or desegregation. Children, in my experience, usually prefer light colours to dark, and in our culture, American culture, and in most countries of the world, though not by any means in all, white stands for such things as purity, innocence, gaiety, and so on, and black stands for such things as evil, terror, night, and so on, so I would think it is fairly natural that children, on the whole, usually will have a preference for white and that I think is a more reasonable explanation of their behaviour than that given by Professor Clark. However, I wish to point out that Professor Clark does not accept the view I have just expressed; that he does feel, and has reiterated that he does feel, that the colour choice was due to segregation or non-segregation and, let me add, that the Supreme Court has accepted Professor Clark's contention rather than my own.

Mr. DE VILLIERS: Have other objections been raised to what one might call the Clark experiment?

Mr. VAN DEN HAAG: Of course, there are numerous things in them which I think from a scientific viewpoint are incorrect. The normal

thing would have been to do far more extensive so-called "control tests"; one could have done control tests with other minorities for instance. One could have done even general control tests; it might be that people in general are confused about their identity and that one need not be a Negro child to have such confusion, in fact a number of social psychologists feel that our times are characterized by such general confusions.

There are all kinds of possible explanations for Professor Clark's results. The one that he selected, the two rather that he selected because he did select two inconsistent ones, are selected quite arbitrarily, I think, to serve a particular purpose. I find no other explanation for this.

Mr. DE VILLIERS: Now have these criticisms and attacks on the reliability of the proposition advanced by Professor Clark, found their echo in any later proceedings in the United States on segregation matters?

Mr. VAN DEN HAAG: Yes. I wrote my own rejoinder to Professor Clark and my original criticism years ago; about three years ago my articles and so on were discovered by a number of lawyers and were used in lower federal court proceedings, at some of which I also testified myself. In two of three cases in which I testified the case was won in the sense that the *Brown* decision was regarded as inapplicable because of a factual vice. However, the Court of Appeals maintained that the *Brown* decision was not necessarily based on the fact but was based on legal considerations and therefore should stand. The matter has been appealed to the Supreme Court which has declined, I think in two cases, to hear it again and in one case the matter is still pending.

Mr. DE VILLIERS: Do you know whether the Supreme Court itself has indicated in subsequent decisions whether it considered its decision in the *Brown* case as resting on the factual proposition, or purely on a view of the law?

Mr. VAN DEN HAAG: No, the decision of the Court not to hear a further appeal was, as you probably know, without opinion so I do not know what considerations were in the Court's mind and one case is still pending; perhaps we will get an opinion in this case.

Mr. DE VILLIERS: Do you know of any scientific defence of Professor Clark after this matter had been raised in public?

Mr. VAN DEN HAAG: The only defence that I know of is the one I read and that seems to me a defence possibly of his conclusion, but not of his experiment.

Mr. DE VILLIERS: Now you have indicated to us already that, quite apart from the authority of the *Brown* case, you do not consider that segregation, or differentiation, must necessarily lead to discrimination in the unfavourable sense.

Mr. VAN DEN HAAG: Yes, as I tried to indicate yesterday, I think, depending on the intention of the user of these devices and on the wishes of those concerned and on the circumstances, segregation must be regarded like a knife, or any other instrument, as neutral; it can be used for surgery, it can be used for murder; it can be used for beneficial purposes, it can be used for malevolent ones.

Mr. DE VILLIERS: And you do not believe in the proposition of inevitable psychological damage following on separation, or segregation, or differentiation?

Mr. VAN DEN HAAG: I certainly believe that this conclusion has in no way been proved and, on the face of it, I would say in many cases, though by no means all, desegregation is probably far more harmful.

Mr. DE VILLIERS: Now we have dealt with the situation with regard to those propositions in the United States of America. You have read our expositions, in our Counter-Memorial, have you not, on the existence of different population groups in South West Africa and on the differences existing between the groups, amongst others, in regard to their culture?

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: Do you find anything inherently improbable in those descriptions?

Mr. VAN DEN HAAG: I have no personal knowledge that would permit me to either confirm or disconfirm them, but what these descriptions, if my recollection does not deceive me, say is simply that there are a number of specific cultures—

The PRESIDENT: I recognize the Agent for the Applicants.

Mr. GROSS: Mr. President, I should respectfully like to have clarification of the intent and purport of the question just asked by counsel; the specific references to the Counter-Memorial upon which the question is based; identification of the groups, and the differences to which the witness is now being asked to testify—all subject, Mr. President, to the general reservation regarding relevance.

The PRESIDENT: I understand. Mr. de Villiers, perhaps you might put your question more specifically.

Mr. DE VILLIERS: Mr. President, may I indicate my purpose is not to ask the witness to give confirmatory evidence of what we said. The witness does not pose as an expert on the situation in South West Africa and I shall not try to use his testimony in that respect. I am merely asking him whether, as a psychologist and a sociologist, he finds anything inherently improbable in our description. I am not taking it any further than that. Following on this I want to ask him what, under the circumstances as we described them and under circumstances of an educational system as described, he would think the probabilities are in regard to inevitable injury in a situation as in South West Africa. That is the purpose of the question.

The PRESIDENT: Perhaps you had better ask the question and then Mr. Gross you can object to the question, it is not much good objecting at large.

Mr. DE VILLIERS: Mr. van den Haag, particularly in our Book III **(II)** of the Counter-Memorial, we gave detailed descriptions of the various population groups existing in South West Africa and I asked you whether you had read that.

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: And whether you had read the descriptions we gave there of differences existing in their levels of development, their modes of life, their habits, their cultures.

Mr. VAN DEN HAAG: Yes, sir, I have read these.

Mr. DE VILLIERS: I merely asked you to indicate whether, in the light of your general knowledge of human relationships over the world, you find anything inherently improbable in those descriptions.

The PRESIDENT: I recognize the Agent for the Applicants.

Mr. GROSS: Mr. President, I renew the objection previously made on the grounds stated, and, more specifically, in the light of the question just asked. I object on the grounds of lack of specificity, since the question cannot be answered in the form addressed without reference to the group or groups attempted to be judged or commented upon by the witness as

an expert or otherwise, and to the respects in which each such group is to be subject to scrutiny by this witness on the basis of expert or other criteria. Specifically, therefore, the objection would raise the question whether this expert, or any other, could testify with regard to such a general question as "inherent probability", or inherent anything else, without at least a foundation laid for the exact subject of enquiry.

There will be a secondary objection with respect to the formulation of a question addressed to this witness with respect to whether a certain issue, or question, or criterion, or argument, is "inherently improbable". Those words, it is respectfully submitted, do not convey any intelligible significance from an expert or other point of view.

Mr. DE VILLIERS: Mr. President, may I point out—

The PRESIDENT: I do not think it may be argued, Mr. de Villiers, at the present moment.

On the question of identification, the identification is by reference to Book III of the Counter-Memorial which the witness might be asked if he has read completely in respect of at least certain pages and certain subject-matter. That identifies the information and then the question is whether the witness, as an expert, is entitled to express his views upon it. In general, he is entitled to express his views. The weight of his views must be a matter for the Court to determine at some subsequent period. But I think first the question may be put to the witness and then, if there is any objection to the form of it that may be taken.

Mr. DE VILLIERS: Then I put that question to you, Dr. van den Haag, whether you find anything inherently improbable in the description as contained in Book III of the Counter-Memorial?

Mr. VAN DEN HAAG: I am aware, as any sociologist is, that there are in this world different human groups at different levels of development, if we take development not to be a matter of developing by regular stages—which is a theory I do not hold—but it is certainly true that some peoples have primitive, and others more complex, cultures, that some are pre-literate and others are literate, that some are more highly developed and others less highly developed in particular respects (for instance, Western civilization has a high technological development, the Indian civilization has a very complex philosophical development but not so complex a technological one, and so on), so there are major differences along those lines and though I cannot vouch for the correctness of the description of these differences in South Africa I should think that, in general, one would expect that different tribes, different people, different groups, are developing in different ways.

Mr. DE VILLIERS: Have you also read, in Book VII **(III)** of our Counter-Memorial, the description given of the aims of, what one might call, the Bantu education policy?

Mr. VAN DEN HAAG: Yes, sir.

Mr. DE VILLIERS: The aims more particularly of resting that education on the basis of a sound respect for one's own culture and developing from there towards drawing new things into that culture?

Mr. VAN DEN HAAG: Not only have I done this but, if you will permit me, I wish to point out that Professor Kenneth Clark, with whom, as I have just mentioned to the Court, I seldom agree, has recently proposed that in the New York schools, in effect, there be introduced a form of resegregation because he has become aware of the fact that for various reasons the Negro pupils are unable to perform on the same level, in the

majority, as the White pupils. Now he ascribes that to cultural deprivation, but he—and, in my opinion, quite correctly—finds that they should be separately schooled, at least for the time being, so as to be able to catch up, and only then be put in schools together with their White co-students, because otherwise the teaching will go, as he puts it, "over their head", and they will lose motivation and so on. So that, even in the United States, where certainly the developments are less dissimilar than they are between Whites and Negroes in South West Africa, segregation is now being recommended in effect on purely educational and didactic grounds.

The PRESIDENT: I recognize the Agent for the Applicants.

Mr. GROSS: I move respectfully that the testimony just given be deleted or ignored, without a specification and citation by the witness concerning Professor Clark's work to which the witness has referred and purported to characterize.

The PRESIDENT: You wish the citation to be made to the work?

Mr. GROSS: Yes, Mr. President, or else the testimony and the characterizations just given be stricken or ignored.

The PRESIDENT: Perhaps the witness will identify where the statement can be found?

Mr. VAN DEN HAAG: I am unable to do so at the moment—I did not bring this with me—these are the conclusions of an interview in the *New York Times*; I will be able to mail the appropriate article to Mr. de Villiers if necessary. Let me point out that this is uncontested, at least in New York; I had not foreseen that I would refer to it, and so I did not bring the documentation with me.

The PRESIDENT: Mr. de Villiers, the information should, at some time, be placed upon the record.

Mr. DE VILLIERS: Certainly, Mr. President.

The PRESIDENT: The evidence will remain on the record; the Court is quite able to evaluate evidence, and if there is no value in the evidence, then there will be no value given to this part of the evidence. If, on the other hand, the Applicants feel that they will need it for the purpose of cross-examining the witness, then the witness will be brought back to enable the Applicants to cross-examine.

Mr. GROSS: Then, Mr. President, the Applicants respectfully reserve the right to cross-examine, and would appreciate the opportunity to examine the documents or any other references to which the witness has referred.

The PRESIDENT: Mr. Gross, I noted yesterday—it might be said now, because it is rather important—that in the course of your objections you said that you had not been given sufficient notice of the purpose and of the type of evidence which was going to be given, and secondly that you could not adequately prepare cross-examination. Without commenting upon whether you could, in the circumstances of this morning, having read the transcript overnight, cross-examine, the Court will not have it appear, because we do not think it to be the fact, that the Applicants are placed in any position of prejudice, and it is proposed, when the witnesses conclude this evidence, that you should be asked whether you propose to cross-examine at all, and if you do propose to cross-examine, whether you propose to cross-examine this morning, and if not, why are you not in the position to proceed with any cross-examination? If you are prejudiced in respect of any particular matter, or claim to be pre-

judiced, then the Court will certainly protect the rights of the Applicants.

Mr. GROSS: Thank you, Mr. President.

Mr. DE VILLIERS: Thank you, Mr. President. Now, Dr. van den Haag, I should like you, as an expert, to assume the correctness of the description you have read about the aims and the nature of the Bantu education policy in the respects I have indicated to you. There will be other evidence about it—there is evidence on the record—I am not asking you to give evidence about the factual correctness of the assumption; but assuming the correctness of that proposition about the aims and the nature of the Bantu education system, would you, in the context of such an educational system, expect that the mere fact of separation of children into different schools must inevitably inflict psychological harm?

Mr. VAN DEN HAAG: No, sir, not at all—I would in fact think that non-separation would be harmful to both of the groups that are congregated; as long as the levels of learning, the backgrounds, the customs, the moves are as different as you describe them to be, an attempted homogenization would certainly be harmful to both, as well as unsuccessful.

Mr. DE VILLIERS: How do you regard this aspect of the matter by way of comparing the situation in the United States with that in South West Africa, making the assumption, of course, that I have put to you?

Mr. VAN DEN HAAG: Well, in the United States there is certainly a much better case for desegregation because, as I mentioned in my testimony yesterday, there is no separate cultural source for the Negroes who are really, generally, participants in American culture. It does not follow that, even in this case, segregation would be necessarily harmful, but it does follow that I do not see a particular need for it, and certainly no need for imposing it by law. As I mentioned a moment ago, in certain cases—and I think they apply to the majority of Negroes whose parents are not either professionals or generally middle-class—it might be useful, even there, to separate at least temporarily to permit, as I said, an equal level to be established where possible, a similar level between Negroes and Whites; but I certainly would think, to come back to a general question, that the need for segregation in the United States is far less than it would be in a place where Negroes have a Native culture of their own.

Mr. DE VILLIERS: Now, you have been dealing with ethnic groups—membership in ethnic groups. The argument against us seems to amount to this: that rights of individuals are denied when they are treated as group members rather than as individuals. The suggestion appears to be that the emphasis ought to fall on the individual rather than on the group when regard is had to their well-being and social progress. What do you say to that?

Mr. VAN DEN HAAG: I certainly would say that the individual is the ultimate constituent of society and of any social group; the very word "individual", which comes from *individuum*—that which cannot be divided—indicates as much, but I would also say, as Aristotle has already pointed out, that human beings are, in his words, *zoon politikon*—that is, they are social beings; that society consists as much of groups as it does consist of individuals, and to regard human individuals as though they are isolated atoms separated from a particular group would be—and I cannot imagine a single sociologist disagreeing with me on that—a very grave mistake. Human beings become human, as it were, only by

being members of a group. It is from the primary group, the family, in the first place that they become socialized or humanized, that they learn the language, that they learn to co-operate with other human beings, that they learn to control their evacuation and to do and not to do certain things that their impulses would otherwise lead them to do, and throughout one's life every human being except those in insane asylums, who are indeed therefore called, sometimes, "alienated"—that is, not capable of participating in group life—the term for a psychiatrist used to be "alienist"—except for these, we all remain members of numerous social groups and, I would say, this is recognized in law. The law indeed does punish for a violation of law only the individual that has violated the particular legal rule, but it imposes obligations on individuals as group members, and it treats individuals very often not in their quality as individuals but in their quality as group members. Let me give you some illustrations, very simply: liability is often as a group member—a child is in most jurisdictions compelled to support his parents when these parents are no longer able to earn a living. Now, the mere fact that the child is a child of these parents—that is, a member of a group, family—establishes the liability; it is, of course, established also vice versa—parents have to support children, but there you might say that they had these children voluntarily and this was an obligation that they took upon themselves as individuals, perhaps but the child has no choice—he has no way of not having parents, and hence if the obligation is imposed on him of supporting his parents it is imposed on him as a member of a group. Similarly in many States we have legislation referring to groups and sometimes to their physiological and anatomical particularities—for instance, women are in the United States and in many other places, as women, not allowed to work certain hours—in short, they are treated by the law not as individuals but as members of the group that is called "women". I spoke of biological groups—there are other groups, ethnically constituted, in which again the law treats people as group members. Just as I left New York, a few days ago, the papers were speaking of a case where a number of Japanese students were being expelled from the United States for having worked in the United States, in this case as waiters in a Japanese club; what happened is that they are permitted to come to the United States as students, but had not been permitted to work. Now this of course is a specific treatment inflicted on these students as members of the group that we call "Japanese", and similarly, I would say, in many other cases individuals are treated as group members; as an American I will be subject to the American draft—that is, to enlistment or recruitment for military service, which I would not be if I were not a member of the group called "Americans". Again, if I go abroad I am very often not treated as an individual, but treated as a member of a group called "strange foreigners" in the first place, and then specifically "Americans"; in some cases I will need a visa on my passport as an American, and in other cases I may not. My own Government so treats me in many other cases—gives me certain rights, privileges and duties which I have as an American, as a male, as a person in a certain age group that I would not have were I not a member of all these groups.

So I would answer your question in two ways: (1) it is a matter of sociological fact that we are all members of quite a number of groups, and (2) the law does recognize that in many instances. Let me add further that where, for one reason or another, either owing to material

developments or sometimes to laws, where this group membership is altogether disregarded and becomes difficult to maintain, there we have consequences to which I alluded already yesterday, which Durkheim described as "*anomie*"—that is, the feeling of not belonging for the individual, and which in modern literature is often referred to as alienation, and this feeling in turn is certainly regarded by most psychoanalysts as basic to neurotic developments in individuals.

Mr. DE VILLIERS: Can it be suggested that the tendency to treat people as group members is diminishing in modern times?

Mr. VAN DEN HAAG: I would not think so. I would say—I am speaking of America now, where I think developments are parallel—I think in fact, and somewhat to my own dislike, the tendency is rising. Take for instance workers in a factory, they may no longer decide individually whether to join a union or not; the law may treat them as group members and say that under certain circumstances, they are compelled to join the union merely by working in a particular plant and regardless of their individual wishes. And I have the feeling that the tendency in modern development is rather to disregard the individual in many cases, and to treat him all too exclusively as a group member. There are some technological reasons why that may be advantageous but it would be of a value judgment to decide whether this justified this legal treatment or not.

Mr. DE VILLIERS: Now, can you give us the background of what you have just dealt with and tell the Court whether you consider that groups can or will or should be formed on an ethnic basis, and respected and treated by the laws on that basis?

Mr. VAN DEN HAAG: Well, Mr. de Villiers, I certainly would not pronounce myself on *should be*, but let us say *are* found on an ethnic basis; this is a matter of fact. This is the very basis of group formation. It is not the only basis, and we do sometimes have group formation which disregards ethnic matters, or is even contrary to them, but most of the time, and in most cases, I would think that ethnic group belonging is the basis for most other group belongings, at least in the United States and I suppose elsewhere too.

Mr. DE VILLIERS: Could you give the Court an indication of the type of consequences one could expect when different ethnic groups are brought into unregulated contact with one another?

Mr. VAN DEN HAAG: Yes, in a very general sense, I would say that the effects of this, unless the contact is carefully regulated, tend to be the production of the phenomenon that I spoke of as *anomie*. Now, another word, which describes about the same, is social disorganisation, and this can be measured by a number of phenomena. Now, the first one who tried to bring about such a measurement was Emile Durkheim who measured, or tried to indicate that the rate of suicide would be an evidence for the presence and frequency of *anomie*. I have, and I would like to quote here another attempted measurement, which strikes me as very pertinent; it is based on the rate of delinquency. Professor Bernard Lander in a book called *Towards an Understanding of Juvenile Delinquency* and published by the Columbia University Press in New York, measured delinquency rates in the city of Baltimore and he compared the rates as they occurred in 1903—that is 60 years ago—and as they occurred again in 1940 and 1950. The results, I would like to very briefly quote. In 1903 he found that—

"Delinquency was highest in those sectors of the city that were in the main inhabited by the foreign born."

Presently he finds the following—referring first to the Negro delinquency rates, he finds—

"The Negro delinquency rate increases from 8 per cent. in areas in which the Negro population is less than 10 per cent. of the total population, to 14 per cent. in tracts with a Negro population of between 30 and 40.9 per cent. However, as the Negro population increases beyond 50 per cent. the Negro delinquency rate decreases to 7 per cent. in areas with 90 per cent. Negro population. A similar pattern characterises the white group. As the Negro proportion increases to 50 per cent., the delinquency rate increases. As the percentage of Negroes increases beyond 50 per cent., the delinquency rate decreases, thus when other factors [such as income level, educational level, residential accommodations, and so on, when all other factors] are held constant, delinquency rates in Baltimore are highest in areas with maximum racial heterogeneity."

To briefly paraphrase what I think is reasonably clear from the quotation, what Professor Lander has found, and it is generally confirmed, is that where there is a great degree of unregulated culture contact, there rates of delinquency increase. Where the population is culturally and ethnically reasonably homogeneous, whether it be black persons or white, all other things being equal, the delinquency rate decreases: that is, the delinquency rate, all other things being equal, is a function of ethnic heterogeneity. Of course the explanation for this is very simple. As groups with different mores and so on, come in contact with each other, the authority of the customs and mores of each group, in the minds of its members, suffers from their proximity to different mores which they do not fully comprehend, but which in some way weaken their own. The result is a higher delinquency rate.

Mr. DE VILLIERS: Just to get it clear on the record. Is this quotation, which you read to the Court, from Professor Lander's work itself, or is it a passage taken over in another work?

Mr. VAN DEN HAAG: I used my own book *Passion and Social Constraint* in which I quote Professor Lander.

Mr. DE VILLIERS: Will you give that reference please for the record?

Mr. VAN DEN HAAG: It is on page 183 of *Passion and Social Constraint*, of which I am the author.

Mr. DE VILLIERS: Now, are there authorities to which you would like to refer on the effect of race mixture, that is, shall I say, where races or ethnic groups are brought into unregulated contact with one another?

Mr. VAN DEN HAAG: Yes, quite a number. I would like to indicate first the way groups are formed and what the changed contact may mean specifically. Let me quote in this respect, Professor Glaister A. Elmer of Michigan State College, *Sociology and Social Research*, Volume 39, No. 2, 1954, pages 103-109. Professor Elmer and I quote:

"The real identifications of individual members are anchored in the group. A sense of loyalty and solidarity is generated in them as a natural process which manifests itself in actual behaviour. As individuals become members of a group, the social process of integration is taking place. Besides the individual members of the

group, the integration binds the social values and goals, the psychic characteristics and the in-group symbols with which the individual members become identified. The social identification which evolves thus constitutes the basis of group solidarity, from which results observable, measurable behaviour.

Social identification is the overt and covert manifestation of a 'we' feeling. There must be a personal consciousness of 'belonging to' or 'being part of', which is reflected in the opinion and the behaviour of the persons concerned. Group membership identification implies not an individual *reaction toward a group*, but his reaction as a *functioning element of the group*. This implies a consciousness of kind, a oneness, a lack of social distance." (P. 105.)

That was Professor Glaister Elmer.

Now I would like to refer to this more specifically as it applies to heterogeneous populations by quoting Professor George A. Lundberg, who is a professor of sociology and a former president of the American Sociological Association.

The PRESIDENT: Mr. de Villiers, interrupting you, the witness is quoting other experts. Does he affirm that the views of the other experts, which he is quoting, are his views?

Mr. DE VILLIERS: Mr. President, I think he indicated initially a certain proposition and he is quoting other experts in support of the proposition, but I shall bring him back to that question.

Mr. VAN DEN HAAG: I certainly am willing to assert that those experts I am now quoting do utter opinions which I endorse.

Mr. DE VILLIERS: Thank you.

Mr. VAN DEN HAAG: I would like, on the same subject to quote Professor Lundberg from an essay of his called "Some Neglected Aspects of the Minorities Problem" which appeared in the magazine *Modern Age*, Summer, 1958 (p. 286):

"In every society, men react selectively to their fellow men, in the sense of seeking the association of some and avoiding the association of others. Selective association is necessarily based on some observable differences between those whose association we seek and those whose association we avoid. The differences which are the basis for selective association are of indefinitely large variety, of all degrees of visibility and subtlety, and vastly different in social consequences. Sex, age, marital condition, religion, politics, socio-economic status, color, size, shape, health, morals, birth, breeding, and B.O.—the list of differences is endless and varied, but all the items have this in common: [first] they are observable, [second] they are *significant* differences to those who react selectively to people with the characteristics in question. [They are perceived as significant differences whatever their objective significance may be.] It is, therefore, wholly absurd to try to ignore, deny or talk out of existence these differences just because we do not approve of some of their social results."

And again, let me quote Professor Lundberg, from a different paper in which he tried to test this theory of selective association by asking high-school students what their preferences were, and observing their preferences in association in work, in dating, in social intercourse and so on, under a variety of circumstances. This article by Professor Lundberg,

appeared in *The American Sociological Review*, Volume XVII, in February 1952, and it is entitled "Selective Association Among Ethnic Groups in a High-School Population". In this, Professor Lundberg states—I am just quoting a few passages, the article is too long to read (p. 34):

> "Every ethnic group showed a preference for its own members . . . a certain amount of ethnocentrism [that is, concentration on one's own ethnic group and preference perhaps] is a normal and necessary ingredient of all group life, that is, it is the basic characteristic that differentiates one group from another and this is fundamental to a social structure."

Mr. DE VILLIERS: You have indicated that you agree with the views there expressed.

Mr. VAN DEN HAAG: Yes.

Mr. DE VILLIERS: Could you indicate to us how early this consciousness of kind would start in the human life?

Mr. VAN DEN HAAG: I have made no personal studies on this but I would like to submit for your consideration the studies that have been made by others; let me quote a study by Marion Radke, Jean Sutherland and Pearl Rosenberg, which appeared in the magazine, *Sociometry*, Volume XIII, May 1950, and entitled "Racial Attitudes in Children". The children in question there are of the ages between 7 and 13, altogether 475 Negro children and 48 White children. Allow me to just quote the conclusion of the study (p. 170):

> "The White children in all situations and at all ages (seven to thirteen), expressed strong preference for their own racial group. This is particularly the case when the choices between Negro and White children as friends, are on an abstract or wish level [this was done through a picture test] . . . The inter-racial choice, is limited strictly to the classroom and does not carry over to the community in which the proportions of Negro and White populations are the same as in school. The White children express unfavourable attitudes towards Negroes by assigning the undesirable behaviour characteristics to the photographs of Negro children; this applies again to all age levels."

Now there is another paper which I would like to quote here by Mary Ellen Goodman of Radcliffe College and which appeared in the *American Anthropologist*. It is entitled "Evidence Concerning the Genesis of Inter-Racial Attitudes" and it appears in the October-December, 1946, issue of the *American Anthropologist*. The Goodman study concludes—and I will only read the conclusion (p. 429):

> "Preliminary analysis leads to the belief that these children of approximately 3 to 4 and a half years were in the process of becoming aware of race differences and of their implications."

This conclusion is finally supported by one more study I would like to quote: this one is by Catherine Landseth and Barbara Child Johnson, both of the University of California and entitled "Young Children's Responses to a Picture and Inset Test, designed to Reveal Reactions to Persons of Different Skin Colour". This appeared in the magazine *Child Development*, Volume XXIV, March 1953. Again, I will quote merely the conclusion. It is (p. 78):

"Patterns of response to persons of different skin colour are present as early as three years and become accentuated during the succeeding two years."

So if I may now conclude from the views of these experts, and while I repeat, in this particular field, I do not regard myself at least as an empirical worker, it seems that consciousness of kind, particularly as regards skin colour, starts about the third year, about three years, that is, the fourth year, and continues and increases. I would like to add a note here; no present evidence that I know of has been able to distinguish to what extent such consciousness of kind is due to possible parental influence and to what extent it is, as it were, spontaneous. It would be very interesting to find that out but no-one has so far, been able to devise a method that would permit us to make this distinction.

Mr. DE VILLIERS: Dr. van den Haag, you have indicated the tendency to recognize ethnic differences and distinctions, a tendency towards separation, living apart, but those tendencies are universal. You have given examples mainly in regard to the United States, about certain aspects of life there. Can you think of other examples which you would like to mention in this context?

Mr. VAN DEN HAAG: I think the tendency is universal and I would like to give some examples from Brazil. I have a special reason for that—Brazil is one society where there has been traditionally no legal racial distinction, and it is also a society where, it is well known, a variety of racial strains have not only lived together, but mixed quite freely. I should like now to quote from an article by Professor Emilio Willems, called "Racial Attitude in Brazil", which appeared in the *American Journal of Sociology* in March 1949. The pages from which I am quoting are 403-404, and 406. Professor Willems enquired with a number of people who had advertized for employees under various circumstances in Brazilian papers. He subjected these people to a questionnaire, and his results are as follows (p. 403):

"Of the 245 advertisers, 194 were interviewed. 18 advertisers did not accept Negro servants because of presumed lack of cleanliness; 30 thought black housemaids were always thieves; 14 alleged instability and lack of assiduity; 12 said only that they were used to white servants" . . ., etc.

Again, I quote from another passage in the same article, page 404 of Professor Willems. He said that his interviewees felt strongly that they did not wish to take as equals negroes; he interviewed negroes of middle-class standing and (p. 404)—

"they felt strongly that they were not taken as equals. There are many situations in social life where white people refused to be seen with negroes; in such public places as high-class hotels, restaurants or casinos, fashionable clubs and dances negroes are not desired, and there are few whites who dare to introduce negro friends or relatives into such places".

This occurred in Brazil.

May I quote one more instance (p. 406):

"Another questionnaire was connected with the exclusion of coloured persons from certain barbers' shops, restaurants, hotels, and theatres. In 20 cities such exclusion was admitted, while in 10

it was denied. [In one case protests were made by a coloured Army Officer who had been denied service in a barber's shop in a Brazilian city, and] the barber himself implored [the customer and] the crowd not to damage his shop, saying that he was not guilty of any discrimination. Exclusion of coloured people had been imposed upon him by his white customers."

Let me add, Mr. President, that I do not myself subscribe to any of these stereotypes or adverse attitudes felt against Negroes; I am a sociologist, on the other hand, a student of the presence or absence of such attitudes, and I find it interesting to note in this case that these attitudes exist in Brazil, which in the United States is usually popularly upheld as a model of an inter-racial society where such phenomena as are infamous in the United States do not exist.

I would like to support this point further by quoting from an article by Roger Bastide, which appeared in the *American Sociological Review* in December 1957. Professor Bastide writes as follows, on page 691:

"Stereotypes against negroes and mulattoes are widespread. 75% of the sample accept 23 or more stereotypes against negroes. No one rejects all stereotypes against negroes. For mulattoes, the overall picture is somewhat more favourable though very similar. Mulattoes are judged inferior or superior to whites, on the same traits as negroes but with somewhat lower percentages. The most widely accepted stereotypes are lack of hygiene (accepted by 91% for negroes), physical unattractiveness (87%), superstition (80%), lack of financial foresight (77%), lack of morality (76%), aggressiveness (73%), laziness (72%) lack of persistence at work (62%), sexual perversity (51%), and exhibitionism (50%)."

I wish to emphasize once more that these are stereotypes, according to these scholars widespread in the percentages quoted in a sample of white Brazilians, held against people classified by these white Brazilians as Negroes or mulattoes within Brazil.

Mr. DE VILLIERS: I shall later ask you about tendencies of increasing or decreasing the holding of such stereotypes in various circumstances, but first I should like to ask you whether you wish to refer to other examples of the same thing, say, outside of the western hemisphere.

Mr. VAN DEN HAAG: Well, my notions of geography are a little vague. Let me refer to some instances in Russia. The Russian Government has purported, at least for a very long time, to be bitterly opposed to all such racial and ethnic stereotypes, and it has indeed taken legislative measures against various group hostilities, or so we are told. Furthermore, it has been the contention of the Russian Government that such prejudicial attitudes are connected with a system of economics other than that prevailing in Russia, and would necessarily disappear there. Nonetheless, I wish to point out that American Jewish leaders have contended over the years, and are contending now, that there is widespread anti-Semitism in Russia, and that it is supported at least by the lower echelons of the Government and possibly also by the higher ones.

With your permission, Mr. President, I would spare you reading a whole article, but I would like to put it into the record. The article I have in mind is written by Mihajlo Mihajlov, a Yugoslav who has recently indeed had some difficulties with the Yugoslav Government by publishing his travel diary in the Soviet Union. This gentleman is himself a declared

socialist, a Marxist, and he is also not a Jew, and he describes at considerable length instances of anti-Semitism, official and unofficial, that he found in Russia (*The New Leader*, 7 June 1965, p. 7).

I also would like to call your attention, Mr. President, to the facts that have been quite recently discussed in the world press that in Russia there certainly was no Negro problem because there were no Negroes, to speak of, but as a number of students from a variety of the new African countries were invited to study at Russian universities, it was found, according to these students returning to their homelands, that the Russians exhibited a considerable amount of anti-Negro prejudice and resentment. In fact, a group of more than a hundred . . .

The PRESIDENT: Mr. de Villiers, perhaps you would indicate to the Court to what particular part of the case this is directed. It seems to be a little far afield, does it not?

Mr. DE VILLIERS: Well, Mr. President, perhaps the measure of detail . . . As I have indicated, I am asking the witness next, after describing these phenomena as he observes them in various parts of the world, what lessons are to be learned from them with a view to determining upon governmental policies in particular types of situations.

The PRESIDENT: It does not involve, does it, going into the detail which is being gone into?

Mr. DE VILLIERS: Yes. Dr. van den Haag, it is perhaps not necessary to go into all the detail but is there anything that you wish to add in general to that point?

Mr. VAN DEN HAAG: The only point I can make very briefly is, that as you introduce a new group, ethnically different, you will, everywhere in the world, find the creation of ethnic prejudice, attempt at ethnic separation, unless this introduction is preceded and continuously associated with a very careful governmental regulation that permits the introduction to be gradual and to allow for acceptance by each group of the alien groups.

Mr. DE VILLIERS: Now, how do you explain the universality of this phenomenon, this tendency of different ethnic groups to want to associate with themselves, to be separate from others?

Mr. VAN DEN HAAG: Well, you are asking me a theoretical question. I think I will give a theoretical answer, and, if I may, I would like to start by quoting an article by Professor Gustav Ichheiser entitled "Socio-Psychological and Cultural Factors in Race Relations", which appeared in the *American Journal of Sociology*, March 1949.

The PRESIDENT: Mr. de Villiers, again I must ask, in respect of evidence such as this, does the witness indicate (he says this is a theoretical matter) that although he is expressing the views of somebody else, does he concur in those views, because that must be established. Otherwise, the evidence would be worthless.

Mr. DE VILLIERS: Thank you, Mr. President. Will you please indicate, Dr. van den Haag, what your views are about the matter on which you are about to quote?

Mr. VAN DEN HAAG: I fully agree with Professor Ichheiser's view. I am quoting from page 395 of the article that I mentioned:

> "People who, in a significant way, look different to one another have a tendency to consider one another as not only looking different but also as being different, and they have this tendency because our socio-sensory perception of the physical appearance of other people

is essentially symbolic in character. The external personality is immediately perceived as a manifestation of the inner personality which it actually or supposedly reveals and represents."

May I emphasize that neither Professor Ichheiser nor I feel that one's physical appearance necessarily discloses one's personality. But what Professor Ichheiser and I both assert is that the impression one has from the physical appearance of someone else tends in most cases to lead to a judgment, however untrue it may be, about the personality of the person one has encountered.

I would like to quote further from Professor Ichheiser, at page 396—the same article:

"Since members of different racial groups, like White people and Negroes, look significantly different, they have a very strong tendency to consider each other not only as looking but also as being different and, consequently, as belonging to two different groups. The degree of disparity between the bodily appearance plays, as experience shows, a very important role. They have this very strong, possibly irresistibly strong, tendency whether they are explicitly aware of it or not, whether they honestly admit it, or hypocritically deny it, whether they would be able to define what this being different means, or not. This means also that this basic socio-sensory perception of difference in physique plays a powerful role in the conscious, and probably still more powerful role in the unconscious group identification. Looking at each other is the most primary form of conversation. Between White people and Negroes the initial and basic part of this conversation is concluded before they start to talk with one another. In spite of Marxian theories we are unconsciously more deeply identified with those who talk as we talk, behave as we behave, look as we look, than with those with whom we have identical economic interests. Again, whether we are aware of it or not, whether we admit it or not, 'we', 'you' and 'they' mean certainly one thing to the White person and another thing to the Negro. To put it another way, our bodily appearance, our external personality, constitutes obviously an integral part, in terms of social identification, an extremely important aspect of our total personality. As a matter of fact, it is the core of our social image. Consequently, in terms of social psychological reality, people who look different are different. I think we should realistically admit this fact and discontinue to deceive ourselves and one another. Nobody, in fact, is seriously able to believe that White people and Negroes belong to the same social group, because our eyes tell us that this is not true, and the eyes are our sense of reality. In everyday life we believe what we see. Thus, the real segregation is not in space, but in socio-sensory perception, and its basis is not a cultural pattern or social system, or prejudice, but the nature of our perceptual experience."

I want to add one more paragraph to this, from page 398:

"The tendency of White people to consider Negroes as being different, as belonging to another group, is much more deep-seated than the tendency to consider them as being inferior, or whatever else is suggested by the cultural pattern. Hence, although it is not easy and will not be easy to convince White people that Negroes

> are not inferior, this is still easier than to convince them that they are not different."

Mr. DE VILLIERS: Do you understand the author to suggest that they are in fact not different?

Mr. VAN DEN HAAG: No, I do not think that that is what the author is suggesting. He is suggesting that in the sense of social psychological reality they are perceived as different. I do not think that he deals with whether such differences do objectively exist. As a sociologist he is interested in people's perception of each other, not in the separate, say, perception by scientific instruments. He is interested in the social perception that we have of each other, so he makes no judgment on whether they truly are different, though certainly it is implied in his writing that he makes the judgment that they are not in any way either inferior or superior—a view that I also hold.

Mr. DE VILLIERS: But in referring to the social perceptions of differences he refers to the fact that those do not necessarily correspond to what the true position is: is that how you see it?

Mr. VAN DEN HAAG: I think that is implied, yes.

Mr. DE VILLIERS: What happens when there are attempts at assimilation of one group with another, depending, of course, on particular circumstances? Could you indicate to the Court what factors are involved?

Mr. VAN DEN HAAG: I really think that I have very little to add to what I have already said before. There are circumstances when this can be successfully accomplished, when it is carefully regulated, when there is a lot of groundwork laid, when it is done slowly, when it proceeds by mutual acceptance. I think the attempt to do so by coercion is not likely to be successful, and if it were so to speak legally objectively successful it would lead to very unfavourable psychological consequences for the individual group members. As I mentioned, it would lead to such things as *anomie*, connected with a high rate of delinquency, probably a high rate of mental disease and neurosis—I say probably because we have not been able to measure that statistically—and so on.

Mr. DE VILLIERS: Have you again a quotation from Dr. Ichheiser that you wanted to refer to on this subject?

Mr. VAN DEN HAAG: Well, yes; this would refer to the attempt that is sometimes made by members of one group to, so to speak, leave that group where this is legally possible. I think that I mentioned before that in many cases this is legally not possible or materially not possible, but, for instance, it is possible, legally, for a Negro in the United States to try to assimilate and to regard himself as a member of the white group. Now if his skin colour is very dark, such an attempt is unlikely to succeed because there would be very visible signs of distinction. But sometimes when the skin colour is reasonably light such attempts are made, and they are known amongst sociologists as attempts at "passing". Professor Ichheiser, and I am now referring to page 399, puts it this way:

> "If Negroes would refuse to identify themselves consciously with Negroes as a sub-group then they would develop a kind of collective neurosis, as do other minorities too, for the conscious 'we' would in case of such an attitude be persistently in conflict with the unconscious 'we', and this inner split would invariably reflect itself in different pathological distortions of the Negro personality."

My own comment on this is, generally speaking, that if one's external identification does not correspond with one's internal identification there is of course a strong conflict which may lead to pathological phenomena.

Mr. DE VILLIERS: Do I understand you to mean—you can correct me if I am wrong—that even where it may be legally possible, even where it may be materially possible, then still psychologically and sociologically it is extremely difficult for a member to quit his group?

Mr. VAN DEN HAAG: You are entirely right, yes.

Mr. DE VILLIERS: Now you were dealing with traditions, with notions, with inclinations: are they not all created by human beings and is there not an argument which runs to the effect that when you can teach certain inclinations they can again be untaught?

The PRESIDENT: Mr. de Villiers, I do not think you ought to lead the witness. That was a leading question.

Mr. DE VILLIERS: No, Mr. President, I am putting a proposition to him which I do not agree with. I am asking him for his comment on the proposition.

The PRESIDENT: Well you could put it another way, I should have thought.

Mr. DE VILLIERS: The argument is sometimes used to the effect that when there are inclinations on the part of human beings they must have been taught and they can again be untaught. What do you say about that proposition in the context of our discussion?

Mr. VAN DEN HAAG: There are two points which perhaps I would make. First let me distinguish—when you say "taught", if you mean formal teaching, such as we have in a school, I would certainly think that what has been taught in a school can in a sense be untaught; but if you mean by "taught" something that is indeed learnt without being formally taught, then your proposition that that which human teaching or learning has initiated can also be eradicated by a different sort of human learning I do not think is correct. Language, for instance, is learnt informally, you are not born with it, yet any attempt deliberately to change people's language habits has been, although individually quite often successful, collectively unsuccessful. Grammarians, for instance, for many years have been trying to impose a particular linguistic use in many languages on people at large and they have succeeded with some of their pupils but they have not succeeded in influencing the development of language as a whole. Indeed, I would say that the general idea that what human beings have created they can also uncreate unfortunately is not altogether true.

If you look at such phenomena as war, for instance, which as far as I know no one likes and is certainly a type of human action, nonetheless, we have not found a way so far of preventing it, and as we are talking several wars are going on in the world. So I would say that the fact that it is a learned type of behaviour, and I would agree if you speak of racial matters that it is a learned type of behaviour, at least we have no evidence that it is innate, but from this fact it does not follow altogether that it can be unlearned, so I would myself believe that it could be modified.

Let me add another point. When the behaviour, however arrived at, is functionally necessary, so that it serves within the group a certain social or psychological function, then I think it is pretty much and very nearly impossible to make people unlearn it. When, on the other hand, it

is behaviour that could be replaced by a different kind of behaviour that would serve the same function, or would permit the group to continue to function, then I think the chances of unlearning that behaviour and replacing it with a different kind are better.

Mr. DE VILLIERS: Could you give an example of cases where you think it may be functionally necessary?

Mr. VAN DEN HAAG: Well, I think group identification as we have now discussed it several times is functionally necessary, and I do not think that it is possible, as Professor Ichheiser has also stated, to make people believe that there are no differences between different ethnic groups. The particular prejudices that people have built up about particular ethnic groups possibly can be unlearned or at least be modified not, in my opinion, probably by formal learning but by a variety of social agencies. Although the feeling and the prejudice that a particular group is inferior or incapable and so on, can possibly be unlearnt and it will take quite a while, the feeling of differentiation, in my opinion, cannot, because that is functionally in the nature of human groups.

Mr. DE VILLIERS: Could you then give an indication to the Court of what you think the role of education could be in the shaping of human relationships, especially across the lines of ethnic group formation?

Mr. VAN DEN HAAG: Let me point out that very great hopes were held for education by most authorities until about 10 or 15 years ago, when a number of studies were made, of which I will quote one, which indicated that education in the formal sense has been quite ineffective, even in removing the more gross stereotypes and prejudices. I would like to add that this does not make me altogether pessimistic on the possibilities of education, but it makes me feel that we ought to consider more carefully what a prejudice consists of, and in particular we ought to bear in mind that the concrete expression of the prejudice is usually a rationalization, that is a formulation in cognitive form of what is in effect a pre-existing feeling or emotion; and that we are unlikely to achieve anything by giving cognitive information. What we have to attack is probably the feeling or the emotion that predisposes to the acceptance of cognitive information or misinformation—that makes the person who has that emotion select his information so as to serve the emotion. And as to how to do that I am afraid I am not altogether able to give a prescription and no one else so far has.

But let me first quote from Charles Stember, Professor of Sociology at Rutgers University, that is the State University of New Jersey, from a book of his called *Education and Attitude Change*, which was published by the Institute of Human Relations in New York in 1961. I quote from page 168:

> "Most research suggested that the educated were less prejudiced, but the present study finds that on many issues the educated show as much prejudice as the less educated, and on some issues they show more. The educated are more likely to hold certain more highly-charged derogatory stereotypes, they favour informal discrimination in some areas of behaviour, reject intimate contacts with minority group members."

I am now quoting from page 171:

> "As we go up the educational ladder old images of minorities are replaced by new ones, often no less harmful. Covert discrimination

continues to be acceptable, and most important perhaps, the desire to keep minorities at some social distance remains."

Page 173:

"The influence of education is more superficial than profound, reaching most strongly those aspects of prejudice which are least entrenched in the normative system."

And the conclusion, more or less, on page 180:

"When the issues are sensitive or controversial, the effect of education is either minimal or inverse."

Finally, on the same page:

"The effects are usually strongest where education tends to set off a group more or less distinctly from its environment. The data suggests that the effect of education on the whole is minimal."

Now, I would like to tell the Court to what extent I endorse the passages I quote. I certainly do endorse Professor Stember in general; I am not quite as pessimistic myself as he is; I think his study reflects correctly what he did find; similar studies have been made and have had the same result, but I think that if we were to try to proceed with different methods of education, and possibly different educational agencies, our chances of reducing prejudice might be better.

Mr. DE VILLIERS: To what extent could you say that these views that have just been stated about education are generally held or otherwise?

Mr. VAN DEN HAAG: Well, they are now quite generally accepted among sociologists, but this is a fairly recent development. Ten or 15 years ago the opposite view was held.

Mr. DE VILLIERS: Now, could you explain why—as you have indicated to the Court—prejudice is so hard to eliminate either by education, or by de-segregation, or by both, when they are taken by themselves?

Mr. VAN DEN HAAG: I would say we know very little really about the basis of prejudice, but I would like to make a distinction. Some of it arises from mere ignorance, and then I think by cognitive information could be dispelled. But the major part of it arises the opposite way, I would say; it is not ignorance that causes the prejudice, but rather the prejudice that causes the ignorance. It is the prejudiced person who does not absorb information that he does not wish to absorb. I do not believe that this has much to do with segregation or de-segregation, in the sense that de-segregation would remove the prejudice.

Let me indicate why. It was only a few hundred years ago that literally hundreds of thousands of elderly women were burned in western Europe, particularly in Germany, as witches. These women lived in the villages, in which their neighbours insisted that they had seen them riding on broomsticks and doing all kinds of things that, according to what we know today, they could not possibly have done; yet there is good reason to believe that these neighbours were in good faith; they did not lack contact with these women, they were not segregated from them. What happened is simply that these women were old and seemed just a little strange and different to the villagers and the rest of the fantasy seemed to follow.

The church in many of these cases tried to avoid such witch burning and so on, but gave in to popular pressures.

The PRESIDENT: Mr. de Villiers, I really think we are going a bit far

away from the issues of this case, with witch-burning and so forth.

Mr. VAN DEN HAAG: Well, that much could, of course (the case took place in Germany) indicate that prejudice may arise despite reasonably intimate contacts. I want to make it very short; just let me add that we know very little about how a preference, and a negative preference, may arise; we do know that generally people prefer people that they think are of their own kind, that they perceive as people of their own kind, and that prejudice arises when people of a different kind seem to threaten the identity of the people who hold the prejudice. The more identification through group membership is felt to be threatened the higher the intensity of the prejudice. That much has, I think, been fairly generally established. When people feel fairly secure in their identification as group members, when they do not feel that the identity of the group is threatened, then their prejudice is lower; hence, when, there is physical or social distance.

Mr. DE VILLIERS: Are there circumstances in the United States in which it has been possible to observe whether separation may or may not have positive consequences—consequences to the good?

The PRESIDENT: Mr. de Villiers, the question as you have put it would seem to be not admissible. Whether there are circumstances existing in the United States which lead to this or that can only be relevant if the certain circumstances of which the witness is aware lead him to some conclusion in relation to this case. We are not concerned about circumstances as such in the United States of America.

Mr. DE VILLIERS: Thank you, Mr. President. That I intended to imply in the question, but I agree, I could word it more specifically.

Are you aware of circumstances in the United States which could, in a sense relevant to our discussion, have some bearing on the question whether separation could lead to good consequences or not?

Mr. VAN DEN HAAG: There are a number of communities which are practically all Negro communities and in which there is a fair degree of isolation. Of course, in the United States isolation is never complete. I have not studied these communities personally, but I have looked at the literature and I would like to offer the conclusions of two writings on this, the first by Professor Mozelle Hill called "A Comparative Study of Race Attitudes in the All-Negro Community in Oklahoma"; this appeared in the magazine *Phylon* in the third quarter of 1946, and I am quoting from page 268, which contains this conclusion:

> "An individual residing in the all-negro society will have a much higher regard for negroes. He will be more equalitarian in his attitudes towards them, and thus more favourable in his expressions towards his race. It appears safe to conclude that the all-negro youths have a higher opinion of negroes, due to the absence of pressure of the white man, combined with their essentially middle-class ideology."

This is the conclusion of Professor Hill from his study of an all-Negro community in Oklahoma.

Mr. DE VILLIERS: And what is your view about this?

Mr. VAN DEN HAAG: It seems, on theoretical grounds, extremely likely that Professor Hill is right, but as I have said, I have not made a study directly of such a community. As I have mentioned before, I feel that isolation is in many cases favourable to identification of each group, so I would tend theoretically to feel the conclusion is likely, but I have

not studied the group. Let me add one more quotation by Professor Allison Davies, from his article "Racial Status and Personality Development", which appeared in the *Scientific Monthly* in October 1943; I am quoting from page 358:

> "Where the social group of the racially subordinate individual is highly organized and integrated, as in the Little Italies and Chinatowns, or in many southern negro communities, its members will usually have relatively less psychological conflict over their racial status."

And again, at page 359:

> "An individual's racial status may be expected to have a marked effect upon his personality if his race is subordinated in community relationships [he means informal relationships here], if his group is ashamed of its culture and seeking the culture of the dominant group, and if it has no integrated society of its own.
>
> The age of an individual is a crucial factor in determining the scars of racial status upon his personality. The American Youth Commission's recent study of personality development among negro children in southern cities revealed that their racial status had a somewhat minor influence upon their personalities"—

and this is, he indicates, because—

> "during both the first and second decades of life these children were more deeply concerned with, and emotionally influenced by, their family, their play groups, their school and Church, than by their consciousness of their subordination to whites. This fact I attribute to the relative lack of direct contact with the white world at that age."

These two authors seem to maintain, as I understand them, that as far as the personality development of Negroes is concerned, it benefits when there is a rather high degree of isolation from Whites, at least in their early years.

Mr. DE VILLIERS: Now, considering these various tendencies in human behaviour and human reactions, to which you have referred, do you consider that the outlook about relations between people is an entirely pessimistic one, or are there constructive lessons to be learned from this subject?

Mr. VAN DEN HAAG: Well, there are certainly lessons to be learned. I do not know to what extent we have been able to profit from them. If I understand you correctly, you asked about my own conclusions?

Mr. DE VILLIERS: Your own conclusions, yes, and particularly in regard to governmental policies in particular situations, or you might differentiate between those.

Mr. VAN DEN HAAG: Well, I would put it this way. The greater the cultural differentiation, the more both groups have a culture of their own, the less I would urge any immediate and sudden homogenization, the more I would want the two groups to remain relatively isolated from each other and, if necessary, I would go so far as to propose that this isolation be undertaken by legal measures for, if it is not, I would say that the technologically less advanced group would be simply overrun by the more advanced group. For instance, American Indians were not, at first, legally isolated from the non-Indian Whites and the major effect

of that was that they were immediately corrupted with alcohol and other things—that is they took on habits by using activities and materials that arose from White culture—which were incompatible with their own culture and which led to the destruction of the Indians as a social group, and almost as a race. This, I think, should be avoided by all means and I should say that sometimes legal measures are probably useful for the protection of the culture of the group that is not technologically advanced.

In the United States itself—well, I do not think that is too relevant, perhaps I should not go on to it.

Mr. DE VILLIERS: What significance do you, in general, attach to the factor of a group considering itself, or its identity, or its standard of life, threatened, or not, by another group?

Mr. VAN DEN HAAG: When it does, I think the amount or intensity of prejudice tends to rise. That is all I have to say on that.

Mr. DE VILLIERS: And would you say the contrary is true?

Mr. VAN DEN HAAG: Yes. The more secure—and this incidentally applies to individuals as well. We have quite elaborate studies of that by a number of authors such as Marie Iahoda, and others—the major book, which I would not uncritically endorse, but which certainly in part is correct, *The Authoritarian Personality*, with regard to individuals found the more the individual feels his status as a group member, and within the group, threatened, the higher his degree of prejudice, and I would think that holds for the group as a whole too.

Mr. DE VILLIERS: Now I should like to conclude by asking you to what extent the views you have been expressing do, or do not, find general acceptance in your field of learning? First, could you give a general indication how the conclusions at which you arrive stand in your field of learning?

Mr. VAN DEN HAAG: Well I can make this rather simple. Most of my colleagues, I think, are unwilling to accept my policy views, that is, my general conclusions. They are contrary to the prevailing ideology in the United States; they are contrary to what I have attempted to call sociological fashion, which 50 years ago insisted that differences existed that have since been found not to exist and which now insists that differences do not exist which I think do exist. Thus my views are unfashionable and not accepted inasmuch as they refer to proposed policies. But, as far as the arguments are concerned and the facts that I have today presented to this Court, I know of not a single one that I would think is seriously contested by my colleagues.

Mr. DE VILLIERS: Could I ask you specifically, on a question of what *constitutes a human group*—

Mr. VAN DEN HAAG: You do not want me to repeat what I—

Mr. DE VILLIERS: No, no, I wanted to ask you what the general state of—

Mr. VAN DEN HAAG: I think the views I have expressed, express pretty much a consensus of sociologists. There are always variations of emphasis, and so on, but I think, on the whole, that would be generally accepted.

Mr. DE VILLIERS: On the phenomenon of identification?

Mr. VAN DEN HAAG: I think the same is true.

Mr. DE VILLIERS: On reactions of group members to members of other groups visibly different?

Mr. VAN DEN HAAG: I think my conclusions are generally accepted. I think there may be dissent on what should be done about it.

Mr. DE VILLIERS: On the question of the value of group membership to the individual?

Mr. VAN DEN HAAG: That is generally accepted.

Mr. DE VILLIERS: And the difficulty of quitting his group?

Mr. VAN DEN HAAG: That also is generally accepted.

Mr. DE VILLIERS: The question of the psychological factors that may be experienced on an attempt being made to quit a group and to become assimilated in a different group?

Mr. VAN DEN HAAG: Rather few people have worked on this, but I know of no dissenting opinion.

Mr. DE VILLIERS: On the question of the reaction of groups to situations of threat, or what they perceive to be a threat?

Mr. VAN DEN HAAG: This is now generally accepted both by sociologists and psycho-analysts.

Mr. DE VILLIERS: On the effect of education, in the way you have described?

Mr. VAN DEN HAAG: Yes, by now this is generally accepted. Such people as Professor Lazarsfeldt of Columbia, and so on, who used to hold a different view, no longer do.

Mr. DE VILLIERS: And, finally, on the positive values that could be attached in particular circumstances to separation or segregation?

Mr. VAN DEN HAAG: Well that is a more controversial question, and I think rather few (in fact I cannot recall anyone) have written on this. I think one reason that, at least American, sociologists are unwilling to write on this presently is precisely that they do not want to come to conclusions that are contrary to the evidence, but they also do not wish to state the conclusions that are conforming to the evidence because these are, as I put it, quite unfashionable. I have quoted, just a moment ago, two (incidentally Negro) sociologists—Professor Hill and Professor Davis—who favoured isolation, but I should note that (I gave the dates, I believe) Professor Hill's article dates from 1946 and Professor Alison Davis's from 1943. I think that today a sociologist who makes the same investigation and came to the same result, I think would be reluctant to publish it.

Mr. DE VILLIERS: Yes. What I am asking you is about your views, which you have expounded, as to the positive values that may attach to differentiation, or separation, in particular circumstances, in general and not merely in the United States. Are they in any way in conflict, as a matter of principle, with views held in your field of science?

Mr. VAN DEN HAAG: They are not in conflict, certainly. Let us say few people in academic circles would be quite willing to go out and subscribe to them at this point for various reasons that I think are less scientific than they are ideological or political, but I know of no contrary evidence and I know of no scientific people stating that the contrary would be more favourable.

Mr. PRESIDENT: I call upon the Agent for the Applicants.

Mr. GROSS: Mr. President, the transcript of the verbatim record of yesterday's Oral Proceedings was not available, for understandable reasons, until our arrival at the Court this morning. There has been no opportunity during the course of the morning to read the transcript; nor, of course, has there been an opportunity to survey the transcript of

today's session. The Applicants do wish to cross-examine the witness; the course of the cross-examination would clearly take longer than the remaining moments of this session. The Applicants would, under the circumstances, respectfully request the opportunity to receive the remaining verbatim record, to read the one received this morning, and to have an opportunity to cross-examine the witness at an appropriate time, as determined by the honourable President.

The PRESIDENT: That will be permitted in this particular instance, but it ought not to be assumed that cross-examination in respect of other witnesses could be postponed until the transcript has been read. There would be no order in the proceedings were this practice to be followed. But in relation to this particular witness, it will be necessary for him to be recalled at an appropriate time and that will be after the Parties have expressed their views upon the questions which were put to them yesterday. The time will have to be arranged between the Parties since they will know better than the Court when they are likely to conclude their respective answers to these questions.

Mr. DE VILLIERS: Thank you, Mr. President. May I just raise this factor, that we have a difficulty as to when Professor van den Haag can be available, and when not. It may be that we come to an arrangement not to have the cross-examination immediately after the discussion of the questions, but that we interpose other witnesses first and then recall Professor van den Haag. Would that be suitable to you?

The PRESIDENT: I do not think there would be any objection to that, would there, Mr. Gross?

Mr. GROSS: No, sir.

The PRESIDENT: In those circumstances, the Parties will arrange between themselves at what particular point of time, once the hearing of evidence has been resumed, the witness will be available to give evidence again.

Before the Court adjourns, the Court would like to indicate to the Parties, in relation to the questions put yesterday, that it is hoped they will reply to them as succinctly and as briefly as they find it possible.

23. REPLIES TO QUESTIONS PUT BY THE COURT ON 22 JUNE 1965

AT THE PUBLIC HEARING OF 30 JUNE 1965

The PRESIDENT: The hearing is resumed. On the last day of sitting the Court directed certain questions to the Parties, to which they will now respond.

I call upon the Agent for the Applicants.

Mr. GROSS: Mr. President and Members of the honourable Court, the Applicants respectfully respond as follows to the questions propounded by the honourable Court on 22 June 1965 (**VIII**, pp. 60-63), and such responses are formulated in the light of the introductory assumption stated in the questions as propounded.

With respect to question 1, as with respect to the other two questions, the Applicants will endeavour to summarize the response and then, with the permission of the President, to elaborate succinctly the reasons underlying the answers in respect of each of the several questions.

First, with respect to question 1: although the Applicants have urged upon the Court a series of legal propositions by which the Court, in the Applicants' view, may soundly adjudge the dispute relating to Article 2, paragraph 2, of the Mandate, the Applicants do not contend that the Court is bound to adjudicate the said dispute solely on the basis on which the Parties have presented their respective cases in regard thereto. Likewise the Applicants conceive that it is not open to the Parties to contend, nor do they contend, that the Court is bound to adjudicate the said dispute solely on the basis of the interpretations the Parties respectively have sought to give to Article 2, paragraph 2, of the Mandate.

In the light of the assumption stated in the introduction to the first question propounded by the honourable Court, the Applicants, while respectfully reaffirming their view of the most just, convenient and sound route for the Court to follow with regard both to the basis upon which the Applicants' case has been presented and with regard to the interpretation of Article 2, paragraph 2, of the Mandate urged by the Applicants upon the Court—nevertheless, in the Applicants' view, the jurisprudence of the Court, traditionally and in relation to the Mandate itself, precludes any but a negative response to the question posed, as shortly will be demonstrated. Traditional jurisprudence of the Court relative to this matter, moreover, is reinforced and rendered most apposite to the cases at bar in the light of the power and responsibilities specially vested in this honourable Court by the Mandate for South West Africa, pursuant to which the Court is the final bulwark and the ultimate protector of the rights of the inhabitants of the Territory under the sacred trust of the Mandate. Considerations of tradition, of logic and of justice accordingly combine to compel the conclusion that the Court has both the power and, in the Applicants' respectful view, the duty to adjudicate the dispute between the Parties on the basis of the Court's own conclusions concerning the proper interpretation of the Mandate, and the Court's own appreciation of the considerations of law, logic and justice upon which the Court's judgment is based.

With respect to question 2, for the reasons adumbrated in the summary response just made to question No. 1, the Applicants likewise perceive no basis in the traditional jurisprudence of the Court, nor in the jurisprudence of the Mandate itself, for a conclusion other than that it is open to the Court to place its own interpretation upon Article 2, paragraph 2, of the Mandate, or indeed of any other provision or term of the Mandate which may be in dispute from time to time, having regard to all relevant legal considerations, and to adjudge between the Parties accordingly. As the Applicants will endeavour shortly, in a few moments, to show, the dispute is framed and formulated in the final submissions of the Parties, and does not comprehend the contentions, theories or legal considerations advanced by the Parties, which may, as indeed is the case here, and not inappropriately, necessarily comprise mutually inconsistent alternative contentions. That it must be open to the Court to place its own interpretation upon the article relevant in this context, in the light of all considerations which the Court itself may deem relevant, is a conclusion which appears to the Applicants to be impelled by every consideration of law, logic and justice. The Applicants, on the one hand, appear before this honourable Court not for any narrow advantage of their own, but solely to protect their interest as loyal members of the organized international community in the vindication and protection of the sacred trust. Respondent, on the other hand, stands before the Court, not as a private litigant but as a mandatory, whose rights in the Territory are mere tools entrusted to the Respondent for the sole purpose of discharging its obligations; and the Court, under the scheme of the Mandate, stands as the final recourse and ultimate protector of the rights of the inhabitants against asserted breaches and abuse of the Mandate. It is not for the Applicants to fix and determine the rights of the inhabitants, nor for the Respondent to limit or define its own obligations, although both may suggest, as both have respectfully and earnestly done and continue to do before this honourable Court, the considerations and theories upon the basis of which they respectively contend the Court should interpret the rules regulating the Mandate. The Applicants accordingly have no recourse, no alternative, but to respond in the negative to question 2 as well.

With respect to question 3, it is respectfully submitted that the considerations just adduced in respect of the response to questions 1 and 2 likewise compel a negative response to question No. 3. No other response within the framework of the jurisprudence of the Court and the jurisprudence of the Mandate itself is, indeed, possible, in the Applicants' respectful submission. More particularly, with reference to question 3, although conceived by the Applicants to be relevant likewise to their responses to questions 1 and 2, the Applicants contend that the relevant facts, circumstances and conditions are comprised by the combination of several elements, all present in the written and oral pleadings: first, laws and regulations, and official methods and measures of implementation set out in the written pleadings, the existence of which is conceded by the Respondent, and the totality of which comprises the policy and practice of apartheid; secondly, the objective criteria for the interpretation of the Mandate reflected in the judgment of the competent international supervisory organs; thirdly, the mandate scheme, including especially the idea of a sacred trust laid upon the organized international community for the benefit of the inhabitants of the Terri-

tory; fourthly, the mandates system, including especially the co-ordination of administrative and judicial functions in carrying out the sacred trust, and the role in the scheme of the Mandate of this honourable Court as providing the final bulwark of protection for the rights of the inhabitants; fifthly, the mandate jurisprudence, including especially this Court's views expressed 15 years ago and reaffirmed repeatedly since as to the character of the obligations assumed by the Mandatory; sixthly, the status of the International Court of Justice as the judicial organ of the United Nations, thereby owing at least a measure of deference to the determinations of other organs of the Organization acting within their respective spheres of responsibility and competence; seventh, the stated purposes and other provisions of the United Nations Charter as embodying standards relevant to the disposition of this dispute by the Court; and finally, canons of interpretation appropriate for an international instrument of the nature of the Mandate.

Mr. President, in general the Applicants would affirm the power and responsibility of the Court to decide the dispute before it in accordance with the Court's analysis of all relevant legal considerations, whether or not such considerations coincide with those contended for by the respective Parties. The discretion of the Court, as the traditional jurisprudence of the Court makes clear, in our view, is grounded in the final submissions, but only to the extent that the submissions operate as the definitive formulation of the dispute between the Parties. In the context relevant here the Applicants have always conceived, and conceive now, that the dispute between the Parties relevant hereto is constituted by their third and fourth submissions, namely that the practice of apartheid in South West Africa is a breach of the obligations contained in Article 2, paragraph 2, of the Mandate and of Article 22 of the Covenant of the League of Nations.

Both the Applicants and Respondent have advanced certain considerations in support of their construction of the obligation embodied in Article 2, paragraph 2. Such considerations, however, do not form an element of the dispute *per se* and hence do not restrict the discretion of the Court in any way in adjudging upon the dispute thus formulated in the submissions in accordance with the Court's conception of the relevant legal and factual considerations. It is, for example, the Applicants' contention that Respondent's policies of apartheid, *ipso facto*, constitute a violation of Article 2, paragraph 2, on the basis of the laws and regulations, and the official methods and measures, by which the policy is implemented, the existence of which is conceded in this record.

It is the Applicants' view that this corpus of fact thus defined and thus formulated, largely derived from the Respondent's own pleadings, is a sufficiently convincing body of fact and law and policy to justify and require a finding of violation of Article 2; that it is, as has repeatedly been said to the Court, a policy and practice which inherently is incapable of promoting the welfare, the social progress and the moral well-being of individuals, not only in South West Africa, but anywhere.

This mode of contention, however, is extrinsic to the dispute. Thus the Court might reject the Applicants' contention on this subject and yet adjudge the dispute in Applicants' favour on the basis of the Court's own rationale as to why the policy and practice of apartheid is a violation of the Mandate. That dispute is the dispute in issue.

The jurisprudence of the Court supports the foregoing interpretation

of the scope of the judicial function, in the Applicants' respectful view.

The clearest statement of the position, perhaps, is to be found in the *Free Zones* case, in which the Court observed as follows:

> "From a general point of view it cannot be lightly admitted that the Court, whose function it is to declare the law, can be called upon to choose between two or more constructions determined beforehand by the Parties, none of which may correspond to the opinion at which it may arise. Unless otherwise expressly provided, it must be presumed that the Court enjoys the freedom which normally appertains to it and that it is able, if such is its opinion, not only to accept one or the other of the two propositions, but also to reject them both." (*P.C.I.J., Series A/B, No. 46*, 1932, p. 138.)

This passage is directly pertinent to the issue there, since the issue there, as here, was the construction, the disputed construction, of a provision in a treaty-type international instrument.

In the *Chorzów Factory* case the Court applied this general approach to the submissions as follows:

> "The Court does not consider itself as bound simply to reply yes or no to the propositions formulated in the submissions of the German Application. It adopts this attitude because, for the purpose of the interpretation of a judgment, it cannot be bound by formulae chosen by the parties concerned, but must be able to take an unhampered decision." (*P.C.I.J., Series A, No. 13*, pp. 15-16.)

And at its judgment in the case of the *Application of the Convention of 1902 governing the Guardianship of Infants*, the Court declared:

> "The final Submissions of the Government of the Netherlands before asking the Court to adjudge and declare that Sweden, in taking and maintaining the measure complained of, is in breach of its obligations under the 1902 Convention, ask it to 'declare' certain propositions relating to the effect of protective upbringing and to *ordre public*. These propositions are, in reality, the essential considerations which, in the view of the Government of the Netherlands, must lead the Court to adjudge and declare that Sweden is in breach of its obligations. In a less categorical form, the Submissions of the Government of Sweden are set out in a similar way. The Court has to adjudicate upon the subject of the dispute, it is not called upon, as it pointed out in the *Fisheries* case, to pronounce upon a statement of this kind (*I.C.J. Reports 1951*, p. 126). [And the excerpt concludes as follows] It [that is the Court] retains its freedom to select the ground upon which it will base its judgment, and is under no obligation to examine all the considerations advanced by the Parties if other considerations appear to it to be sufficient for its purpose." (*I.C.J. Reports 1958*, p. 62.)

It appears clear, accordingly, that the Court has not hesitated to ignore any element in the submissions which does more than define and formulate the issue in dispute between the Parties. In particular the Court will decide the dispute on grounds it regards as relevant and authoritative, whether or not such grounds are to be found in the pleadings, and the Court, likewise, may reject either Party's theory of the case even if such theory should be incorporated in the submissions.

Mr. President, the distinction between theory, contention, argument,

and similar considerations, on the one hand, and the formulation of the issue in dispute in the final submissions, on the other—that distinction has been perceived by the Parties in these very proceedings, the most striking evidence of which is the last-minute amendment of the submissions, in 1962, in the Preliminary Objections phase of these proceedings, when, as the Court will be well aware, at the conclusion of the written pleadings and Oral Proceedings, the Respondent, as was its right (and it drew no objection on this score from the Applicants), amended its submissions alleging a theory of the case—a basis of the case—which had not previously been presented and which had not been argued by the Parties, and which went to the heart of the very legal nature of the mandate instrument itself. Reference to this is made merely to point out that it is not only the traditional jurisprudence of the Court, but the very history of these proceedings themselves, of the cases at Bar, which demonstrate in this dramatic way the distinctions perceived by the Parties herein between the theory, or contention, or argument, upon which their case is based in support of their submissions and the issue in dispute, as formulated in the submissions themselves.

In concluding my remarks, Mr. President: the basis upon which the Applicants have presented their case proceeds from the conviction that the policy and practice of apartheid (the meaning and content of which is neither obscure nor elusive, but clear from the record) are extreme forms of official discrimination in which race and colour are the primary determinants of individual rights, burdens, status and privileges, and form a systematic basis for imposing disabilities upon individual persons without regard to their individual quality or capacity. Secondly, that application of a universally accepted standard of official non-discrimination, exemplified in numerous basic agreements and constituent statutes to which both Parties adhere (I cite for example, Article 1, paragraph 3, of the United Nations Charter itself—the very statement of purposes and principles, of the Organization)—that application of a universally accepted standard of official non-discrimination to the policy and practice of apartheid in the territory of South West Africa has been reflected in the consistent, explicit and overwhelming judgment of the competent supervisory organs, as well as the official condemnation of governments expressed both severally and through collective judgments.

The Applicants, thirdly, have urged upon the Court that authoritative weight should be given by the Court in the interpretation of Article 2 obligations to the judgments thus expressed. The violation, in the Applicants' view, is so clear as to constitute, *ipso facto*, a violation of the Mandate and it may justly be observed that, although from time to time during the course of these proceedings the Respondent has had recourse to statements and charges that theories have been changed, or that the cause of action has been altered, no cry of prejudice is tenable on such a basis, for the very logic of the situation demonstrates that what the Respondent purports to complain of is a so-called "narrowing" of issues and their voluminous pleadings in this case have clearly been addressed to the broadest possible construction of the Applicants' theory.

The Applicants, moreover, have contended that the condemnation of official discrimination is so firmly and universally enunciated as to be regarded as a rule of international law within the meaning of Article 38 of the Statute of the Court. Apartheid is contended by the Applicants to be an impermissible infringement of human rights within the meaning

of this rule and *a fortiori* a violation of the Mandate, and this, as the Court will be aware, has been asserted as an additional, cumulative argument which does not in any way affect or limit the principal argument with respect to the standards which the competent organs have applied to the practice of apartheid, and to whose views this Court is respectfully requested to accord due and authoritative weight.

But in the Applicants' view, in conclusion, as has been stated, it is the right and duty of the Court to interpret the obligations under the terms of the Mandate, as the organ vested with the function of serving as the final bulwark of protection of the rights of the inhabitants of the Territory against asserted breaches and abuse of the Mandate.

Finally, the Applicants, for reasons which have been advanced, likewise conceive it to be the Court's function to interpret the Mandate on the basis of whatever facts, circumstances and conditions the Court may regard as relevant to a proper interpretation of the Mandate. In this connection, Mr. President, the Applicants reaffirm their intention and desire, expressed, *inter alia*, in the verbatim record of 19 May 1965 (**IX,** p. 363) "to provide the Court with whatever information or evidence" the Court may regard as relevant in any respect.

Thank you, Mr. President.

The PRESIDENT: I call upon the Agent for the Respondent.

Dr. VERLOREN VAN THEMAAT: Mr. President, I respectfully request that Mr. de Villiers be allowed to address the Court.

The PRESIDENT: I call upon Mr. de Villiers.

Mr. DE VILLIERS: Mr. President and honourable Members, it will have been evident to the Court that the Applicants have again changed their ground. One could hardly have expected anything else: that seems to come about as regularly as the rain from heaven does in this capital city of the Netherlands.

My learned friend and Agent for the Applicants has spoken of the fact that we referred before to changes of attitude or front or basis by the Applicants in advancing their case or causes of action and the like. Perhaps he wished to protect himself in advance from further comment to that effect, because he spoke in advance of the question of prejudice or the lack of prejudice.

We have, Mr. President, never complained of prejudice on any occasion in the past. We have been willing to follow the various attitudes, the various changes, the various different forms of attack proferred against us. We have only on occasion asked for sufficient time to adapt ourselves to the new situation, that is all.

We have never raised any technical objection. There are principles of procedure which would have made it possible for us to object formally and technically to the presentation of a new case at such a late stage of the proceedings, as the Applicants have done during the presentation of their case here in the oral phase of these proceedings. We elected not to do so. We could have asked the Court to say, the stage is now so late that this materially new case is not to be allowed to the Applicants because it now means that they start near the end of the proceedings with something which should have come at the beginning—something in respect of which there ought to have been proper discussion in written pleadings as is contemplated in the Rules, but which we now have to pick up at a late stage in the course of the Oral Proceedings, and to analyse to see what it is about, and then to present our answer to it.

We have, Mr. President, presented that answer as best we could under the circumstances. But I submit that the factor of prejudice operates in two ways. Because we have now taken on the Applicants' new description of what their case is, of what the dispute is which is proferred against us, and what the ambit of that dispute is, we cannot now be put in a worse position than we would have been in if the Applicants had followed the proper course of saying: we stop here and we start again from scratch, and this is the new case which we present.

The Applicants cannot have the best of two worlds. They cannot inform us, through the Court, as they have done, that their case is to be seen as being confined within a narrow ambit, as to both its factual and its legal aspects, because the factual aspects are the important ones as I shall stress to the Court. The Applicants cannot have the best of two worlds in saying to us, that is now the ambit of the case on fact which we bring against you, and we then adapt ourselves to that in the presentation of our legal argument, which has been concluded, and also, Mr. President, in the presentation of our facts to the case, in the preparation of the evidence which we intend to present to the Court, on the basis of what we understand the dispute between the Parties to be, a dispute which given new definition in the final amendment of submissions which the Applicants presented to this Court on 19 May.

You asked me, Mr. President—you asked both Parties—to be succinct in the presentation of the answers to the questions of the Court. I shall try my very best to comply with that request, but the matter is of such fundamental importance for the further course of proceedings in this case that I shall have to be some time in analysing precisely what the situation now amounts to.

May I start with a reference to the wording of the questions, and may I say at once that in certain respects there is, as regards the principles to be applied in this matter, little difference between the Applicants and ourselves. The important difference lies in this, namely the question of importance to be given to the ambit of the factual aspect of the dispute as defined in the submissions before the Court, because, Mr. President, the definition of that ambit serves both as a limit to the Court's powers in the particular case and, at the same time, as a limit to the intimation of the opposite side of the case which it has to meet. Those two things go hand in hand—the powers of the Court in a civil dispute and the case which the opposite side is advised that it has to meet.

The Court has said on occasion and other courts have said in municipal systems, that when it comes to choosing between alternative contentions of law, then the court is certainly not bound by what the parties present to a court, but it must always remain within the ambit of the factual dispute disclosed by the pleadings, or whatever system may be followed in order to define that particular ambit. Because, Mr. President, that is the important thing, that is the factor which links up with a basic consideration of natural justice, that both parties are to be heard—one of the considerations of natural justice which underlie the principles of civil procedure in all civilized systems. If the court is not clearly apprised, and if the defending or respondent party is not clearly apprised of the ambit of the factual allegations made against it, how can such party properly defend itself against those factual allegations? How can it put before the Court all the evidence that it would wish to put before the Court if it knew that that is the factual case being made against it?

I have, with reference to the exposition given by my learned friend, Mr. Gross, noticed that in regard to question 1 he spoke of the Court's right to arrive at its own conclusion about the interpretation of the mandate instrument—the Court's right to apply its own views of law and logic and justice to the situation. I have no difficulty with that.

He also spoke towards the end of the right on the part of the Court to apply its own *rationale* as to why the policy and practice of apartheid in the Territory of South West Africa are or are not in violation of Article 2, paragraph 2, of the Mandate. Again, Mr. President, I have no difficulty with the *rationale* provided that due effect be given to another expression used by my learned friend, and that is that it is to be within the context of the dispute; and the context of the dispute is to be determined, surely, by reference to what the case on fact is that is being made by the Applicants against the Respondent.

Not long ago, in presenting those amended submissions to the Court, my learned friend at the same time, or shortly before, assured the Court that his case as it was standing at that stage rested solely upon his contention in regard to a norm and/or standards, and he told the Court that if that could not succeed, then his Submissions 3 and 4 must fail. In other words, Mr. President, he left no scope whatsoever for the possibility of the Court enquiring beyond the ambit of facts which would be necessary for the purposes of deciding on his contention as to a norm and as to standards. He went so far as to say that it would be incompetent for the Court to do so—that this Court would have no power of "second-guessing" (that was his expression) the decisions already given by administrative organs of the organized international community—and he said, indeed, that if the Court were to determine for itself the factual nature of the policies in South West Africa, and if the Court were to pronounce a value judgment upon those policies, either as to their purpose or as to their effect, then the Court would be departing from what is traditionally its function.

He went so far. Yet now, Mr. President, he suggests to the Court that if his contentions are not accepted there is still some scope within the dispute as he has now defined it in his amended submissions upon which the Court can possibly decide upon whatever facts (he said), conditions and so forth as the Court may regard as relevant to the dispute.

There has been one significant failure in my learned friend's exposition, and that is a failure to demonstrate to the Court that any investigation of fact outside the scope of his contention in regard to a norm and in regard to standards is covered by the dispute as now presented to the Court in the amended submissions, either by way of being stated in the amended submissions, or by way of being incorporated by reference in those submissions. That is the point which I want to emphasize and to which I shall return after some reference to relevant authorities.

First, as I have said, I should like to remove what may appear to be a misunderstanding emerging from the wording of some of the questions which have been put to the Parties. The general introductory portion of these questions states after referring to the Applicants' reliance upon a certain norm and/or standards:

> "On the other hand, the Respondent disputed the existence of any such norm or standards and based its case upon the proposition that Article 2 (2) could not be shown to have been breached by it unless, in respect to the exercise of its authority under Article 2 of

the Mandate, it was shown that it had acted in bad faith, or for a purpose other than to give effect to Article 2 (2) of the Mandate and that the article must be interpreted accordingly." (**VIII**, p. 60)

I wish to direct the Court's attention to the words "bases its case upon the proposition". One sees a reference of the same kind in question 1 where there is a reference to adjudication of the dispute exclusively upon the basis on which the parties have presented their respective cases.

Mr. President, I want to make it perfectly clear that the Respondent has submitted to the Court as a matter of law that the only basis upon which a case could be made against it—a case of alleged violation of Article 2, paragraph 2, of the Mandate—is as is broadly described in the introductory portion of this question.

But that does not mean, Mr. President, that we are now, on the basis of that conception of the legal situation, presenting a case on fact to the Court.

May I use an example from ordinary municipal legal proceedings. Suppose party A brings a case against party B, and alleges in that case that party B has been guilty of a misrepresentation which led to the conclusion of an agreement, that that misrepresentation has led to certain damage for the plaintiff party, and that damages are now being claimed. There is no allegation that the misrepresentation was a deliberate one, but there is an allegation that it was a negligent one. Now, party B's response to that is that in law there is no case for claiming damages against it—let us assume that is the answer given by Party B; and party B says, in addition, in argument to the Court, that the only basis upon which there could have been a claim for damages against him would have been if party A had alleged, and could have proved, deliberate misrepresentation, intentional misrepresentation, on his part.

That, Mr. President, would merely be part of the legal demonstration of saying what case could have been made against him, but that certainly, then, does not oblige party B, or even entitle him, to proceed to lead evidence in order to show that his misrepresentation was in fact an innocent one—although it may have been negligent, it was not an intentional one—for the simple reason that no such case is being made against him.

The Court will immediately say to party B, to the defendant, it is unnecessary for you to show that there was no intention on your part; no such intention on your part is alleged, therefore you need not meet such a case; the dispute between you now rests upon this proposition, supposing you admit the fact that the misrepresentation was a negligent one; the dispute now rests between you on this legal question whether a negligent misrepresentation is a sufficient basis for this claim for damages.

The same applies here, Mr. President, with the greatest respect. We have pointed out to the Court what we consider to be the sole basis upon which a case could have been made against us in law, but we have at the same time pointed out that the Applicants now, whatever the position might have been at an earlier time, make it perfectly clear in their amended submissions that they do not present such a case against us—no case based upon alleged bad faith on our part; no case based upon an alleged improper motive or intent or purpose; no case, as they have said repeatedly, based upon any subjective motivation on our part.

We indicated, also, that there may be an alternative possible basis of

formulating much the same kind of test as is applied to see whether there has been an abuse of power, and that this is to formulate the test whether the actions of the Mandatory have been so unreasonable that no reasonable authority could have decided upon such actions. We posed that as a possible test, but the Applicants have not adopted it in their case; they have nowhere said to the Court that they are bringing that type of case against us. On the contrary, they have made it clear that they do not do so. They say they base no case whatsoever either on the purposes or upon the effects of the policies of the Mandatory.

So, Mr. President, under those circumstances we have intimated to the Court, and I submit correctly, with respect, that we do not propose to lead evidence in order to show to the Court that the Mandatory has in fact been bona fide in deciding upon these policies, because there is no allegation to the contrary. As I understand the Applicants' case, they accept the bona fides of the Mandatory; they at least make no allegation to the contrary. They make no allegation to the effect that the Mandatory has been so unreasonable that no reasonable authority could have decided upon a similar policy. That again is a case which we are not called upon to meet; therefore we do not propose to meet it, and we are not doing so in this evidence we are presenting. We would be fighting windmills if we were doing that, because it is not a case being presented against us. I thought I ought to make that clear at the outset, because that might otherwise lead to a misunderstanding.

Now, Mr. President, it may be relevant to refer to a very apt description of this situation in law by a Dutch writer, P. J. de Kanter. It appears in a legal thesis published in Leiden in 1928 called "*Rechtsgronden en rechtsmiddelen*" ("Legal Grounds and Legal Remedies"), at pages 57-58. We read our own translation:

> "The attitude of the plaintiff we see as an absolute one; by instituting action he intimates that in his opinion this particular claim is valid as against all defences . . .
>
> In contrast with this absolute character of the attitude of the plaintiff stands the completely different character of the attitude of the defendant. All defences amount to the defendant saying: 'this claim you cannot enforce against me', whether he stresses in this regard 'this claim', or 'you', or 'against me'. In contrast with the attitude of the plaintiff, that of the defendant has a relative character. The defendant does not pass upon the question whether any other claim, or the same claim instituted by a third party, is valid as against him; his only concern is that this particular claim, which has been instituted against him, be dismissed."

That, I submit, Mr. President, states very clearly and very correctly, in my submission, a basic principle applicable throughout all systems of procedure of which I am aware, to situations of this kind, i.e., to the respective roles of a plaintiff and a defendant, or an applicant and a respondent.

Now, question 1 asks whether the Parties contend that the Court is bound to adjudicate the dispute between the Parties exclusively on the basis on which they have presented their respective cases, and the interpretation they have respectively sought to give to Article 2 (2) of the Mandate.

Question 2 links up with it immediately: "Do the Parties contend

that it is not open to the Court to place its own interpretation upon the Article having regard to all relevant legal considerations and adjudge between the Parties accordingly?"

Mr. President, in so far as placing an "own interpretation upon the Article" is concerned, as I have said before, there is no difficulty whatsoever about that aspect of the matter. That certainly is the Court's right, and the Court's duty—interpretation is a question of law. But when it comes to "[adjudging] between the Parties accordingly" that, with respect, is also correct, provided one understands it to apply within the context of the dispute of fact which has been presented to the Court.

May I again present an example to the Court. Suppose a ship belonging to State A passes through a channel under the control of State B, in terms of a treaty governing the relationship between the States in that respect. The ship comes to a bottleneck part of this channel and gets stuck there for some reason or other—it goes out of order and causes a blockage in the traffic through the channel, and consequent damage to State B, the one in control of the channel. State B then institutes an action. It alleges the simple fact that the ship went into the channel and at a particular point it went out of order—not alleging any misconduct, negligence, or wilful misconduct on the part of the master or crew of the ship—simply stating that fact and saying, because of that fact, because of the damage caused, the meaning of the relevant treaty—the effect of the treaty—is that there is an absolute liability on the part of State A to make good the damage.

Now, Mr. President, on that basis State A is brought into court, and State A says: I admit those facts, I admit that the ship went out of order at that particular place; I have no reason to doubt what you say about the damage that was caused, but my construction of that treaty, and the one which I urge upon the court, is that there could be no liability on my part unless there had been wilful misconduct on the part of the master or the crew.

So those are the conflicting interpretations of the treaty upon which the parties come to court. It would then be perfectly open to the court to say, I do not agree with either interpretation; I do not agree with the interpretation of absolute liability, nor do I agree, on the other hand, that there must necessarily be wilful misconduct; I find that on a proper construction of this treaty negligence on the part of the master and the crew may be sufficient to visit State A with liability.

Having given that interpretation, the court would then proceed to adjudge between the parties accordingly, but what would "adjudge between the parties accordingly" mean? "Adjudge accordingly" would simply mean this, that inasmuch as there has been no allegation of negligence in this case, and inasmuch as there has consequently been no canvassing of the question of the existence or otherwise of negligence, this claim must fail. On the basis of statements of fact which are directed purely towards setting out the position that in fact this situation occurred, but there is no allegation of negligence and no warning to the defendant that it has to meet any allegation of negligence, so that the defendant may join in putting those facts to the court, surely the court cannot then say: on the basis of the facts which I have before me, it seems to me that there must have been negligence on the part of the master or the crew of the ship. Surely that would be contrary to all considerations of natural justice, for the simple reason, Mr. President, that such an allega-

tion is not made; it has not been introduced into the case as being part of the dispute.

That is the basic consideration, in my submission, to be borne in mind with regard to the answer to question 3, which is put, as I understand it, not only with reference to questions of law, but also with reference to questions of fact.

I shall revert to that. I should first like to review certain authorities which emphasize the distinction which I have sought to draw in this respect between questions of fact and questions of law.

In the Anglo-American system of procedure which is, to a large extent, also applied in South Africa, the position is clear that the issues in any case are defined by the pleadings, the pleadings being, on the whole, very much shorter documents than those which we know of in the type of procedure adopted in this Court, which corresponds, as I understand, to procedures adopted on the continent of Europe. In any case, the underlying principles would appear to be the same, and I should like to demonstrate the matter first with reference to the system of pleadings as known in Anglo-American law.

The pleadings are regarded as determining the ambit of the dispute between the parties, as circumscribing the evidence to be adduced by each party, and as limiting the Court in the finding that could be made by it. In regard to American law, this is very well expressed in the following extract from *Corpus Juris Secundum*, Volume LXXI, pages 17-18:

> "Pleadings are statements in logical and legal form of the facts which constitute plaintiff's cause of action or defendant's ground of defence. They are the allegations of the parties of what is affirmed on the one side and denied on the other, disclosing to the court or jury who have to try the cause, the real matter in dispute; the means provided by the law to enable the court to ascertain the claims of the respective parties to a justiciable controversy.
>
> The purpose of pleadings is to present, define and narrow the issues, and to form the foundation of, and to limit, the proof to be submitted on the trial. They are designed to advise the court and the adverse party of the issues and what is relied on as a course of action or a defence, in order that the court may declare the law and that the adverse party may be prepared on the trial to meet the issues raised."

In regard to English law, Mr. President, the same position is expressed in Bullen and Leake, *Precedents of Pleading*, XIth Edition, page 1, as follows:

> "The principal objects of pleading are, first, to define the issues of fact and questions of law to be decided between the parties; secondly, to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them; and thirdly, to provide a brief summary of the case of each party, which is readily available for reference and from which the nature of the claim and defence may be easily apprehended."

The important things which appear, Mr. President, are firstly to define the issues of fact and questions of law to be decided between the parties, and, secondly, to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them.

It follows from this basic situation, Mr. President, that the Court would not, save in very exceptional circumstances to which I shall refer later, be entitled to decide on a basis of fact other than that which is disclosed in the pleadings. And this situation is very well illustrated by a recent authoritative judgment of the House of Lords in England, in *Esso Petroleum Company Limited* v. *Southport Corporation*, reported in 1956, Appeal Cases, page 218. I could give the relevant facts to the Court briefly. An oil tanker was stranded in a river estuary and in order to prevent her from breaking her back, the Master jettisoned 400 tons of her oil cargo. And that was then carried by the tide on to a foreshore where it occasioned damage. The owners of the foreshore brought against the shipowners an action which was based on various grounds of which the only important one, for present purposes, was negligence. The plaintiffs alleged that the Master of the ship was negligent in respect of his navigation and management of the ship, and that he was consequently liable in damages. They also alleged liability on the part of the owners of the ship, but only because the owners were said to be answerable for the negligence of the Master. It was only in that vicarious sense that the owners were sought to be held liable. There was no allegation of actual negligence against the owners themselves. That was the basis on which the case went to trial and the trial court held that the charges of negligence against the Master were not proved and consequently the case, both against the Master and against the owners, failed.

The matter went on appeal to the Appeal Court and eventually to the House of Lords. It would appear that the original successful defendants, the owners, were the appellants and the original unsuccessful plaintiffs were the respondents.

On appeal, in the course of the argument, the question arose whether it would be proper to find that the owners had been negligent in a manner which had not been pleaded, namely by allowing the ship to go to sea while in an unseaworthy condition. That was an allegation which was made in the course of the discussion, viz., an allegation of negligence directly on the part of the owners concerned, which was given some countenance or some colour by the facts presented at the trial.

But, of course, that would have been an additional ground to the one relied upon in the pleadings which was only that there had been negligence in the navigation of the vessel, but no allegation of this kind of negligence on the part of the owners. The court and the House of Lords unanimously held that such a finding would be improper, that is, a finding on the basis of evidence that there had been this other form of negligence on the part of the owners, and the opinions of the various Lords who gave their opinions in the case are very instructive. I read first an extract from the opinion of Earl Jowitt, the Lord Chancellor, at page 237:

> "If the plaintiff's case had been put in the alternative, either that there was some navigational error or that the ship was unseaworthy, the case would no doubt have been developed on wholly different lines. Had any such case been made, the ambit of discovery would have been enlarged and the theory that . . . the *Inverpool* [that was the vessel concerned] may have broken her stern frame against the bed of the channel would have been explored. [That was apparently a point which may have disproved the suggestion that the ship had been unseaworthy at the time of going to sea.] It is

idle to speculate what would have happened if such a case had been made.

In the present case, every allegation of negligence has been answered by the finding of the judge, and there was no allegation of unseaworthiness. That being so, I do not think that . . . the owners of the *Inverpool*, can be held responsible because they did not negative some possible case which had never been alleged against them in the pleadings or made against them in the course of the trial."

Next, from that of Lord Normand, at page 239:

"I do not wish to speculate on what might have been alleged, nor on what evidence might have been adduced by either side on other allegations, nor on how the onus might have shifted in consequence of other allegations and evidence. Confining myself to the actual allegations of negligence and to the evidence in the case, I find the conclusion inevitable that, since the Master has been acquitted of the faults alleged against him, the owners must also be acquitted . . . To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

Next we come to the opinion of Lord Morton of Henryton, at pages 240-241. I quote again:

". . . may well be that the respondents' case might have been pleaded in such a way as to cast upon the present appellants the burden of proving that they had exercised proper care. In that event . . . the case would no doubt have developed on different lines. The respondents, however, . . . had pleaded negligence of the master . . . as against the appellants, they chose to rely only upon the responsibility of the owners for the master's negligence.

In this state of the pleadings it seems to me to follow that the Court of Appeal, having affirmed the judgment of Devlin J. in favour of the master and having thereby acquitted the master of any negligence, should also have affirmed his judgment in favour of the present appellants."

And then finally, Mr. President, Lord Radcliffe said, at page 241:

". . . think that this case ought to be decided in accordance with the pleadings. If it is, I am of opinion . . . that the respondents failed to establish any claim to relief that was valid in law. If it is not, we might do better justice to the respondents—I cannot tell, since the evidence is incomplete—but I am certain that we should do worse justice to the appellants, since in my view they were entitled to conduct the case and confine their evidence in reliance upon the further and better particulars of paragraph 2 of the statement of claim which had been delivered by the respondents. It seems to me that it is the purpose of such particulars that they should help to define the issues and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant and how much irrelevant to those issues. Proper use of them shortens the hearing and reduces costs. But if an appellant court is to treat reliance upon them as pedantry or mere formalism, I do not see what part they have to play in our trial system."

And only this further brief portion from the same opinion of Lord Radcliffe, at page 243:

> "I find it impossible to read the statement of claim and the particulars without coming to the clear conclusion that, while the respondents were announcing it to be one of their heads of complaint that the master had brought his ship into the channel with defective control of steering, they were not putting it forward as a ground of complaint that the appellants, the ship owners, had allowed their ship to be at sea in such a defective condition. And that is what they now wish to complain of.
>
> The respondents called evidence in chief, expert evidence, in support of their heads of claim. In their turn the appellants called their evidence upon these heads. The trial judge, after weighing the evidence, came to the conclusion that the respondents had not made good their case on any of the particulars. There, he thought, the case ended, and I am of the same opinion. I think it was quite wrong that the respondents should, nevertheless, be entitled to say that the appellants must lose because they did not cover at the trial a range of evidence . . . which the respondents by their own pleading had excluded from the trial."

Mr. President, I have read at some length from this judgment because it demonstrates and illustrates so pointedly the same type of situation as the one with which we are dealing here, as I shall try to demonstrate later. When analysing the actual situation in this case. It is not that this is an isolated example of this type of judgment given by a court in the legal systems of which I am aware. Such judgments abound, but this is a particularly pointed one, since it deals with facts easily grasped and with a situation which serves as an eminent illustration of the difficulty with which we are here confronted. Our contention is, Mr. President, that at the time when it mattered, at the time when the Applicants presented and closed their case—as it eventually turned out, on the facts as well as on the law—and put their amended submissions to this Court, they made it perfectly clear that they were excluding certain factual allegations from the ambit of their amended submissions. And they thereby gave notice to us—and they even put it in those words, they gave notice to us through the Court—that we were not called upon to meet allegations of that kind in evidence. We contend that they cannot when it suits them, for reasons which must be evident to everybody, now, at this belated stage, come and say that in spite of that, it is open to the Court to embark upon a factual investigation of an undefined content. Nobody knows, and the Applicants do not say, and they do not indicate what the ambit of it is, or possibly could be, but still they say that the Respondent must—in spite of what they told us, in spite of the way in which they framed their amended submissions, and the way in which they said that they are to be understood—must have known that Respondent must come with evidence covering a wider ambit than that which they so emphatically indicated to us at that particular stage.

Mr. President, the extracts from the case show, in our submission, the extreme importance of limiting the Court's finding to the claim actually presented. It involves a principle which, as the Court will know, applies also in the jurisprudence of this Court, and in the procedure of this Court. The reason for that is essentially a practical one; it is that a party cannot

meet a case which is not made against it. If a court were to decide on issues which are not raised—not fairly and explicitly and clearly raised—in the pleadings, the result would normally be that a party would be condemned without having had an opportunity of leading evidence and presenting argument on his own behalf, and that would be contrary to the principles of natural justice which underlie all procedural systems.

It does happen exceptionally that issues are canvassed at a trial on a wider basis than indicated in the pleadings. In such cases, of course, the practical objections and the objections of principle to deciding such issues would fall away. I could give the Court an example which occurred in South Africa. I quote from the Judgment of an eminent South African Chief Justice, Sir James Rose Innes, in *Wijnberg Municipality* v. *Dreyer*, 1919, Appellate Division, at page 443:

> "Over this wide area the controversy ranged, the parties confining themselves neither to the periods specified nor to the matters complained of in the declaration [declaration being one of the pleadings]. The position should, of course, have been regularised by an amendment of the pleadings. That was not done; but the defendant cannot now claim to confine the issue within limits which it assisted to enlarge; nor can it complain that the learned Judge in his summing up dealt with the case on the basis which both parties had adopted."

I can give the Court a similar quotation from a later decision by Judge of Appeal, afterwards Chief Justice, Centlivres in *Collen* v. *Rietfontein Engineering Works*, 1948 (1) *South African Law Reports*, at page 433. The learned Judge of Appeal said on the facts of the case before him:

> "This was not the contract relied on by the defendant in his pleadings, and the position should have been regularised by an appropriate amendment. But in this case . . . [t]his Court . . . has before it all the materials on which it is able to form an opinion, and this being the position it would be idle for it not to determine the real issue which emerged during the course of the trial."

Mr. President, at the same time, there are on record numerous decisions in which the most stringent warnings of great caution in this regard are uttered—warnings to the effect that it should not lightly be assumed that merely because a matter outside the pleadings happens to be mentioned by one of the parties, or even canvassed to a certain extent, that that would constitute as full a canvassing as there could have been if the matter had been properly raised in the pleadings and the defendant had then been obliged to canvass the situation. Unless the Court can be satisfied that the matter is as fully canvassed as it would have been if properly raised in the pleadings, then it is not competent for the Court to decide upon that issue of fact.

The PRESIDENT: It might be convenient, Mr. de Villiers, to adjourn. The Court will recess for 20 minutes.

Mr. DE VILLIERS: Mr. President, I wish to ask: would it be possible for the Court to allow us a slightly longer adjournment, say half-an-hour? I should very much like to discuss some of the aspects of what my learned friend has said with my colleagues before I resume the address.

The PRESIDENT: Certainly.

Mr. DE VILLIERS: Mr. President, on the question of the caution to be

applied by a court in determining whether it would be safe to regard a question of fact as fully canvassed when it is something going outside the scope of the pleadings, I should like to refer the Court to one decision, just as an example—that is again by Sir James Rose Innes but at the time when he was an ordinary Judge of Appeal in South Africa in 1910. In that he refers to a judgment by Lord Watson (in the Privy Council, I think—it may also have been the House of Lords); the reference is *Cole* v. *Government of the Union of South Africa*, 1910 Appellate Division, at pages 272 and 273—I commence at page 272. This was a case, I may say, where the question was discussed in an analogous way; it arose in regard to the taking of a point of law for the first time on appeal, and it was in that respect that this aspect was mentioned. The learned judge said:

> "The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it."

May I interrupt for a moment—those two qualifications are very important: "If the point is covered by the pleadings"—even this point of law now raised for the first time must be within the ambit of the pleadings; if it is covered by the pleadings, "and if its consideration on appeal involves no unfairness to the party against whom it is directed". I shall proceed with the quotation:

> "And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In the presence of these conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong."

I skip some lines, and proceed at page 273:

> "But where a new law point involves the decision of questions of fact, the evidence with regard to which has not been exhausted, or where it is possible that if the point had been taken earlier it might have been met by the production of further evidence, then a Court of Appeal will not allow the point to prevail. Because it would be manifestly unfair to the other litigant to do so. The rule has been thus stated by Lord Watson (*Connecticut Fire Insurance Co.* v. *Kavanagh*, A.C., 1892, p. 481):
>
> 'When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts, either admitted or proved beyond controversy, it is not only competent, but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact, in consideration of which the Court of ultimate review is placed in a much less advantageous position than the Court below.

> But Their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence on which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea'."

Mr. President, consequently we submit the true ratio underlying these rules is that a tribunal is, as a matter of fairness, not entitled to come to a conclusion, and particularly not a factual conclusion, if the party against which it is made was not given a reasonable opportunity to contest such a conclusion and to lead evidence relevant to it.

This same consideration has been applied constantly to proceedings before quasi-judicial tribunals, the proceedings of which can be taken on review to superior courts on ordinary principles of review. The basic consideration in each case taken into account—one of those—by the court of appeal, is that as a matter of natural justice each party is entitled to a proper hearing, and that includes proper warning of the case which it is called upon to meet. The matter was put in this way by S. A. de Smith, *Judicial Review of Administrative Action*, 1959, at page 102:

> "That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's *Medea*, enshrined in the scriptures, mentioned by St. Augustine, embodied in Germanic and other proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden."

The rule is, of course, commonly known, Mr. President, as the *audi alteram partem* rule, and it is applied, as I have said, also to proceedings before administrative tribunals with quasi-judicial functions. It goes so far that, even where those tribunals are expressly authorized by statute or otherwise to take into account local knowledge, i.e., facts known to the members of the board without having to resort to formal evidence on the point, the requirement has been stated repeatedly that where the members of such a tribunal intend to take account of a matter of fact which has come to their knowledge and to apply it adversely to the interests of a party appearing before it, then that ought to be put to the party so that the party may be able to put a different complexion upon it, or to meet it, or to controvert it if he can by evidence.

In a case in Great Britain, *Board of Education* v. *Rice*, 1911 Appeal Cases 179, at page 182, Lord Loreburn said the following:

> "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds . . . In such cases . . . they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial . . . [Omitting certain lines.] They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

In our own practice in South Africa this principle has been applied repeatedly. A very well-known case is that of *Loxton* v. *Kenhardt Liquor Licensing Board*, 1942, Appellate Division, at page 275. There the court of review, which was ultimately the Appeal Court in South Africa, set aside a decision of the Liquor Licensing Board on the grounds that the members of the Board had made use of facts within their personal knowledge without putting them to the person affected thereby, and without giving that person an opportunity of dealing with the facts and if possible qualifying or controverting them.

Mr. President, I have given this review with reference to the Anglo-American system of procedure with which I am more acquainted than the Continental, but as far as we have been able to study the Continental system the same underlying principles would appear to apply. I am not going to attempt to give to the Court an exhaustive review of Continental authority. Sometimes the authority is difficult to find, for the simple reason that the considerations are so self-evident that they are very seldom expressed. We have found a very good expression of these considerations in relation to the Code of the Netherlands, the Dutch Code, Section 48. The wording of that section is, in our free translation: "In their deliberations the judges must, by virtue of their office, add the legal grounds which may not have been advanced by the parties." And in respect of this section, we find the following comment in van Rossem-Cleveringa's *Het Nederlandsch wetboek van burgerlijke rechtsvordering*, 3rd Edition, pages 93-94. They state:

> "In civil cases the judge is passive; in reaching his decision he is restricted to the facts which have been alleged by the parties, as also to the relief claimed by the parties by reason of the facts. In his judgment the judge consequently only has to decide whether the alleged facts can be accepted as proved, and whether the relief claimed by the parties by reason of the facts is sound in law . . . [I omit some lines, and proceed.]
>
> It follows that the judge who is of the opinion that the alleged facts have not been established, but that other relevant and sufficient facts have been proved, may not base his decision on the latter facts; nor may he grant relief (either to the plaintiff or to the defendant) which in his opinion is the only relief justified by the alleged facts, if such relief has not been claimed by the parties."

So those are the limitations, Mr. President—I am pausing there for a moment—imposed by this principle of passivity, as it is called, of the court in civil cases. In regard to the alleged facts, that sets a limit beyond which the court cannot go and also the actual relief or remedy claimed—that also sets a limit for the court.

Now comes the qualification which is dealt with in this very section of the Dutch Code:

> "But *curia jus novit*: [the Court knows the law] it would be in conflict with the conditions of a sound legal system if the passivity of the judge should be stretched to such limits that he is also restricted to the grounds advanced by the parties why the relief claimed by virtue of the facts in a given case is sound in law. On the contrary, in this regard the judge is completely independent; he has to add all the grounds which the parties did not—or did not

> fully—advance for the purpose of showing that the action instituted or the defence thereto is good in law."

A very clear exposition, Mr. President, in my submission, of the distinctions in this regard, between the limits set by the allegations of fact and by the relief claimed and then falling in between the application of the law to the facts in order to see whether the relief claimed is good. The principle extends, according to the comment of this author, as he proceeds in commenting on this section, also to the question of the permission given, or the right given, to a court to call witnesses of its own, or to call in expert evidence of its own in civil cases, where he emphasizes that even in such cases it can only be done within the limits of the factual dispute, of the factual allegations made by the one party and contested by the other. The Court cannot call such evidence with a view to establishing some proposition of its own, as a matter of fact, of which there has not been fair notification to the other side.

In the French law—I wish to give the Court only this reference to *Delort* v. *Rongier*—a case decided on 18 March 1955 and reported in *Recueil Dalloz 33*, 1956, at page 517. There it was stated that the judges hearing a case "can neither modify the object nor the cause of the claim and must decide within the limits fixed by the 'conclusions' of the parties". And the case referred to that principle as the principle of *non ultra petita*, not extending beyond what is asked for, what is claimed.

Turning then to the practice in international law and in international tribunals, Mr. President, I wish to give only a few brief references to commentators and to the practice of the previous Court and of this Court.

President Basdevant stated in an article which was published in 1957 in Milan, an anthology called *Scritti di Diritto Internazionale in onore di* Tomaso Perassi, Volume I, at page 175 (I give our translation):

> "The conclusions [in the plural] presented by a litigant before a court are, conforming to the current meaning, the deductions he draws from the legal facts and 'motifs' advanced by him;".

Motifs, again the French word, to which we had regard before, ". . . the deductions he draws from the legal facts and motifs advanced by him. They are, at the same time and eventually, the enunciation of that which the litigant requests the Court to say and to pass judgment on." May I pause there for a moment, Mr. President?

By legal facts and the motifs, as I understand the learned author, he means those facts which have legal significance for the purposes of the dispute between the parties. The motifs, they are the justification, the facts providing justification or a *causa* for the relief claimed. So that is the function, then, of the submissions, that they are to set out those legal facts, those facts regarded as a justification, as a prerequisite and as a *causa* for the relief which is claimed. That is to be indicated in the conclusions or the submissions.

I wish to emphasize also the word "deductions" which the party draws from those legal facts and motifs. It is quite evident that the party is not required to set out in the submissions all the facts on which he relies. It would sometimes be entirely clumsy; it would be an impossible feat for him sometimes to do so. As long as he sets forth the deductions which he draws from the legal facts and motives, and those legal facts and motives must then surely be identified clearly in the submissions in order that one might know what their ambit is.

Another author, J. C. Wittenberg, *L'Organisation judiciaire, la procédure et la sentence internationales*, Paris, 1937, at page 215, speaks of these conclusions as "the deductions made by the parties on the questions of law and fact dealt with by them". The general principle of *non ultra petita* has been recognized in international law in the jurisprudence of this Court, for instance, in the *Asylum (Interpretation)* case, 1950, at page 402. There the Court stated ". . . that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions".

The Court may recall this was the attempt made to obtain an interpretation of the Judgment of the Court in the previous *Asylum* case and the party asking for the interpretation alleged that there were gaps in the Court's Judgment. The Court's answer was that there were no gaps; that those points referred to in this so-called request for an interpretation were points which were deliberately not dealt with by the Court in the previous Judgment because they had not been included in the submissions of the parties. And President Winiarski dealt with this matter in his dissenting opinion in the *Corfu Channel* case, and drew the same distinction in that regard between questions of fact, as I see it, and questions of law. I quote from page 51 of the record, *I.C.J. Reports 1949*:

> "United Kingdom Counsel admitted that if Albania did not know of the minefield, she cannot be held responsible. Can the Court take a different view on this subject? It is not a matter of a *petitum* of the Parties beyond which the Court has no jurisdiction, but of an interpretation, or a conception of a rule of interpretation or a conception of a rule of international law. Here the Court is not limited by the views of the Parties, as was recognized by the Permanent Court of International Justice in the case of the *Free Zones*."

And then followed the passage which was read to the Court this morning by my learned friend.

So here, Mr. President, a clear distinction is drawn between the case of *petitum*, the case of the limit to the factual case presented to the Court and, on the other hand, questions of interpretation, conceptions of a rule of interpretation or a rule of international law. The *Free Zones* case itself, to which my learned friend referred, provides an interesting example or an illustration of the manner in which this passage was applied, this passage which is an often quoted one commencing with the words "From a general point of view".

In truth, the Court was not there suggesting that it was aiming at a possible interpretation not contended for by one of the parties at all. What happened in that case was that the first question was so framed that the Court was asked whether a certain article in the Treaty of Versailles "has abrogated, or is intended to lead to the abrogation", of the provisions of previous treaties—"has abrogated or is intended to lead to the abrogation". I might say that the quotation is from a special agreement which was submitted to the Court in that case by the parties and a question arose as to the interpretation of the special agreement. The representative of France contended that those were the exhaustive possibilities on which the Court could find; the Court could only find either that the Treaty of Versailles had abrogated the previous provisions or that it was intended, necessarily, to lead to the abrogation of those provisions,

and that there was no alternative. The representative of Switzerland, on the other hand, strenuously contested this and said: No. Switzerland's contention is that neither of those two constructions would be correct, either that there has been an automatic abrogation or that the article of the Treaty of Versailles was intended to lead necessarily to that abrogation.

That was Switzerland's attitude: it had been its attitude throughout the dispute that came to the Court, as appears from the Judgment. The Court eventually found, in terms of Switzerland's contention, that neither of those two possibilities indicated was the correct interpretation of the article in the Treaty of Versailles. That is the sense in which these words are to be understood:

> "From a general point of view, it cannot lightly be admitted that the Court, whose function it is to declare the law, can be called upon to choose between two or more constructions determined beforehand by the Parties, none of which may correspond to the opinion at which it may arrive. Unless otherwise expressly provided, it must be presumed that the Court enjoys the freedom which normally appertains to it, and that it is able, if such is its opinion, not only to accept one or other of the two propositions, but also to reject them both." (*Free Zones of Upper Savoy and the District of Gex, Judgment, 1932. P.C.I.J., Series A/B, No. 46*, p. 138.)

So the Court merely mentioned that as a general consideration which it relied upon in interpreting what was the real intent of the parties to the special agreement. It is true that it there recognized the general principle that even if the parties were to purport to bind the Court to two or more constructions then the Court would not be so bound "[u]nless [as the Court said] otherwise expressly provided", but I am merely pointing out that in that case it was not even a matter of the Court arriving at a conclusion not contended for by one of the parties. The Court in fact then used this consideration for confirming its interpretation of the special agreement, and saying that Switzerland's interpretation of that was correct, and ultimately also upheld the contention of Switzerland as to the interpretation of the Treaty of Versailles.

And that, Mr. President, brings one on to the question of amendments of submissions. The general principle seems to be clear that, subject to certain considerations again pertaining to fairness, equity and so forth, and the convenience of the Court and of the parties, amendments are to be allowed, and what is important is that when the amendment has been made the amended submission takes the place of the earlier submission, whether it has narrowed the case or whether it has widened it. That has been recognized in several instances, for instance, in the case of the *German Interests in Polish Upper Silesia*. The merits of that case before the Permanent Court are reported in *P.C.I.J., Series A, No. 7*, and I read at page 10 where it was said that the Respondent—"withdrew the submission set out in the Rejoinder and agreed to argue the matter on the basis of the so-called subsidiary submission, that is to say, the submission formulated in the Reply". In fact, the matter was then adjudged on the basis, on the subsidiary submission which was indicated by that party as the one on which it relied.

In the *Chorzów Factory* case, *P.C.I.J., Series A, No. 9*, at page 18, it was stated as follows:

"As has already been indicated, the Applicant has, in his case on the merits, made submissions which constitute an amendment of the submissions made in the Application.

Since this amendment has been effected in the first document of the written proceedings, in a suit brought by application—i.e., at a time when, in accordance with Article 38 of the Rules, the Respondent still retains a completely free hand to file Preliminary Objections—no exception can be taken to it. Moreoever, the Respondent, in his preliminary plea, has referred to the Applicant's submissions as formulated in the case and not as formulated in the Application [in other words, the case is then proceeded with on the basis of the Applicant's submissions as formulated in the case and not as formulated in the Application]. It is, therefore, the submissions as formulated in the case that the Court has now before it."

Similarly, in the case of the *Readaptation of the Mavrommatis Concessions*, the jurisdiction aspect of which is reported in *P.C.I.J., Series A, No. 11*, at page 11 and the following, the submissions were also considered to be the basis of the judgment:

"The Greek Government having in its case amended the submissions of the Application, the Court takes as the basis of its examination the submissions of the Case, which are the submissions made in the last document upon which the opposite party has been able to base his objection."

And then the next case, Mr. President, refers to some of the considerations to be taken into account in this question of amendment of submissions, that is the case relating to the *Territorial Jurisdiction of the International Commission of the River Oder*, also in the Permanent Court, *P.C.I.J., Series A, No. 23*, at pages 45 and 46. There the Court fixed a time-limit if one of the parties wished to file an alternative submission, because, as was stated at page 45, "the Parties must have an equal opportunity reciprocally to discuss their respective contentions", and they must accordingly, "be enabled to discuss in their first oral argument and not only in their reply any alternative submissions made".

I proceed, Mr. President, to refer to the summarization given by Judge Read, in the case of *Certain Norwegian Loans*, of the considerations applying in this regard in the practice of the Court:

"It is true that it has been the established practice of this Court, and of the Permanent Court, to permit the Parties to modify their Submissions up to the end of the Oral Proceedings. Indeed, the President asked the Parties to file their Final Submissions before terminating the Oral Proceedings; and, in so doing, he was following a practice of long standing. Thus, it was open to France to amend the Submissions at that stage. But the right is subject to two limitations. The first limitation is that, when there is an appreciable change, the other Party must have a fair opportunity to comment on the amended Submissions. In this case, the amendment was made at the close of the French opening statement, and Norway has had two opportunities to reply, of which full advantage has been taken.

The second condition is that the amendment must be an amendment. It must not consist of an attempt by the Applicant Government to bring a new and different dispute before the Court. If so,

> the amended Submissions are not admissible, unless the new elements have been incorporated in the dispute either by the Respondent Government or by the two Governments in the course of the Written and Oral Proceedings." (*I.C.J. Reports 1957*, pp. 80 and 81.)

This passage indicates therefore, Mr. President, very evident limits to the right to amend submissions.

Now especially in regard to this last aspect as to the amendment of submissions at the close of a party's case, viz., that it must be an amendment and it must not bring an entirely new and different dispute before the Court, let us take the case where a party has closed his case and at a later stage, while the other party is presenting its case, or right at the close of the proceedings, that party comes and wishes to introduce an amendment which in substance amounts to the making of a new case. Now surely, Mr. President, one then stands in a position where the new case might relate to something which has not been canvassed in what went before in the pleadings and in any oral presentations of evidence and argument to the Court; then surely the ratio of this limitation becomes perfectly plain. The party cannot then, at the very end, introduce something which should have come at the very beginning or should have come at the stage where it could have been followed up by the normal steps which would proceed upon it; where the other party would still have been in the position to present such evidence and to present argument as might be necessary for that purpose of meeting the new case.

It therefore stands to reason, Mr. President, in my submission, that at the close of proceedings, where both parties have presented their case, or after a party has presented and closed its case and the other party has started on the presentation of its case as it understands the case which it has to meet, then it is not competent for a party to introduce a further amendment which brings into play something which has not been canvassed at all before, something which would have to be canvassed right from the start and afresh if it were to be taken into consideration by the Court.

These basic principles, therefore, Mr. President, are to be applied, in my submission, to the situation now confronting the Court. The submissions are the key, as we understand the authorities. They are the formal conclusion. They provide the key to the propositions of fact which are alleged and relied upon; therefore, they are also the key to what the other side is called upon to meet and they are also the key to what is submitted to the Court. In addition, they provide the limits to what is submitted to the Court for its investigation and its adjudication. The limits to the Court's powers in that respect correspond exactly to the limits of what has been advised to the other side as the case on fact which that party has to meet.

Those are the functions of the submissions, apart from indicating the legal conclusions which are sought to be drawn from the facts alleged and relied upon.

It would also be clear to the Court, Mr. President, with submission, that there must in reason and in logic be two basic ways in which submissions could indicate a limit to the ambit of the factual case which is presented. There could be combinations of them, or they could both operate as they in fact do in this particular case, or one or the other could operate. One could be a positive statement of the factual averments or propositions, and that positive statement could then indicate

the limits of the proposition or averment relied upon; that is the one way. The other way would be to frame a legal conclusion in such a way as to indicate clearly that the only facts relied upon are those which are necessary to sustain the legal conclusion, and no other facts.

Then, Mr. President, there is the other factor to which I referred in passing when I quoted from the article by President Basdevant, and that is that by reason of considerations, of convenience it may very often be quite impossible to set out fully in the submissions themselves all the propositions or facts relied upon. What is required to be set out is the deduction from those facts; in other words, the broad scope of the factual proposition drawn from the facts relied upon; and the actual facts, and their scope, and their limits would have to be indicated by a process of incorporation by reference. The submissions would indicate by reference what the facts are upon which reliance is placed.

That is, Mr. President, what was very clearly done in this case, in the first submissions as they appeared in the Memorials. There the Applicants, without any objection on our part and, in my submission, completely properly as a question of form, set out their submissions in such a way as to incorporate, by reference in those submissions, certain allegations of fact. I read from page 197, **I**, of the Memorials:

> "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 . . ."

So the second portion indicates the legal conclusion drawn; the first portion sets out, by way of incorporation by reference, what facts are relied upon, what are the limits and the scope of those facts. We look back to Chapter V of the Memorial, and then we see that in the first instance the facts are grouped under certain headings, and with reference to certain measures, certain laws, regulations, practices, and so forth. Various subjects are thus introduced into the discussion; various others are not introduced. One looks over the whole of it and then one sees that there is no complaint in the sphere of health, for instance—provision of hospitals and similar health facilities and so forth—no complaint of that kind, so one knows that is excluded from the case. One sees, as at that stage, that there was no complaint whatsoever about levels of wages; that was *prima facie* excluded from the case. An attempt was made later in the Reply to introduce a complaint of that kind, but as it stood at that stage, that was what the submissions meant.

There was a complaint of oppression of the Native population, but no complaint of a similar nature, or of any nature, in regard to the Coloured population of the territory, so one knew that anything of that nature was excluded.

Finally, Mr. President, on analysis of what content was then ascribed to this concept of apartheid in the relevant portions of Chapter V of the Memorial, and particularly also as repeated in the summary in paragraphs 189 and 190 thereof, it was unmistakably a definition of deliberate oppression, deliberate oppression of the Native peoples. I have read those definitions to the Court before *ad nauseam*; I need not read them to the Court again. The description in them is so absolutely clear; that

is the only interpretation one can give to it. And when one comes to paragraphs 189 and 190 in the summary they again highlight and emphasize the aspect of deliberate oppression. That is therefore the content then given, and the scope given, to this policy of apartheid complained of, the concept of being a system of deliberate oppression in the various fields, and if one reads the actual exposition of the facts under the various heads, and again as summarized in that lengthy portion of paragraph 190, in each and every instance it comes to this, that by design and by result, apartheid was in the particular respects alleged a discrimination against the Native population and in favour of the European population. That was the case then set out in Submission 3.

Similarly, Mr. President, when one looks at Submission 4 which reads:

> "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 . . .".

There again is the factual allegation, exactly the same applies here as in regard to Submission 3. If one wants to know what those economic, political, social and educational policies complained of are, what the factual aspect of those complained of is, one has but to look back and one finds the same answer—deliberate oppression, deliberate systematic discrimination against the Native population in favour of the White population.

So one knew also that those were the limits of the contention; one knew also that there was at that stage, Mr. President, whatever the Applicants say now, no suggestion whatsoever that the mere fact of distinguishing as to race, colour, national or tribal origin in establishing rights or duties, that that fact, taken neutrally and by itself, without having regard to the allegation of alleged oppressive effect, was in itself to be regarded as a concept being relied upon, as a factual concept. One knew also at that stage that in no other sense was any factual case being made against the Respondent.

Now, Mr. President, we have amended submissions, submissions as amended at the end of the proceedings on 19 May, which was the end of the Applicants' presentation to this Court of their case, not only on the law, but also on the facts. For days and days, beginning particularly at the stage of the discussions on the inspection proposal, there had been a preparation and a building up towards this amendment of submissions, when the Applicants started to explain to this Court that we were understanding their case completely wrongly; that it was not a case of deliberate oppression at all; that they did not rely upon any intent, any improper motivation, or anything of that kind, on the Respondent's part, nor on the effects of policies, or the results of policies as constituting the brunt of their complaints; that they were relying on this very fact of distinguishing as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the territory, or as more fully set out to the same effect at **IV**, page 493 of the Reply.

That came to be their theme and, Mr. President, they indicated in various ways why this new case, this new formulation of their case, as they put it, this new explanation of their case—we say it is a new case and, we submit, it is very clearly that—was to be seen as indicating the

ambit of the further proceedings. They referred to it specifically as the reason why they submitted that no evidence that we wanted to call could be relevant, that the inspection *in loco* could not be relevant; in other words, they served notice upon us that the ambit of the factual case being preferred against us did not make it necessary to have any evidence and that there was nothing outside the scope of this case which they were presenting that called for any factual canvassing on our side at all.

That was how they set about it, Mr. President, in the explanations given which lead up to the amendment of the submissions. Then they came and they presented the amended wording of their submissions, and that coincided exactly with the explanations given, and to make doubly sure they added a formal interpretation and formal explanations of the submissions.

Therefore, Mr. President, that was the stage from which we proceeded in presenting our legal rejoinder and our case on the facts in the evidence now being presented to the Court. Now we had new submissions quite obviously intended to remove any of the misunderstanding of the past as the Applicants would prefer to have it or, as we suggest to the Court, any vestige of the remainder of the original case made by the Applicants. And these submissions are now to be looked at primarily, together with whatever is incorporated by reference *in them*, in order to see what is now this case being made.

Mr. President, our submission is that those submissions, read by themselves and as read, secondly, with incorporation into them of the interpretations and explanations given, formal and informal, make clear beyond any doubt that the Applicants did not include in those submissions any factual averment which would authorize this Court to conduct any factual enquiry beyond the scope of the Applicants' case as described in the Court's questions under consideration, namely the case based upon standards and/or the norm.

They made it perfectly clear, Mr. President, that that case which they were making was intended to indicate not only the scope of their legal contentions to the Court, but also the scope, and the only scope, of the factual case which they were presenting and which they were calling upon us to meet.

They made that clear in various ways. They made it clear, firstly, by the positive descriptions which they gave to the factual propositions on which they rely. They made it clear by the ambit of the relevant facts indicated by the formulation of their legal contentions. They indicated that those contentions were their sole case, and if they could not succeed, then their Submissions 3 and 4 had to fail. They expressly indicated that they do not advance certain factual propositions, namely anything concerning the purpose of the Mandatory or the effects of the policy, which are really the only conceivable other factual propositions which could have been relied upon if they had wished to do so—they made it clear that they did not rely upon those. They expressly indicated, they said, that they were informing the Respondent, through the Court, that no evidence outside certain undisputed facts would be relevant and they said that their sole case rested exclusively on a legal conclusion which they contended flowed inherently and *per se* from the undisputed facts. That they stressed throughout, making it clear that they were not relying on a factual proposition and that there was no justification for the Respondent to see them (the Applicants) as relying upon a factual

proposition which would require an establishing of facts. Finally, they said that they were not presenting to the Court facts falling outside the scope of those undisputed ones on which they were relying—they used that expression—they were not presenting them to the Court and they made it clear that it would not be the Court's appropriate function to conduct a factual enquiry beyond the scope of what they were submitting to the Court.

I could illustrate this, Mr. President, abundantly from the record. I do not wish to refer again to all the passages that could be said to be relevant in this respect because that would be a very, very tedious process. I gave the Court, on 10 June if I remember correctly, a list of excerpts of what the Applicants stated at various times in this respect and I should like to refer now to some of those—not all of them—and I wish to add one or two more to demonstrate what I have just said to the Court, but before doing so I should like to make one point clear.

The submissions as they stand are quite clearly unintelligible by themselves. They require to be read, and they are intended to be read, with reference to certain matters intended to be incorporated by reference in them; that becomes very clear from their wording. The only thing is now that the incorporation by reference is something different from what it was in the initial submissions. The wording is different, and therefore the effect is different, of what is now being incorporated by reference. We find in Submission No. 3 that the wording is "Respondent by laws and regulations, and official methods and measures, which are set out in the pleadings herein, has practised apartheid".

Mr. President, how could one, merely by reading that, know which are the laws and regulations, and official methods and measures, relied upon? It is merely said that they are "set out in the pleadings herein"; not as originally in Chapter V of the Memorials and as summarized in particular paragraphs, but which are "set out in the pleadings herein". Quite obviously, the man who has drafted this intends the Court to have reference to some explanation which he has given as to which are those laws, etc., he relies upon as being set out in the pleadings. And, Mr. President, one finds that in the verbatim record of 17 May, in which the explanation is given which are those laws and regulations and where they are to be found in the pleadings.

The same applies to Submission No. 4, which by official, formal, interpretation is said to have exactly the same meaning and intent as Submission No. 3; the distinction being verbal only. There we read that the 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 a norm, or standards, or both, failed to promote. So, again, the vague formulation, of policies applied within the Territory by means of laws and regulations and so forth which are "set out in the pleadings herein". Again one has to refer to the record of the Oral Proceedings, to the explanations which went before the submissions, in order to see what it is that is now intended to be incorporated by reference in the submissions.

That is the only point I want to make at the moment. One finds that very clearly in the records of the Oral Proceedings and that is why, Mr. President, I want to commence this interpretation of the submissions, as amended, by referring first to these explanations which went before

and then, on the basis of those explanations, to come back to the wording of the submissions as they stand.

I should like to begin with the verbatim record of 3 May, at **IX,** page 91, where my learned friend, Mr. Gross, said to the Court:

> "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.'"

That was our question and now comes my learned friend's answer. He says:

> "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." (**IX,** p. 92.)

Mr. President, in my submission, I cannot see how my learned friend can now say that this Court is free to conduct an enquiry of which he does not say what the limits would be, but an enquiry which falls clearly outside this answer which he gave to a query from our side where we asked him: are there any "factual allegations which ask this Court to pass an adverse value judgment either as to the purpose or as to the effect or as to both", and he replied: "No, there are none." He rests purely upon the existence of certain undisputed laws and regulations, the existence of which he says "constitute sa *per se* violation". Now, how could there be a clearer intimation both to the Court and to the other side that that is the factual scope of the proposition being advanced and which was then eventually incorporated in the amended submission?

[Public hearing of 1 July 1965]

Mr. DE VILLIERS: Mr. President and honourable Members, at the adjournment yesterday I had just begun a process of interpretation of the Applicants' amended submissions, as presented to the Court on 19 May—interpretation, that is, with a view to ascertaining the ambit of the factual propositions which are intended to be advanced in those

submissions. As I pointed out to the Court, those were now the governing submissions, in substitution for the original ones as set out in the Memorials, just as in the *Chorzów Factory* case, to which I referred yesterday, and in the *Mavrommatis Adaptation* cases, in which the Court said that the submissions as amended in the course of the cases, were now the governing submissions in substitution for the original ones.

I pointed out also, Mr. President, that when it comes to interpreting the submissions it is a matter, as in all interpretation, of ascertaining the intention of the author of the document, and I pointed out that the submissions by their wording are obviously not intended to be self-explanatory; that particularly in so far as the factual ambit of the case is concerned, the submissions were intended to be read with explanations given simultaneously or shortly before. Particularly that was so in regard to the laws, regulations, official methods and measures and policies referred to in those submissions—they were not defined, except very vaguely, as having been set out in the pleadings herein, and it was necessary therefore to have regard to the oral record in order to see which exactly those were. And the second important respect in which it would be necessary, or very useful, to have regard to the explanations offered, was in regard to the exact aspect of fact upon which the Applicants sought to rely with regard to those measures and methods and policies applied in the Territory—what the particular factual aspect of those measures was they were seeking to rely upon.

Our submission is that in this respect the wording of the submissions in itself is clear, but we submit that when regard is had to the explanations given in various ways and in various formulations, the matter becomes clear beyond any possible doubt. It was in that context, then, that I started off with a reference to a passage in the record of 3 May, at **IX,** page 91, which I read out to the Court. That related to the question in which we asked specifically what factual allegations were made and whether any factual allegations were made outside the ambit of the Applicants' case resting upon a norm and/or standards. We got a very definite answer which was to the effect that no factual allegations were intended to be advanced, either as to the purpose or as to the effect of the measures, methods and policies concerned.

I should like to refer now to another passage in that same record of 3 May, to be read in conjunction with the one to which I referred yesterday—that is at **IX,** page 91 of the record. The Applicants referred first as follows to what they suggest Respondent's attitude is in regard to the inspection and in regard to evidence:

> "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'."

Now, after that, my learned friend proceeds to put the Applicants' contrary attitude:

> "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 word in the record is "fall"; it may have been intended to be "fail", but in any event the effect seems to be the same. This very clearly tells us, Mr. President, that it is that *per se* aspect, i.e., of looking at the laws, regulations, official methods and measures, the existence of which is conceded—constitutes the factual aspect relied upon, and that, then, if the Applicants' legal contention flowing from that fails, then Submissions 3 and 4 must fall, or fail.

I should like to refer next to the record of 30 April. My learned friend was there dealing—at **IX**, pages 61 and 62—with a question which had been put by the honourable President in regard to the existence or otherwise of any distinction between his Submissions 3 and 4, as they were worded in the Memorials and as they still stood on record at that stage. My learned friend then explained that there was no difference at all, and that no difference was intended; and in order to make that perfectly clear he gave a reformulation of his Submission No. 4, at page 61, which included the words "in the light of the applicable international legal norm and international standards". Now, in that context, my learned friend proceeded as follows at page 62:

> "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."

And immediately adjacent to that, on the next page—63—the Applicants said:

> "In the Applicants' respectful view, there appears to be even less justification for presentation of oral testimony than for inspection."

Mr. President, may we pause again and look at the significant features of this wording? In the second line of what I read we see "no issue is presented thereunder ['thereunder' apparently meaning under Submission 4, or 3 and 4, which have now been identified as meaning the same thing]; which would call for, or make relevant, an inspection". And then, on the next page, presentation of oral testimony is put on the same footing as, or even on an *a fortiori* basis than an inspection—in order to appraise or evaluate, or to make judgments concerning whether or to what extent

Respondent's policies of administration in fact, in the various spheres, are compatible with or repugnant to the legal obligations. So, Mr. President, again in so many words it is said that no issue is presented on those factual aspects, and the further explanation follows which is supplementary, and fits into the picture: the reason why no such issue of fact is presented is because the Applicants' case stands or falls by its theory and submission of an inherent, a legal, consequence which is said to flow from the mere existence of those laws and regulations in the light of the legal norm and/or standards. So nothing, again, could have been a clearer intimation to the Court and to us as to the limit of the factual presentation intended in the submissions. Of course, the submissions, as they then stood, did not yet give full effect to the manner in which the Applicants chose to present their case, and that explains why the amendment was eventually made on 19 May.

I should next like to refer to a passage at **IX**, page 64, of that same record of 30 April, where, just below the middle of the page, my learned friend says as follows:

> "In the Rejoinder, **V**, and I refer to page 119, Respondent concedes, or contends: [and then follows a quotation from the Rejoinder, which I should like to read very carefully to the Court.]
>
> > 'If this alleged norm [and my learned friend interposed "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 differentation 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.'"

That is the end of the quotation from the Rejoinder, and my learned friend proceeds to state:

> "With this comment, of course, the Applicants agree fully. The word 'contain' [that is in the last phrase 'whether or not the Mandate contains such a norm'], we would construe as an interpretation of the obligation." (**IX**, p. 64.)

So, Mr. President, here it is said that we exactly represent what the true issue is, "comment . . . [with which] the Applicants agree fully", and our comment is explicitly so worded that "Respondent's admitted policies of differentiation [my learned friend now complains about our use of that word] would constitute a contravention . . . 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". And our comment was rounded off with: "Consequently the sole issue . . . on this aspect . . . is a legal one."

My learned friend, having now made clear that this case brought on the norm and/or the standards of the same content as the norm, is his only case, surely then it follows that that is in respect of the case which he brings, the sole issue between the Parties is a legal one.

My learned friend went further at page 64, and said:

> "For the purpose of interpretation and application, the following passage in the same volume of the Rejoinder removes any vestige of

doubt that Respondent clearly understands the basis of the Applicants' case."

I shall now read to the Court only the relevant passage from the Rejoinder, which was cited by my learned friend, commencing at about the fourth line thereof:

> "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".'" (**IX**, pp. 64-65.)

I need not quote further, Mr. President. That is the passage which my learned friend says "removes any vestige of doubt that Respondent clearly understands the basis of the Applicants' case". That discloses an understanding of Applicants' case as involving that Article 2 allegedly contains an absolute prohibition on that kind of allotment and that, in that event there would exist no dispute of fact between the Parties.

In the same record, Mr. President, carrying on in this same context, there is an interesting indication of the sense in which the Applicants now use the word "apartheid". In the presentation of their new case to the Court—this limited case, as contrasted with the one which we understood them to make initially, viz., that apartheid was a deliberately oppressive policy, Applicants now concentrate on the aspect of a differential allotment—of distinguishing between various inhabitants of the Territory in the allotment of rights and obligations on the basis of their membership in a race or class or group. After saying that these two extracts from the Rejoinder reflect an exact understanding of what the Applicants' case is, my learned friend proceeds to say that that shows that the Applicants' case does rest on such a proposition of a *per se* result (without any conflict of fact) flowing from the mere existence of the laws and measures concerned. He then proceeds in the same sentence and in the same breath to state, at **IX**, page 65:

> ". . . 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".

Clearly in the context he indicates in what sense apartheid is now used for the purposes of this new limited contention. I shall come back to this point, but this is one of the passages which throws light on that situation. There are more, and the others are even more explicit.

I should next like to refer to a passage in the verbatim record of 28 April, at **IX**, page 57, and I quote from about the middle of the page:

> "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."

Mr. President, with respect and submission, how could we have it plainer and more explicit, in all these various kinds of wording, that there is now a limited factual proposition relied upon, and intended to be relied upon, in the submissions, and that, consequently, evidence outside the ambit of that proposition would be unnecessary? We have it in the statement that "that is the heart and soul of the Applicants' case, and . . . if wrong, they will be told so"; we have it in the statement that the "Applicants have confidence in the legal propositions upon which they rest their submissions". In other words, those legal propositions then indicate also the ambit of the facts upon which the Applicants intend to rely in their submissions, because those are the facts, and the only facts which are sufficient to sustain those legal propositions as relied upon by the Applicants. That is what they keep telling us over and over again in these passages.

They say ". . . on the basis of the submissions, as the Applicants intend and respectfully present them". Now, what is that basis? They go on to say: ". . . on the basis of the undisputed facts of this record", namely the existence of those measures, methods and policies explained so often in other passages, the Applicants "respectfully submit, and accordingly through the Court advise the Respondent, that . . . [they] rest their case upon the propositions asserted" and that makes evidence unnecessary—evidence outside those propositions.

Next, I should like to refer to a passage in the verbatim record of 13 May. In the last passage I quoted, the Applicants emphasized that they were advising us as to the ambit of the factual case which they intend to make in their submissions, and that they intend their submissions to be read in that respect; but here, in the passage I am about to read, the Applicants emphasize the limit to what they are asking the Court to do. I shall read from **IX,** page 246:

> "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."

And that is why the Court is not asked to indulge or engage itself in any process of evaluation of the policy on a basis of fact, and thereby to second-guess the competent organ.

Then, further on this theme, Mr. President, we find in the record of 18 May that the Applicants go so far as to say that it would be foreign to the judicial nature of the Court's task to engage upon such an investigation. There is a passage on this point in this record of 18 May and also in the one of 17 May. I shall read the passage 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". (**IX,** p. 326.)

I read, with that, a passage in the record of 17 May:

"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." (*Ibid.*, pp. 299-300.)

My learned friend, Mr. Grosskopf, in quoting this passage to the Court before, indicated that those introductory words would appear to be inappropriate. This result would not follow from the Respondent's contention of testing on the basis of whether there has been an abuse of power but it would certainly follow upon the basis of a contention, that the Court is to judge in accordance with the effects, the consequences

or the results of the policies. But be that as it may, the Applicants put the proposition of making a choice between Respondent's conception of moral and material well-being and social progress and that of the Court's and saying that such a decision would not possess the juridical attributes properly to be associated with the tradition of this honourable Court.

So again, we are being told in various ways, Mr. President, that the Applicants do not present to the Court, and do not require us to meet, any factual proposition outside the ambit of what is strictly necessary for the purposes of their norm and standards' contention. And they go so far as to suggest that outside that ambit there would be no competence for the Court to exercise a judicial function, irrespective of where they have set the limit of their submission. Then, at **IX,** page 299, of that same record to which I have just referred, 17 May, there is another passage which links up very clearly with this note, and it gives the same explanation as in other parts—the explanation of the legal consequence which must, *ipso facto*, follow. I read at page 299:

> "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."

I stress the words, Mr. President, "*[i]t has never been part of the Applicants' case*". This is not merely their theory of the case; it is the Applicants' case.

Now I should like to refer to the record of 19 May, in order to indicate that what I have read here, bringing us as it does up to 17 May, was maintained right up to the last moment, leading up to the amendment of the submission. I wish to read a passage from the record of 19 May:

> ". . . 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." (**IX,** p. 363.)

Mr. President, here we get another indication of the sense in which the word "apartheid" is now used—"apartheid" in a sense which views that policy quite independently of its actual effects, quite independently as explained in other passages of the consequences attached to it. It is the aspect of the policy which inherently and *per se* constitutes a violation of the standards and the norm contended for by the Applicants; it is that aspect of the policy and that aspect of the policy alone, which constitutes the basis of the Applicants' case; and that is what they tell us here in so many words.

We may now revert to the record of 19 May in which the submissions

were put. Let us come to the wording of the submissions and we begin again with these first words of Submission 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 . . ." (**IX**, p. 374.)

The first question is, which are these laws and regulations? Where are they identified? As I said to the Court, the identification one finds in the record of 17 May, and I should like to refer to certain of those passages which make it clear beyond doubt what those regulations and laws, policies, and methods and measures are, and what particular factual aspect of them the Applicants seek to rely upon. I begin with a passage at **IX**, page 285, of the record of 17 May—a general passage which I should like to read with a passage at the same page. The paragraph at page 285 reads:

> "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."

So, Mr. President, here we find the identification. The purpose is to present to the Court that *corpus*, that pattern of laws and regulations, the existence of which is conceded and which, in the Applicants' contention, leads to that *per se* inherent violation. It is referred to as this *corpus* of fact, the body of laws and regulations, measures and methods. And, Mr. President, in a further description, going on to the economic aspect of it, but expressed in a general sense, the Applicants say (at p. 285): "This is the body of fact upon which the Applicants rest their case: . . ."

Now, Mr. President, the Applicants proceed, having stated in general that that is the body of fact, that that identifies the body of fact and indicates the aspect relied upon, viz., this *per se* aspect. One finds that the Applicants break it up into compartments, categorization as they call it. And in respect of each compartment, we find the exactly repetitive words, in each instance emphasizing to the Court that it is only this limited *per se* aspect of the matter relied upon by the Applicants—only the aspects of the existence of those measures which is undisputed. Then the legal consequence is suggested to follow *per se* from that existence, namely that of violation of the norm and standards and therefore a violation of Article 2.

I shall give the Court an example of how the matter is dealt with in the economic sphere, and then the references to how it is dealt with in the other spheres, and the Court will see that in each case the formulation is exactly repeated. The system in each case is, first, to refer to certain passages in the Memorials in which there were set out the general duties

of the Mandatory, with regard to the particular aspect of life. Thus we find in the record of 17 May this stated, on the economic aspect:

> "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: . . ." (**IX,** p. 285.)

Even now, when stating the duties, that formulation follows, all within that context, all to be carried out in that context. Those words, Mr. President, are repeated every time—when it comes to the political aspect, when it comes to the civil rights aspect, and when it comes to the educational aspect; those very words are repeated every time as to the sense in which those duties are to be read: all to be carried out in the context of the international standards and the legal norm of non-discrimination and non-separation.

Then, after quoting the words of the declaration on these duties, there is this statement at the same page:

> "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."

So here we find our identification, Mr. President. The pages of the Memorials are given, and then in what follows there is given a reference also to pages in the other pleadings where these same measures are dealt with; this description in two ways emphasizing that the only aspect of the measures, etc., relied upon falls within this limited *per se* contention of the Applicants—within the context of that, both in regard to the duties and in regard to the laws, regulations, measures and methods. We find those statements limiting the context, the factual aspects, on which the Applicants seek to place reliance.

That we find again in regard to the political aspect, at **IX,** page 287:

> "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, [and then those same words] 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."

After quoting the Memorials, giving the pages of the Memorials where the Applicants have set out the laws and regulations, official measures and methods regarding political lives, there is again the same formulation, viz., that they constitute *per se* violation of the norm and the standards.

Pages 289 and 290 **(IX)** give us the same position in regard to civil liberties—at page 290, first the duties, with that sole formulation attached to it; and then at the same page, the references to the pages of the Memorials, where the laws, regulations, methods and measures are dealt with—

again with the same formulation attached to it. Finally, at page 294, we find the same story with regard to the educational life—the duties and then, in a later paragraph, the reference to the laws, etc., and the same formulation in exactly the same words as before.

So, Mr. President, we find, with respect, that when we interpret those first words of the amended Submission 3, here is the identification both of the laws, regulations, measures and policies, and of the factual aspects averred and relied upon.

In the result, the term "apartheid" now takes on this new sense which I have indicated, and that is explicitly explained in this same record of 17 May. This is what the Applicants stated at the conclusion of their presentation of the catalogue:

> "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." (**IX**, pp. 298-299.)

So, Mr. President, I cannot see how one can have it clearer, that this is now the limited sense in which reference is made to apartheid. This is the content assigned to apartheid—this aspect of it which allots rights and obligations in conflict with the suggested norm and/or standards, thereby rendering it inherently and *per se*, and without regard to factual aspects such as effects, purposes, or the like, violative of Article 2 of the Mandate in the light of the norms and the standards.

I have emphasized this, Mr. President, because my learned friend, in his presentation to the Court yesterday, said that the issue was one of apartheid and that the Court could apparently play around within the concept of that policy of apartheid and then present a case or come to a conclusion along different lines from those of the Applicants. The Applicants are not allowed to do that; I wish to emphasize to the Court how they themselves, for the purposes of these amended submissions, have now reduced and confined the concept of apartheid by the definition which they now give to it.

Let us contrast this definition with what they stated initially in the

Memorials. I said yesterday that I have read certain of these passages *ad nauseam,* but I think it is of crucial importance now to stress certain aspects of them. One finds the formulation, the definition then, given at I, pages 108-109, of the Memorials, and repeated in substantially the same wording at page 161 in paragraph 189, which was one of the paragraphs incorporated by a reference expressly in the original submissions and now omitted from the submissions.

I read at page 108:

> "Under *apartheid*, the status, rights, duties, opportunities and burdens of the population are determined and allotted arbitrarily on the basis of race, color and tribe, in a pattern which ignores the needs and capacities of the groups and individuals affected, and subordinates the interests and rights of the great majority of the people to the preferences of a minority. Since this section of the Memorial 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. A sober and objective appraisal of the factual record, as hereinafter detailed, compels the conclusion that *apartheid,* as actually practiced 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 in so far as the Mandatory finds it necessary to use the 'Natives' as an indispensable source of common labor or menial service."

Mr. President, if we compare this definition of apartheid now with the one I have just read to the Court from the record of 17 May, surely the significance hits us in the eye—the significance of the distinction. There is no longer this allegation of an arbitrary allotment which ignores the needs and capacities of the individuals concerned; all we have now is that the system itself allots rights and so forth on the basis of membership in a group, rather than on the basis of individual merit, capacity, or quality.

But most important is this aspect: "and subordinates the interests and rights of the great majority of the people to the preferences of a minority." That is stated at I, page 108, and again at page 161 it is specifically put in these words: "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."

Mr. President, can that allegation (as particularized again towards the end of this statement) about exclusion from participation—significant participation—in the life of the territory, and the allegation about using the Natives only as common labourers or for menial service—all that—be regarded as still being included in the amended submissions of 19 May, or must we take the Applicants at their word when they told us in their explanations, in so many words, that they do not rely on any aspect of purpose or effect of the policies complained of but rely only on the existence of these laws and the *ipso facto, per se,* effect which they ascribe to it in the context of the norm and/or the standards relied upon?

Surely, we have had the clearest intimation that whatever the case might have meant initially, as presented in the Memorials, the amended submissions are no longer intended to encompass any such case. If, on

the amendment of the Applicants' submissions with these explanations, I had not said to the Court I shall confine the presentation of further facts by way of evidence to the Court to what is relevant in this limited context—if I had not done that—the Court could have said to me: if you intend leading any evidence outside the ambit of what the Applicants now rely upon in their amended submissions, then that evidence is irrelevant and should not be led.

Now the Applicants want to come back and say that apartheid is really the issue and if the Court takes a different view of apartheid from that of the Applicants, then the Court is free to do so. I submit, Mr. President, that as regards placing a factual meaning upon the concept of apartheid, the Court is very clearly not competent to do so, just as I am not competent to address any evidence to a case in that respect which is in fact not being made by the Applicants.

What is said in regard to apartheid in Submission No. 3 is exactly the same as we find in the result in regard to the policies spoken of in Submission No. 4, quite apart from the official explanation that the two submissions are intended to mean the same thing.

So we find in the verbatim record of 17 May that the Applicants say this:

> "The categorization itself [that is the splitting up into economic, political, and so forth], 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." (**IX**, p. 290)—

making it clear, therefore, that as with regard to the specific use of the word "apartheid" in Submission No. 3 so also with regard to the use of the vaguer words "economic, political, social and educational policies applied within the Territory" in Submission No. 4, the Applicants rely only on what I might call, in short, this *per se* or suggested legal aspect thereof, and nothing more.

Against this background the wording of these submissions falls entirely into place and leaves no doubt whatsoever as to the limit to the factual allegations intended to be made as part of the Applicants' case.

That is why Submission No. 3 says simply that by the laws and regulations concerned Respondent has practised apartheid and then gives this definition of apartheid, that is, has distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory, and that such practice is in violation of its obligations. Therefore, that is the ambit; the words mean exactly what they say and no more and no less. That is the factual sense in which the term "apartheid" is used and is brought into the case as an allegation against the Respondent—an allegation with a certain purport and effect, but also with a certain limit and the limit is an unmistakable one.

That is also why the Applicants say, in Submission No. 4, that "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 inter-

national legal norm, or both, failed to promote to the utmost" (**IX,** p. 374).

All this falls into place. It is exactly as the Applicants intended it—exactly as they explained to us repeatedly and in all these various ways.

So, Mr. President, applying the matter to the context of the third question put by the Court on 22 June, my learned friend said in yesterday's verbatim record:

> "In the context relevant here the Applicants have always conceived, and conceive now, that the dispute between the Parties relevant hereto is constituted by their third and fourth submissions, namely that the practice of apartheid in South West Africa is a breach of the obligations contained in Article 2, paragraph 2, of the Mandate and of Article 22 of the Covenant of the League of Nations." (*Supra*, p. 185.)

Then the Applicants proceed to explain that they have a theory which leads to this *ipso facto* result on the basis of their norm and/or standards. But then they say:

> "This mode of contention, however, is extrinsic to the dispute. Thus the Court might reject the Applicants' contention on this subject and yet adjudge the dispute in Applicants' favour on the basis of the Court's own rationale as to why the policy and practice of apartheid is a violation of the Mandate. That dispute is the dispute in issue." (*Ibid.*)

Mr. President, if the Applicants abide by the definition they themselves gave of the concept of apartheid for the purposes of their amended submissions and which they so obviously intended to incorporate in those amended submissions, then I have no difficulty with this.

Then it could well be said, on the basis of the principles we discussed yesterday, that here we have the existence of a corpus, a body of laws, regulations, methods, policies and practices the existence whereof is undisputed. They have the effect of differential allotment, of distinguishing between inhabitants on the basis of membership in a race, class or group. That is the aspect upon which reliance is placed by the Applicants—the factual aspect—and the Applicants say that from that a conclusion is to be drawn, a legal conclusion of a *per se* violation of the Mandate. The Applicants' rationale for that conclusion, its legal argument in support of the conclusion, is based on the existence of this norm and/or the standards.

It would be competent for the Court, as a matter of theory, to say: we do not agree with that legal contention as to norm or standards; that contention is entirely unsound. But we find that for some other legal reason the mere existence of those laws in this particular context complained of by the Applicants does lead to a violation of Article 2, because of the construction or interpretation which the Court places upon Article 2 as a matter of law.

That would be possible in a theoretical sense, Mr. President. I can, for the life of me, see no practical basis upon which the Court could say that as a matter of law. That would, however, be perfectly permissible. But, Mr. President, if my learned friend suggests by the cited statement that the Court could adopt its own factual conception of what apartheid is, and should not regard itself as being limited by what the Applicants have advanced, and deliberately advanced, as being a limited conception of

what apartheid is as a matter of fact, then I submit that the Applicants are contending for something which is entirely impossible—entirely in conflict with all principles of law and of logic and of natural justice pertaining to the law and the practice of procedure.

The Applicants would appear to suggest this: they say there is one dispute about apartheid and there are various theories of the case. One is the Respondent's theory of an abuse of power as being the only possible basis for finding a violation of Article 2. They say they do not make a case of abuse of power Next, they say there is the Applicants' theory, such theory being based, and exclusively and solely based, upon the *per se* aspect—upon the norm and the standards, and whatever effect that may have in law—and they say that is the case on which they rely. But then, they suggest that the Court may have a theory of its own, and, on the basis of its theory, it may come to its own conclusions, on its own *rationale*. Now, I submit that, in this last respect, a distinction is to be drawn—the distinction between a theory of its own, the legal conclusions to be drawn from the limited ambit of facts relied upon by the Applicants, and the alternative of going outside that ambit of fact.

Mr. President, if the Court could go outside the ambit of fact, how would I know, how would the Respondent know, to what length the Court could go, or what exactly this case is which the Respondent has to meet? My learned friend suggested, if I understood him correctly, not merely that the Court is here—possibly that may have been the effect of his suggestion—to decide a dispute between parties, but that a special significance is to be assigned to the fact that the Court is said to be the final bulwark of protection in the mandate system. The suggestion would seem to be that there is special significance to be attached to that role of the Court—that the Court is to be seen as a kind of an upper-guardian—and that therefore the Court could call the Mandatory to task, and ask the Mandatory to account to it independently of whatever case or dispute might be brought before the Court in respect thereof by an opposite litigant. If that is what the Applicants intend to say to the Court, Mr. President, I submit that quite obviously that is again without foundation.

The case arises under Article 7 of the Mandate, paragraph 1, which speaks of a dispute between the Mandatory and another Member of the League of Nations. It comes before the Court under the general concept of Article 38, paragraph 1, of the Statute, which speaks of the Court's function as being one of deciding, in accordance with international law, such disputes as may be submitted to it by the parties. That is the sole role of the Court, with respect, in a matter of this kind.

How could a litigant possibly know what the Court has in mind in a civil case, unless the Court were to put itself in the position as if it were the Applicants bringing the case—as if the Court were the *dominus litis*—and then assume to itself the function of formulating a submission which the Applicants have not formulated, and of saying that there is intended to be read into that submission something which the Applicants do not intend to be read therein—which they have said repeatedly they do not intend to be read therein. How does the Court formulate that, and if the Court does not formulate that, how does a Respondent litigant—how does that Respondent know—what case the Court might possibly have in mind which it may have to meet? If that were the true position, Mr. President, then my learned friend can never raise any

objection whatsoever on the basis of relevance because on what basis is he going to raise it? Is he going to raise it on his theory of what is relevant and what is not relevant, or is he going to base it on the theory of the Court, and if he bases it on the theory of the Court, how does he know what the limits can be of that theory of the Court?

I submit it is only in this limited sense of applying an alternative legal construction on the basis of the limited facts, relied upon by the Applicants, that the Court has the freedom suggested by my learned friend. And even in regard to the exercise of such a freedom, the general principle would appear to be that considerations of fairness and of equity and of doing proper justice between parties would require that if the Court or any Member of the Court may have a *prima facie* legal view different from that contended for by either of the parties, that should be put to the parties in order to be dealt with by them in legal argument. I could refer the Court to the *Nottebohm* case, *I.C.J. Reports 1955*, at pages 30 and 31. Learned Judge Klaestad dealt in a dissenting opinion with a certain solution discussed by the Court—a certain solution of the matter under consideration—and he said this, that this solution—

> "... was never invoked by the Government of Guatemala, nor discussed by the Government of Liechtenstein. It does not conform with the argument and evidence which the Parties have submitted to the Court, and the Government of Liechtenstein has had no occasion to define its attitude and to prove its eventual contentions with regard to this solution, whereby its claim is now dismissed. In such circumstances, it is difficult to discuss the merits of such a solution except on a theoretical basis; but I shall mention some facts which show how necessary it would have been, in the interest of a proper administration of justice, to afford to the Parties an opportunity to argue this point before it is decided."

I am of course, Mr. President, not concerned with the correctness or otherwise of the application of these considerations to the facts of that particular case or the situation which arose there; I am concerned with the considerations themselves which are so clearly stated by the learned Judge.

Then Judge Read in the same case, also in a dissenting opinion, referred to the same principles, at pages 38 and 39. He stated:

> "Accordingly, the matter is governed by the principle which was applied by this Court in the Ambatielos case (Jurisdiction), Judgment of July 1st, 1952, *I.C.J. Reports 1952*, at page 45:"

[I quote from that case:]

> "The point raised here has not yet been fully argued by the Parties, and cannot, therefore, be decided at this stage."

Then proceeding, Judge Read stated:

> "Indirectly, some aspects were discussed as elements of abuse of right, but not as a rule of international law limiting the power of a sovereign State to exercise the right of diplomatic protection in respect of one of its naturalized citizens.
>
> As a Judge of this Court, I am bound to apply the principle of international law, thus declared by this Court. I cannot concur in the adoption of this ground—not included in the Conclusions and not argued by either Party—as the basis for the allowance of the

plea in bar, and for the prevention of its discussion, consideration and disposition on the merits."

I need not labour that further, Mr. President.

I wish to conclude by saying that in the light of this situation it is our intention to continue with a presentation of evidence on the same basis as we understood the situation before. We do not understand that there is any case being made against us, outside of the ambit of the case explained so repeatedly by my learned friend to this Court, and which seems to be clearly incorporated in the submissions now before the Court. I have said repeatedly that we are prepared to meet any case that may be presented against us, provided that it is presented fairly—that is through the front door, not through a back door—so that we know what that case is, and that we are given timeous notice in order to adapt ourselves to that case.

My learned friend had his choice, and he exercised it with deliberation, at the stage before it came to the amendment of these submissions. He then gave notice to us of this limited scope of his case. On the basis of that notice we have made arrangements totally different from what they were initially. We are calling our evidence now on this very much more limited basis of presentation of the case—very much more limited than it was before. We made new arrangements in regard to witnesses, disposing of some whom we had in mind and not negotiating any further with others whom we had in mind to call in regard to the issue as we initially understood it to be presented. We have limited ourselves in these various respects; we have added certain other witnesses, in order to meet this case and the sole case which the Applicants said they were making against us.

Mr. President, there must, in circumstances of that kind, surely be a limit to the extent to which a party can chop and change and then indicate a new attitude to the Court. There must come a time when the Court should say to a party: you have made your election and you must abide by it, because the case has been shaped on the basis of the election you made and you cannot now, at this late stage, alter it again.

However that may be, Mr. President, the question of what is relevant and what is not relevant, as a matter of fact, is to be determined on the basis of the Applicants' amended submissions, as I have construed them to the Court, and as I submit is their very plain meaning and intent at the moment. That means that what would be relevant by way of evidence would be any factual aspects of the contention of the existence of a norm and/or standards, and I have indicated before what factual aspects could be relevant in that respect. I need not repeat what I have said in that regard.

As regards the factual aspects of apartheid, the Applicants have said to us that they rely only on a very limited aspect of it, and they have defined that aspect, that it is an undisputed aspect, and therefore, in that respect itself no further evidence would appear to be called for.

It is true, Mr. President, that by presenting our evidence and the facts that are already on record, it is possible to demonstrate beyond any possibility of doubt that it would not have been possible for the Applicants to succeed on any of the alternative cases which they could possibly have made on the basis of purposes or on the basis of effects. And we shall, for good measure, in due course when we come to deal with the matter in argument, demonstrate that to the Court by way of illustration.

It so happens also that some aspects of the evidence, which we shall present to the Court on the factual aspects pertaining to the Applicants' contention as to a norm and as to standards, will also serve as an illustration why it would have been quite impossible for the Applicants to succeed on the basis of a case of purposes or effects.

That happens to be so, but that is not the purpose for which the evidence is being called. If I had to meet—if I were given due notification that I would have to meet—a wider case on fact, a case relating either to the purposes or to the effects of the policies referred to, or any factual aspects other than the *per se* one apparently relied upon by the Applicants, then, of course, I would have to reconsider the whole position and widen the ambit of the evidence to be presented to the Court. Then it would be possible to bring evidence upon a much wider basis, but that is not necessary. The Applicants, at the time when it mattered, when they wanted to limit the evidence and to rule out the inspection proposal, when they were explaining their amended submission to the Court, took up the manful attitude: here is my case, in law and in fact, and if I cannot succeed on that case, then my Submissions Nos. 3 and 4 must fail. Now in circumstances where the legal basis of that case has been shot to pieces, they come forward and they would appear to suggest to the Court, like a child, that the Court must now protect them and that the Court must try to make a case for them where their own case has failed; that the Court must do so, on the basis of what they have specifically said, is not part and parcel of their case. My submission is that, for obvious reasons, that is not permissible. I thank you, Mr. President.

Mr. GROSS: Mr. President, may I then request respectfully opportunity to prepare comment? It would appear to me that the arguments just completed either raise very fundamental issues which necessarily go to the positions of the Parties, the requirements of fairness, and the power of the Court, and it would appear to the Applicants, Mr. President, that rather than attempt to address themselves at this moment to a studied reply, the Applicants would like, with your permission, to take not more than five minutes to indicate the basic problems which they understand to be presented by the arguments just concluded, and to request an opportunity tomorrow to complete their comments, on the assumption that this is fundamental, without exceeding perhaps half an hour at the outside.

The PRESIDENT: Well, Mr. Gross, the Court is anxious at all times to meet the convenience of the Parties. It is somewhat difficult to understand why it is necessary to require an adjournment for the purpose of responding to the address made by the Respondent's counsel. I had understood that it was only for about five or ten minutes that you desired to address the Court; now you want to address the Court for five to ten minutes, and have then an adjournment until tomorrow.

Mr. GROSS: Mr. President, I had thought, with respect, that if the Court pleased the Respondent might continue with testimony, but on the other hand, if that is inconvenient, I should do my best under the circumstances to present the comments on behalf of the Applicants now in as brief a compass as possible.

The PRESIDENT: Permission is granted.

Mr. GROSS: To do so now, Sir?

The PRESIDENT: Yes.

Mr. GROSS: Mr. President and honourable Members of the Court, as

has just been stated by the Applicants, it has been their effort to deal succinctly with the questions propounded by the honourable Court and not to re-argue the case. It does seem, with respect, that there is a triangular problem involved at this point which is characteristic of all litigation and which, as I have just briefly attempted to summarize it, involves the related aspects of the actual contentions of the Parties, which of course involve a question of appreciation of the statements made, of phrases used and of the context in which they were used. Many of the references made by the Respondent's counsel to expressions and formulations of language used, for example, in the context of the inspection proposal, at a time prior to the formulation and submission of legal arguments, may very well create an impression unwittingly which does not correspond to the more studied and carefully elaborated subsequent presentation with respect to the legal aspects made in the argument properly so called.

The contentions of the Parties are, of course, obvious from the record. The question with which we are dealing here, in response to the questions propounded by the honourable Court, involve additionally related aspects, the first and foremost of which is the power and the duty of the Court. That power and duty of the Court (as we have attempted to explain) according to our view, is fixed, of course, by the Statute of the Court, and by the Mandate, and is always of course subject to the requirements of fairness and justice in judicial administration.

It had been anticipated, in the very succinct response to which the Applicants had confined themselves as an exercise of self-discipline, that cries of "prejudice" or implications of unfairness would be forthcoming—this has been the pattern from the Rejoinder on. This presents a serious problem in terms of the desire of the Applicants to co-operate both with the Court and with the Respondent in assuring in every possible way that requirements of fairness and justice shall be strictly honoured; this is a factor upon which we would insist. It has been our intention and hope that evidence in the form of testimony might be limited. This case has proceeded for a very long time, and the evidence is very replete in an unusually voluminous written record. In the history of this Court evidence has generally been submitted in such form, and when we hear about implications of prejudice, or natural justice, or unfairness, or opportunity to lead a case, and we hear references to canvassing of the facts, are we to ignore that the facts have been canvassed in 11 volumes of written pleadings, on the broadest possible basis and theory of any construction of the Applicants' case, which indeed the Applicants have complained is too broad a construction and under which, in many, many pages of evidence, the Respondent has canvassed facts, canvassed arguments, and addressed itself to contentions beyond the ambit of those which the Applicants insisted they have been making? We have listened with great interest and concentration to the lengthy re-arguments of the Applicants' case to which we have just been exposed. As the Applicants stand before this Court now, they are unable to discern from these three hours or more of re-argument what Respondent's answers to the Court's questions are. The Court has the power under the Statute to conduct such inquiries, make such investigations of fact, as it deems appropriate and relevant. The Applicants never for one moment have presumed to say that the Court lacks the power to take evidence, or consider or weigh evidence, which the Court may consider necessary or appropriate to a proper legal

construction of the Mandate or to the adequacy of the relief sought, or to its propriety. We have naturally proferred our co-operation in furnishing any information or evidence in response to questions or directions with respect to enquiries or otherwise which the Court might see fit to pursue within the meaning and pursuant to the authority of the Rules and the Statute of the Court. It is our hope (and has been and remains) that the evidence canvassed in the many volumes of the written record need not be, and should not be, cumulative and repeated under the guise of canvassing new facts. If expert opinion additional to that argued and set forth in the written pleadings is necessary, that will be put before the Court subject to the Court's view on the matter.

One of the fundamental questions which has caused most difficulty to the Applicants, in all candour, is Respondent's apparent confusion between fact and law. This is, of course, no implication with respect to the very distinguished and learned leader of Respondent's delegation, but when one hears phrases like "what is relevant or not relevant *as a matter of fact*", then it is difficult to understand what the requirements of justice are. I would have thought that relevance or irrelevance is a question of law, and this Court must of course determine and set the bounds upon what evidence will be admitted, because either Party or both could make the most unreasonable contentions with respect to the evidence which either side considered essential to a presentation of its case, including a trip to the moon. A rule of reason must be applied.

Now the Applicants have relied upon a contention which they have adhered to consistently and reaffirm, which is based fundamentally upon a concrete statement of fact; we have attempted, for the sake of clarity and for the sake of administrative justice and expediency, and completion of these protracted hearings, to eliminate or minimize issues of fact. At first we were met with contentions which confused us, because they seemed to regard inferences of law or legal conclusions as "factual" questions, so we attempted to eliminate that blur by the formula of the undisputed "laws and regulations, and the measures and the methods of implementation which are conceded to exist", and which are largely cited to the pleadings of the Respondent itself. This is a concrete body or *corpus* of fact. These are the facts upon which we rely. The Respondent may feel it necessary to rely upon additional facts, not merely cumulatively stated or repeated (as we have been exposed to in this Court recently, when 90 per cent. of the witnesses' testimony was repetitive of what was in the written pleadings).

However, with the Court's permission, and with all submission and deference, if there is any question concerning the intent of the Applicants to establish for the convenience of the Court and for purposes of justice a body of undisputed fact upon which legal conclusions may be drawn, we should respectfully like to be advised, if this is an appropriate intimation or suggestion, how the matter could be further clarified. We wish to state a concrete body of facts which we rely upon, and which we urge the Court to apply to the legal theory of our case; and with respect to the legal theory of our case, we are confused also by the references to—and I think I quote accurately—"the factual existence of standards"; this was a phrase used by my learned friend—if I understood it correctly, I noted it at the time—"the factual existence of standards". It is a phrase which I cannot comment upon because I do not understand it. "Standards"; does negligence factually exist as a

standard? It would seem to the Applicants, therefore, that there is, consciously or unconsciously, a distortion of the Applicants' case which involves among other things a confusion between factual allegations, properly so called, and legal conclusions to be drawn from them. That whether or not a standard of non-discrimination exists is beyond dispute —one looks at Article 1, paragraph 3, of the Charter, and there it says, in so many words, that the Members shall not distinguish on the basis of race; that is a standard. How does one prove or disprove the existence of such a standard? The question, of course, is its application; its definition by some responsible body, as in the case of any standard which must be interpreted, and its application to a specific, concrete set of facts.

Now it would seem that the evidence which the Respondent proffers is directed to the establishment of a factual question as to whether a standard exists—this would seem to be the basis of the testimony which the Applicants find an utterly confusing and incomprehensible foundation for testimony. It would of course be open to the Respondent, without question, to introduce evidence, expert or otherwise, with respect to the existence of State practice, let us say in connection with the demonstration that the legal norm is not to be found by the Court to exist as a matter of law in terms of Article 38 (1) *(b)* of the Statute. That would seem to be essentially a legal argument—if there are factual predicates in terms of practice of States, it would seem that they might be presented by competent experts or witnesses; but we are talking here in a context of the interpretation of a mandate on the basis of agreed facts, or facts which the Applicants rely upon and find undisputed in the record and draw from the Respondent's own pleading. The interpretation of a mandate to those facts in the light of objective criteria, we perceive in the form of standards which have been interpreted and applied to this particular set of facts by a competent supervisory organ, and this is the case. And of course, if the submissions—and I would conclude with these impromptu and I fear discursive and inadequate remarks—it would appear that the fundamental issue raised by the questions propounded by the Court centres on the submissions, the legal character of the submissions (the extent to which the Court is free, on the one hand, or bound, on the other, to stay within the ambit of submissions properly understood); if so, then of course the question of the interpretation of the submissions becomes a fundamental question—that is perfectly obvious.

We have contended that the jurisprudence of the Court demonstrates that submissions are the formulation of the dispute, and that arguments, contentions, and references to facts made in submissions have frequently been ignored by the Court as not within the bounds, ambit, setting, function and characteristic of a submission.

When the Applicants rested their case because they had concluded their legal arguments, and presented a summary of those facts upon which they rely, with respect to the establishment of their legal theory, they reserved the right to amend their submissions: a right which inheres in the Statute and Rules, and which was recognized by the honourable President, who was gracious enough to refer to it in a subsequent statement of procedure.

The final submissions of the Applicants may or may not, have yet been made. As I stand here today I do not know whether they will be

amended. The fundamental question is not the amendment of the submissions; this was made clear in dramatic form in 1962—I referred to that yesterday—after the Applicants had concluded their case and when a basic amendment was made at the last minute in the submissions, perfectly within the rights of the Respondent. The fundamental question is the one that has been stressed in cases cited from the House of Lords and that is, whether there has been a fair opportunity to understand and meet the case; this case, as the words very aptly used by the Respondent's counsel yesterday to the best of my recollection, was one that involves an allegation, a concrete factual averment, and this we have tried to do as one of the indispensable ingredients of a fair hearing, natural justice in due process.

If the Respondent deems it necessary or desirable, notwithstanding the legal theory upon which the Applicants have rested, within the ambit of the undisputed facts upon which we have relied (if there are any questions about what they are, we have repeatedly offered to clarify that)—if the Respondent feels that additional testimony is necessary on any other basis, it would seem that they are free to produce it so far as the Applicants are concerned. We would regard it as irrelevant, on the basis of our theory; that does not govern the Court nor does it govern the Respondent.

Finally, Mr. President, I would stress again that it is difficult to conceive of a situation—and I am talking now about the requirements of fairness and natural justice—in which there has been more notice of charges brought or complaints made, where the breadth of the original complaint has been responded to by the Respondent. It now claims that it must be *given the opportunity, as it says, to canvass facts in the form of testi*mony, which is cumulative at best, or which is expert, and to which the Applicants object only if the foundation is improperly laid (as it has been, in our respectful submission).

There is, in one final sentence, only this to be said: the Applicants have been, and remain, of the view that the policies and practices of which they complain, violate the Mandate. Such policies and practices do so inherently because by their quality and character they are incompatible with the welfare of the inhabitants. When we have talked about value judgments, it has been in the context of the fact that the value judgments have been made by the international bodies responsible for interpreting standards—supervisory responsibility—for interpreting standards of non-discrimination, with respect to this extreme form of discrimination, and that the Court should give authoritative weight to those judgments within the circumstances and scheme of this Mandate.

When the Respondent insists that the Applicants have not, or do not now, contend that apartheid has bad effects upon the Territory, that, with all deference, may unwittingly be a play on words. When the Applicants contend, as they have and do, that apartheid as a policy and practice is so inherently incompatible with human welfare and moral progress, that the Court need not take further evidence, then it would seem to me that it is simply unintelligible to take words and phrases out of the pleadings, and say that the Applicants no longer consider or contend that this Court should find and declare and adjudge that apartheid does not benefit the inhabitants of the Territory. When the contention is that this Court should find that the policy and practices

are so inherently inconsistent with moral welfare and social progress, that weighing and balancing material benefits is irrelevant, and that purpose is irrelevant and that there is no way by an application of weights and measures to determine whether an individual's moral welfare has been impaired or thwarted by disabilities placed upon him, on the basis of race, how is the Court to examine that question: on the basis of inspection or on the basis of testimony? It is a qualitative factor, and it is only in this sense, that the Applicants have respectfully contended, and continue to submit, that the effect of this policy, these practices, upon moral welfare, is inherently injurious, and that it is impermissible under this Mandate, and if there is any evidence, expert or otherwise, which the Respondent sees fit to produce, with the Court's permission, that would shed light upon the effect, upon moral progress, moral welfare and social progress, policies and practices of racial discrimination, then of course, it is not only permissible, but would be listened to with the greatest interest by the Applicants, subject to the right reserved to comment on all testimony given.

With apologies for the length of this impromptu observation, I think that I might conclude by repeating that the Applicants do not understand whether the Respondent has really answered the Court's question. The ambit of the dispute which the Applicants feel is before the Court in the formulation of the submission, is whether or not apartheid, the undisputed body of fact, is a practice and a policy within the prescription of the Mandate—as a matter of interpretation of the Mandate; if the Court should deem it an element of the submission that some legal theory is within the ambit of the submission in the sense of the jurisprudence of this Court, the Applicants would request leave to amend this submission, to remove any such ambiguity, if such indeed exists. We do not think it exists. We think that the arguments made, the legal theories advanced, and the contentions made in support of our interpretation of the Mandate, do not deprive the Respondent of a fair opportunity to meet factual allegations, that it has indeed taken full advantage of that opportunity on the broadest possible construction of the Applicants' pleadings and that it is in no way prejudiced by withholding, if it desires to or deems it necessary to withhold, any evidence it feels necessary or relevant to the question of whether or not this policy and this practice have a deleterious and a thwarting effect upon moral progress, moral well-being and social progress. Thank you.

Mr. DE VILLIERS: Mr. President, I should like to deal very briefly with some of the points made by my learned friend. He suggested that we are ignoring the fact that the facts have been very fully canvassed on the pleadings. We are not ignoring that, Mr. President; we take that into account, but we insist, with the greatest respect and submission, that we have a right, under the rules and procedure of this Court, to present oral evidence to the Court and we regard that as being very desirable—the oral evidence and the inspection—for the reasons which I dealt with in full before, when I indicated that there are special circumstances why we consider that merely dealing with these matters in the written record could not sufficiently do justice to our case—I explained those before—that is, of course, if a case is presented to us on fact, on the factual aspects of the policies in regard to their purposes or their results. And that is why we suggested that in spite of the full canvassing of facts on the pleadings, a certain portion of what we considered to be an absolute

necessary canvassing, is not yet before the Court and that can only come through evidence.

Now, my learned friend has said, in the same respect, that he does not yet know our answer to the Court's questions. I thought that I had answered them all. I answered 1 and 2 explicitly and 3 I answered by general reference to the distinction that has been drawn by us, and I came back to that at the end of my address. I did not address myself again specifically to the wording of question 3 and perhaps that was an omission, which I should like to rectify.

The question reads: "In particular, do the Parties contend that it is not open to the Court to interpret paragraph 2, subparagraph 2 thereof, in a manner by which it would examine and evaluate all relevant facts, circumstances and conditions appertaining to the Territory, as they appear before it on the final record in the case, in order to determine whether the Respondent has discharged its obligations under that article and adjudge between the Parties accordingly?"

Now, Mr. President, as my learned friend has correctly said, relevance is a question of law but the question does arise—to what must something be relevant? One of the first lessons one has to learn in the law of evidence is that there are two basic conceptions: facts in issue and facts relevant to the issue.

Now one must know what the issue is first, before the Court can determine the question of law as to what is relevant to the issue and that is the important thing, in the formulation of this question also. The question immediately arises, when the question speaks of "all relevant facts", relevant to what? My submission is that that could only relate to facts relevant to the issue as presented to the Court in the submissions and particularly the ambit of the factual propositions contained therein. Otherwise it would be impossible to know what it is that the Court will have regard to eventually, if the Court is to have regard to all the relevant facts as they appear before it on the final record of the case.

Mr. President, we are still building that final record and we must know for what purpose, or towards what eventual result, we are building the record. If we know that the Court wishes to follow a certain line of enquiry and that that is the purpose towards which we ought to build the record, then we shall do that; but if we do not know that then we cannot build the record in that respect. That is why it is so important that we are to know, at the stage when we begin to present our evidence to the Court, what exactly the factual allegation made by the Applicants is which we have to meet.

That is why my answer to this question is specifically that the Court could certainly have regard to all relevant facts, but then only within the ambit of the issue that has been presented to the Court by the submissions of the Parties, and those would have to be the operative submissions, not the original ones.

Let me come back to the example which I used before. A party making a case on, say, a deliberate misrepresentation, claiming damages; halfway through—after he has led some evidence indicating prima facie that there may have been a fraudulent, or a deliberate element in the misrepresentation—alters his case and says: "now I no longer make that allegation; I now rely purely on the legal proposition that even a negligent misrepresentation makes the defendant liable in damages". Now there is that evidence on the record, but the defendant is advised that it

need no longer meet that case; it therefore does not direct any evidence to that issue. Then the court cannot, in the end, come and say: "on the evidence which is before me on the final record I still find that a fraudulent misrepresentation has been established."

That is the distinction, Mr. President, and the application here, I submit, will be an obvious one.

On the question of the purpose for which we are leading evidence, my learned friend made some play of the words "the factual existence of standards".

Now, Mr. President, of course, we understood his contention to rely both on a norm and on standards, and when we speak of the factual existence of a norm or of standards we speak, of course, of the question whether they are in fact applied in practice. That is the intention which this shorthand expression is intended to convey.

There is, in regard to standards and in regard to the norm, this other factual aspect also towards which we are directing our evidence, and that is the proposition that in circumstances pertaining in certain parts of the world, including South West Africa, the application of such a norm or standards would injure well-being and progress and not promote it. That is also a question of fact—I submit, a relevant question of fact—on the case as proposed by the Applicants within the context of their norm and their standards.

Then my learned friend has said that the wording of the dispute as determined in the submissions is determinative, and that argumentation or statements made in the submissions which are regarded as superfluous, are sometimes ignored. I perfectly agree, Mr. President, that those are sometimes ignored, but only in so far as they are superfluous towards the definition of what is in issue as a question of fact, and what is proffered as a case in fact, which has to be met. Those are the circumstances under which they could be ignored, but when they are essential towards determining what the ambit is of the factual propositions made then, surely, they cannot be ignored.

My learned friend has said that his final submission has not yet been made and he does not yet know at this stage what that final submission may be. That may well be so, Mr. President. He referred to the fact of our 1962 amendment of our submissions at a very late stage. He leaves out of account that that amendment was made on a question of law which was argued, and full opportunity was given to the other side to argue that question of law after we had made the amendment. There could be no prejudice; there was no question of marshalling evidence or preparing evidence in order to meet what was being laid in the amended submission. It is a different question when amendments are made on vital allegations of fact, which could change the whole complex of what case should be presented to the Court by the presentation of evidence; then the stage at which that amendment is sought to be made could be of vital importance.

Finally, my learned friend has said that he has invited us to ask for clarification of certain aspects of his case, and he says we can still do so. He can clarify aspects of his case in so far as we may not understand that case. But, Mr. President, what are we faced with in the present situation? We are not faced with a question of clarification within the ambit which he has indicated for his case in his amended submissions; we are faced with the position of an obvious desire now, on the part of the Applicants,

to extend the ambit again of their submissions or to give an extended interpretation to their submissions, at a stage when it may be prejudicial to us. Are we now to ask for a clarification of statements in which this extended, so-called interpretation is given which really amounts to an extension of the ambit of the definitions? I submit, no. If my learned friend wants to rely on something wider, as a factual proposition, than he made so clear to the Court before, then it is up to him to decide what appropriate steps he ought to take in order to bring that into the case again. He will have to decide to make the necessary formal application to the Court. We shall have to determine our attitude to such an application, and the Court will have to decide whether it is an appropriate one to be granted at this stage of the proceedings.

There is only one more aspect on which we must, with submission, obtain clarity. My learned friend says that when we say to the Court that the Applicants do not contend that the policy of apartheid, or separate development, or differentiation, or call it what you will, has bad effects, then we are creating a wrong impression.

Mr. President, I thought that I indicated the distinctions so clearly and the Applicants have made it so clear to us in repeated passages, some of which I have cited to the Court. They say they believe it is the theory of their case—it is their pre-supposition—that the effect must be a bad one, but at the same time they make it absolutely clear that they are not submitting the determination of that question of fact to the Court, and they are giving us notice that we need not meet that as a proposition of fact which is being presented to the Court. That is made so clear in these various passages. They say that the pre-determination has been made, the value judgment has been made, and the Court is obliged to apply it, and therefore they do not present a case on fact which this Court would be competent to enquire into and which we could meet as a proposition of fact. That is the distinction which they have made so clear on the record, and they have not distinguished (I have looked at the record very clearly) in this respect between the so-called qualitative aspects of moral well-being and social progress, on the one hand, and the so-called quantitative aspects of material well-being, on the other.

They did at one stage say that the effect of their contention is to draw a distinction between these two, but they never said that they are making a case on fact to the effect that this Court is asked to find, as a fact, that moral well-being and social progress are being detrimentally affected. That they never said. They made it clear that they in no respect made such an allegation of fact, and that when they say their case is that the measures concerned are inherently incapable of promoting well-being and progress, they make that as a legal submission to the Court on the basis of the alleged norm and alleged binding standards. So that is quite clearly the case which they have made thus far, and in these circumstances I do not understand this invitation to us, now extended by my learned friend, to bring whatever evidence we like on this question of the effect in fact of the laws and policies and measures in respect of moral well-being and social progress. In answer we say we can bring that evidence, but what are we to direct that evidence to when the Applicants made it clear to the Court that they rest their case on a submission that the result is a *per se* one—that it is an inherent and an illegal one. Until they have altered that proposition, then any informal invitations they

may extend to us in that respect have no bearing and no significance whatsoever, especially not when they come at this late stage of the proceedings when they have not attempted to regularize the position in that respect.

I thank you, Mr. President.

24. HEARING OF THE WITNESSES AND EXPERTS *(continued)*

AT THE PUBLIC HEARINGS OF 1 JULY–21 OCTOBER 1965

The PRESIDENT: Mr. de Villiers, could you indicate to the Court—you had intended to call witnesses this morning. Is there any purpose in commencing the calling of the witnesses at this stage—twenty minutes to one?

Mr. DE VILLIERS: It is for you to decide, Mr. President. My learned friend, Mr. Muller, is ready to commence the presentation of the evidence of Professor Bruwer. Possibly we could qualify the witness, or the Court could leave it until tomorrow, as it might suit the convenience of the Court.

The PRESIDENT: The Court will proceed.

Mr. MULLER: May it please the Court, Mr. President, my learned colleague, Mr. de Villiers, has indicated that the next witness will be Professor Bruwer. His evidence will relate to the issues raised under Applicants' Submissions Nos. 3 and 4. The particular points to which his evidence will be directed will be the following: the differences between the various population groups of South West Africa, the consciousness of a separate identity amongst the different groups, their wishes to maintain their separate identity, and what, in the opinion of the witness, will be the effect if all measures of differentiation on the basis of membership in a population group were to be done away with in South West Africa.

May I explain, before the witness is introduced, that Professor Bruwer is Afrikaans-speaking? He does speak English, but he is not so proficient in that language as in Afrikaans. He would have preferred to give his testimony in Afrikaans, but we have certain practical difficulties with regard to interpretation. He has consequently decided and agreed to give his evidence in English.

May I introduce the witness, Mr. President.

The PRESIDENT: Do so.

Mr. MULLER: May I ask that the witness be called upon to make both the declarations provided for in the Rules of Court, as witness and expert.

The PRESIDENT: The witness will make declarations both as a witness and as an expert.

Mr. BRUWER: In my capacity as a witness I solemnly declare, upon my honour and conscience, that I will speak the truth, the whole truth and nothing but the truth.

In my capacity as an expert I solemnly declare, upon my honour and conscience, that my statement will be in accordance with my sincere belief.

Mr. MULLER: Professor Bruwer, your full names are Johannes Petrus van Schalkwyk Bruwer, is that correct?

Mr. BRUWER: That is correct, Mr. President.

Mr. MULLER: You were born in the year 1914, is that so?

Mr. BRUWER: That is correct, Mr. President.

Mr. MULLER: Did you qualify as a teacher and a missionary?

Mr. BRUWER: Mr. President, that is substantially correct. I was qualified as a teacher with a view to serving in one or other mission field.

Mr. MULLER: Did you follow the calling of a missionary for any period?

Mr. BRUWER: Mr. President, I served as an educationalist in the mission field in Northern Rhodesia for 16 years.

Mr. MULLER: Did you subsequently obtain the following academic qualifications: I shall read them and you can state whether I am correct: Bachelor of Arts of the University of South Africa?

Mr. BRUWER: That is correct, Mr. President.

Mr. MULLER: Master of Arts of the University of Pretoria?

Mr. BRUWER: That is also correct, Mr. President.

Mr. MULLER: And a Doctor of Philosophy of the University of Pretoria?

Mr. BRUWER: That is also correct, Mr. President.

Mr. MULLER: Will you kindly explain to the Court what your special field of study is?

Mr. BRUWER: Mr. President, while I was working as a missionary I found it very necessary to be able to know more about the people amongst whom I was working at the time, and for that reason I chose as my special interest of study social anthropology and linguistics, meaning mainly African languages.

Mr. MULLER: Was that also your field of study for the degree of Doctor of Philosophy?

Mr. BRUWER: Yes, Mr. President, actually for the B.A. degree I majored in social anthropology and linguistics; I also have an M.A. degree in both social anthropology and Bantu languages, and, as far as the doctor's degree is concerned, I concentrated mainly on social anthropology.

Mr. MULLER: What is your present occupation, Professor Bruwer?

Mr. BRUWER: My present occupation, Mr. President, is that I am holding the Chair of Social Anthropology at the University of Port Elizabeth.

Mr. MULLER: Did you hold positions at other universities in South Africa in the past?

Mr. BRUWER: Mr. President, I was appointed senior lecturer in social anthropology at the University of Stellenbosch in January 1951, and I served in that capacity until December 1955, when I was promoted to the Chair of Social Anthropology at the same university, that is the University of Stellenbosch.

Mr. MULLER: Have you held positions in universities outside South Africa?

Mr. BRUWER: Mr. President, I had a brief experience, or at least I had the opportunity for a short span of time, that is for six months, to be visiting professor at the School of Advanced International Studies, at the Johns Hopkins University in America.

Mr. MULLER: What period was that?

Mr. BRUWER: That was from September 1959, Mr. President, up to February 1960.

Mr. MULLER: Have you been connected with any of the non-European universities in South Africa?

Mr. BRUWER: Mr. President, I was a member of the governing council of the University College of Fort Hare, during 1958-1959, and then in 1959 I was appointed chairman of the governing council of the newly founded University College of Zululand.

Mr. MULLER: Am I correct in saying that you have a practical knowledge of most of the Bantu groups in South Africa?

Mr. BRUWER: Mr. President, I have had practical experience amongst the Zulu people, amongst the Xhosa people, amongst the Northern Sotho people, and amongst the Bavenda people—all members of the Bantu-speaking peoples of South Africa. My experience was mainly in the form of field research, but I have also served on the General Missionary Council of the Church in South Africa for many years, and also, in that capacity, I had practical experience in regard to the African peoples in South Africa.

Mr. MULLER: Do you speak any of their languages?

Mr. BRUWER: Mr. President, I have a good working knowledge of the Zululand language, which is actually also understandable by the Xhosa people.

Mr. MULLER: Are you connected with the Board of Control of Radio Bantu in South Africa?

Mr. BRUWER: That is correct, Mr. President, I am a member of that Board.

Mr. MULLER: Will you explain to the Court what the functions of that Board are?

Mr. BRUWER: Mr. President, the Board of Control in regard to Radio Bantu was initiated mainly with an aim to build up a service—a radio service—in regard to the Bantu-speaking peoples of South Africa.

Mr. MULLER: Have you knowledge of the Bantu people in other parts of southern Africa outside South Africa?

Mr. BRUWER: Mr. President, indeed, yes I have. I have already told the honourable Court that I was working as a missionary in Northern Rhodesia for 16 years, and naturally I had experience of the Bantu people in that territory, but I also had the opportunity to visit quite a number of other territories in southern Africa, mainly with a view to get acquainted with the various peoples in the territories.

Mr. MULLER: Will you mention some of the territories which you have visited for that purpose in southern Africa?

Mr. BRUWER: Mr. President, I have actually visited most of the territories from Uganda down southwards, that is, I have visited Uganda, Kenya, Tanganyika which is at present, of course, called Tanzania; I have visited the Congo, Ruanda Burundi—at that time still one territory—I have visited Angola, Mozambique, also Nyasaland—the present Malawi—naturally Northern Rhodesia; I have visited Southern Rhodesia —that is the present Rhodesia, and then I have visited South West Africa, of course, South Africa, and the three High Commission Territories of Swaziland, Bechuanaland and Basutoland.

Mr. MULLER: You have told the Court that you were a missionary for 16 years in Northern Rhodesia. Did you there conduct any anthropological field research amongst the Native people?

Mr. BRUWER: Mr. President, my main academic research, that is research that had to deal with material that I had to prepare for academic purposes and academic degrees, mainly dealt with the people of Central Africa. I may tell the honourable Court, Mr. President, that I have always been very much interested in the matrilineal type of society in Africa, and I chose as my examples of study certain groups in Central Africa; for instance, I worked amongst the Chewa people who are, or were, also called the Nyanja people—the people today referred to as the people of Malawi; I also worked amongst the Kunda people of the

present Zambia, and I worked amongst the Nsenga and also the Ngoni —all of them residing in the present Zambia.

Mr. MULLER: Do you speak any of the languages of the people that you have just mentioned?

Mr. BRUWER: Mr. President, I speak Chewa or Nyanja as it is more usually called, and that language actually for 16 years for practical purposes, but I also speak Nsenga which is, to a certain extent, related to Nyanja. I also speak Kunda. Mr. President, the first two languages are languages which have been reduced to writing, but the Kunda language has not been reduced to writing but is related to the Bemba-Bisa group of languages.

Mr. MULLER: Have you assisted with publications in any of the languages mentioned?

Mr. BRUWER: Mr. President, yes, indeed I have. I tried to give service in regard to the development especially of the Nyanja language, and in that respect I aided in regard to the efforts of the then Joint Publications Bureau of Northern Rhodesia and Nyasaland. I have also at one time made a revision of the Nyanja dictionary that was originally composed by Dr. Hetherwick and Dr. Scott.

Mr. MULLER: Were you a member of any board—educational board —in Rhodesia while you were there over the period 1935 to 1950?

Mr. BRUWER: Mr. President, in my capacity at that time as the principal of a training college for African teachers, and ultimately also as Secretary of Education, I had the opportunity to serve on the Advisory Board of African Education for Northern Rhodesia, and also, naturally, on sub-committees of that Board.

Mr. MULLER: You have told the Court that you know South West Africa. Have you visited South West Africa? Can you tell the Court whether you have done research work in South West Africa?

Mr. BRUWER: Mr. President, yes, indeed I have done research work in South West Africa. As I have already told the honourable Court, I am very interested in the matrilineal group of people in Africa, and while I was working for my doctor's degree, working on the matrilineal group of Central Africa, I naturally had an inclination to also visit the people in South West—that was in 1954—and actually my research amongst those people started in 1954, although I did major research work only a little bit later.

Mr. MULLER: Amongst which of the population groups in South West Africa have you done research work?

Mr. BRUWER: Mr. President, I have mainly concentrated on the matrilineal Bantu-speaking people, naturally, and I have concentrated mainly on the people of Ovamboland and of the Okavango region, but I have done lesser research work for comparative reasons also amongst practically all the other groups; I have also concentrated in regard to research work on the one group of Bushmen generally indicated as the !Kgu or the Mbarakwengo.

Mr. MULLER: Have you held any official positions in South West Africa?

Mr. BRUWER: Mr. President, yes, indeed I have. In 1964, at the beginning of 1964, I was appointed Commissioner-General for the indigenous groups of South West Africa.

Mr. MULLER: For how long did you hold that position?

Mr. BRUWER: I held that position until December 1964, Mr. President,

when I went to my present position, that is as Professor at the University of Port Elizabeth.

Mr. MULLER: Did you serve on the Commission known as the Odendaal Commission?

Mr. BRUWER: That is correct, Mr. President, I served on that Commission as a member from September 1962 up to December 1963, when the Commission submitted its report to the Government of South Africa.

Mr. MULLER: Have you assisted in publications regarding the Bantu people of South Africa or South West Africa?

Mr. BRUWER: Mr. President, in regard to the Bantu-speaking peoples of South Africa, I am the author of one comprehensive monograph called *The Bantu of South Africa*, in Afrikaans *Die Bantoe van Suid-Afrika*, and that monograph deals also with the Bantu-speaking groups in South West but not in such great detail; then I have also published approximately nine other books, dealing mainly with the history and certain eminent figures amongst the Bantu, and also Bantu folklore.

Mr. MULLER: Are you at present busy with any as yet unpublished studies of Bantu or Native people?

Mr. BRUWER: Mr. President, I am at present busy working on a comprehensive monograph on the peoples of South West Africa—the Bantu-speaking peoples—that is, the Ovambo and the Okavango's. I have already finished one brief preliminary study on one group in Ovamboland, namely the Kwanyama.

[Public hearing of 2 July 1965]

Mr. MULLER: Professor Bruwer, you told the Court yesterday that you have an intimate knowledge of the Native peoples of South West Africa. Have you at any time lived amongst any of the Native groups in South West Africa?

Mr. BRUWER: Mr. President, naturally, if I am doing research work amongst people, I stay amongst them, and I told the honourable Court yesterday that I have been doing research work in South West Africa. In 1959 I stayed amongst the people for eight months, and again in 1962 I had intended to stay for the whole year amongst the people of South West Africa, in Ovamboland, but having been appointed on the Commission of Enquiry into the Affairs of South West Africa I could only stay amongst them for nine months of the year; but I have also often stayed amongst them during vacations while I was proceeding with my research work.

Mr. MULLER: Do you speak any of their languages?

Mr. BRUWER: Mr. President, I speak the language of the Kuanyama people—that is one of the peoples of Ovamboland; I also have a working knowledge of the Ndonga language and of the Kuangari language spoken in the Okavango Territory. Mr. President, if I may be permitted—when I say a working knowledge I mean that I can decipher fairly well written material; I can follow the gist of a conversation; and I can make myself understood; but that does not mean that I am conversant in a language in which I only have a working knowledge.

Mr. MULLER: I want you to express your opinion with regard to the population of South West Africa—would you say that the population is a homogeneous one?

Mr. BRUWER: Mr. President, indeed, no—I would not say that the population of South West Africa is a homogeneous one, taking into

account the sense and meaning of the word homogeneous. To the contrary, looking at the population from an anthropological point of view, I would in fact say that it is extremely heterogeneous, comprising as it does a number of separate and also distinguishable groups or communities of people.

Mr. MULLER: What criteria would you use in expressing the opinion that you have just given?

Mr. BRUWER: Mr. President, I would naturally use criteria within the scope and limits of my discipline—that is, social anthropology—and I would very definitely apply, if one could call them criteria, the following factors: the question of identification by means of a specific name for a specific people; then I would also apply the factor of ethnic background to find out whether the people are of diverse ethnic background, or whether they have the same ethnic background; and, Mr. President, one of my major criteria as a social anthropologist would certainly be the civilization or the cultural configuration of the various groups. I will compare their differing civilizations, if they indeed do differ, and on that basis I would then say that I can distinguish one or more groups in the population. Naturally, I would also make use of the factor of territorial abodes—that is, the place where they stay, since a people are very often brought into relation with their area of abode.

Mr. MULLER: Starting with your first criterion or factor, what are the different names of the groups in South West Africa, as you identify them?

Mr. BRUWER: Mr. President, if I have to use the more popular and collective terms for the various groups on the basis of identification by means of a specific name used in regard to a specific people, I would be able to distinguish the following groups within the heterogeneous population of South West Africa: the Bushmen, the Nama, the Dama, the Herero, the Kaokoveld cluster, the Ovambo cluster, the Okavango cluster, the Eastern Caprivi cluster, the people of Rehoboth—also, sometimes, Mr. President, referred to as Basters—the Coloured people, and then also the Whites or Caucasoids; those would be the groups that I would be able to distinguish on the basis, Mr. President, of nomenclature, specific names; but if I may be permitted, Mr. President, I would like to say that there are naturally also other terms which are more of an indigenous nature. For instance, I have used the term "Bushmen" to indicate a specific group of people. Now that naturally is a term that has been coined by the white people, meaning "people of the bush". But similarly, the Herero people will, for instance, refer to the Bushmen as the "Ovatwa". The Bushmen themselves, again, have their own names to identify themselves, and with the Court's permission I will give only one of those names, namely "!Khung". Similarly, the Ovambo people again have a name by which they will identify, say, for instance, the Bushmen as a group of people, and they will call the Bushmen the "Ovakwanghala". But the indigenous groups also have a name by which they will for instance indicate, say, the White people or the Caucasoids. Now the Herero will refer to the White people as the "Ovilumbu", meaning perhaps "pale-faces" or "white ones". The Ovambo again, in referring to the White people, will refer to them as a group as the "Ovatilyana", meaning "the red ones". So, Mr. President, I think I have made it clear that there definitely is a distinguishability of groups on the basis of the identification by means of names.

Mr. MULLER: With regard to certain of the groups, you have referred

to a "cluster", such as the "Ovambo cluster"—what do you mean by that?

Mr. BRUWER: Mr. President, in using the term "cluster" I had in mind a group of people having certain factional subdivisions, but on the basis of a pattern of culture, on the basis of a collective name and on the basis also of their territory of abode they are in fact a group.

Now, to explain the term "factional sub-division", Mr. President, I may, for instance, take the Bushmen as an example—there are factions; I have already mentioned the name of one faction, the !Khung; there is also another faction, the Hei//om; there is yet a third factor, the !Kga; and even a fourth one, Mr. President, the Nusan//Aikwe; they are all Bushmen and they form one group.

Similarly, in Ovamboland, we have factions identifying themselves by indigenous names. I shall repeat, for instance, the eight indigenous names of the factions comprising the group or people of Ovamboland: we have there the Kuanyama; we have the Ndonga; we have the Kuambi; we have the Ngandjera; we have the Mbalantu; we have the Kualuthi; we have the Nkolonkati; and we have the Eunda. That is indicative, Mr. President, of my use of the term "cluster".

Mr. MULLER: Can the different indigenous groups in South West Africa be classified into two main groups?

Mr. BRUWER: Mr. President, it could be done, and in fact it is also very often done in anthropological descriptions; the two main categories then being, on the one hand, the category called Khoisan, and on the other hand the category called Bantu. Now, Mr. President, since both of these terms are actually coined terms, derived from the indigenous languages themselves, I would beg to offer a very brief explanation.

The term Khoisan is composed of two words, the one word being Khoi, which is of Hottentot origin—that is a group of people indicated as Hottentots—the word San is also of Hottentot origin; Khoi meaning, in the Hottentot language, "people", and San being the term used by the Hottentots to indicate the Bushmen. In other words, we have the Hottentots' name for themselves, as a people, and the name they use for the Bushmen, forming one term to indicate one category of people. Then we have the word Bantu, or Bantoe as it is sometimes pronounced, meaning "people"—it is a plural form of a noun which is found practically in all the languages also referred to as Bantu languages; sometimes we have phonetic variations, for instance in South West Africa the term would be Ovantu and Ovanhu; the term Bantu being primarily the Zulu term, and it was applied in the previous century by the linguist, Dr. Bleek, in denoting this family; and so when I use the two names for the two categories we have, on the one hand, the category comprising the Bushmen and the Nama in South West Africa—being the Khoisan group—and the various Bantu peoples belonging to the Bantu group. On that basis one can, indeed, distinguish two main categories of people.

Mr. MULLER: What are the main differences between these two groups that you have just described?

Mr. BRUWER: Pardon, Mr. President, I did not get that question very well?

Mr. MULLER: What are the differences between these two main groups that you have just described—the Khoisan on the one hand, and the Bantu on the other hand?

Mr. BRUWER: Mr. President, with due respect, the question that has

just been put to me is a very complicated one. We have to deal with languages distinguished as two language families on the basis of their great structural and morphological differences. The Khoisan language family is what one may perhaps call one of the interesting language families of Africa, and it is characterized mainly by the use of certain click sounds—I have already used one, or rather two of the click sounds in mentioning the names of the Bushmen; then, also, the Khoisan languages are characterized by the fact that tone plays a very important role in the language, in the sense that one may have a word which, if you write it in its specific orthography, will look exactly the same, but when the man pronounces the word and makes use of certain tone levels, the word has altogether a different meaning, depending on the tone-level that the speaker uses.

Then, of course, the Khoisan languages in sound and in speech itself differ altogether from, for instance, the Bantu languages. As far as the characteristics of the Bantu languages are concerned, Mr. President, we have to deal with a language family which is, indeed, a very, very interesting family of languages, and, offhand, I would say that one of its main characteristics of differentiation as a language family is, in fact, the classification of nouns in various classes; every class has got a distinguishing prefix in the singular form of a noun and in the plural; and that prefix influences the entire sentence, Mr. President, in that the prefix of the noun is, in one or another form, repeated in every word of the sentence so as to link the various words—for instance, Mr. President, as an example I would just say that it is not possible to translate in a Bantu language unless one first knows the subject of the sentence, because your whole sentence depends upon the class in which the subject of the sentence will fall. Then, the Bantu languages also have another very interesting phenomenon which the linguistics usually call the ideophone; it is a type of part of speech, Mr. President, which is very difficult to describe, but through the ideophones the Bantu-speaker is in a position to describe something by using just one ideophone where, for instance, we would have used a whole description. In short, Mr. President, those are the differences between the two language families—the Khoisan language family and the Bantu language family.

Mr. MULLER: Is there any other main difference that you would find between these two main groups?

Mr. BRUWER: Mr. President, there is also the question of physical differences which is actually the field of the physical anthropologists, and I would not even endeavour, Mr. President, to explore the avenues of the criteria of physical anthropologists; but, on a perceivable basis it is interesting that one could distinguish between these two main categories of people in regard to the degree of pigmentation. There is in this respect a perceivable physical difference between the Khoisan group and the Bantu group, the Khoisan being a very light yellowish-brown people, as against a darker pigmentation of the Bantu; so one can immediately see that you have to deal with a person belonging to either the Khoisan or the Bantu family.

Mr. MULLER: You have indicated that under the Khoisan group you class the Bushmen and the Nama. Which of the population groups fall under the other main division—that is the Bantu group?

Mr. BRUWER: Mr. President, the Bantu family or the Bantu language family—the users of the Bantu languages—in South West Africa is

represented by the Herero, the Kaokoveld cluster, the Ovambo people, the Okavango people, and the people of the Eastern Caprivi.

Mr. MULLER: You have not mentioned the Dama in referring to these two divisions. Does the Dama population group fall in any one of the two main groups?

Mr. BRUWER: That is true, Mr. President, I did not mention the Dama. One sometimes finds, Mr. President, to your disillusionment, also as a scientist, that your criteria are not always applicable, and in regard to the Dama one is immediately in a difficulty in the sense that, if you take the linguistic basis, you would have to classify them in the category called the Khoisan, because they speak the language of the Nama; but, if you take again the criterion of perceivable physical differences, then you would say you have to deal with a man comparatively the same in physical features as the Bantu group—in fact, the name Dama means dark people, and that is the name applied by the Nama to indicate the Dama.

So, Mr. President, on a linguistic basis, the Dama will have to be classified with the Khoisan, on a basis of physical features they would have to be classified with the Bantu as being what is sometimes called a negroid type of people.

Mr. MULLER: Can the different groups understand the languages of other groups in South West Africa?

Mr. BRUWER: Mr. President, naturally not. The Khoisan languages are very definitely not understood by people using the Bantu language. Since I know, Mr. President, at least one of the Bantu languages but none of the Khoisan languages, I can say as a fact, that it is impossible to understand them. They are two different language families altogether; but even when one comes to the languages within a family, it must be remembered, Mr. President, that the Bantu family of languages comprises more than 300 languages and they are, although they belong to the same family, not mutually understandable. Now in South West Africa, the Herero language is not understandable by people using the language of the Ovambo and similarly, the language of the Ovambo is not easily understandable by the people in the Okavango. And, Mr. President, when one comes to the Eastern Caprivi you have to do with a different language altogether, although it is Bantu, but a language related to the Lozi language of Northern Rhodesia or the present Zambia, and it is altogether different from any of the other Bantu languages in South West Africa.

Mr. MULLER: Would you next deal with your second criterion, that is, the matter of ethnic background.

Mr. BRUWER: Mr. President, the ethnic background of a people has to do with all events in regard to the coming into being or the evolution of a people as an organic entity and it will naturally be appreciated, Mr. President, that if I have to answer the question, I would have to deal with very complicated matters and more so, in the case of South West Africa, where one has to do with a great diversity in regard to ethnic background. But, Mr. President, with due respect, I do hope that it is not expected of me to burden the honourable Court with the *minutiae* of this whole matter. I shall only touch on the more salient features that, in my opinion, have a bearing on the definite distinguishability of the various groups.

It will be recalled, Mr. President, that even information in regard to

the existence of the peoples of South West Africa, is of a very recent nature. As a matter of fact it was not before the eighteenth century that one could say that the outer world had information, and not even always reliable information, in regard to the groups of people in South West Africa. I can recall, Mr. President, from the available sources which I will not quote, but which are there, that the first time that people or a group of people made contact with another group of people, in the sense that the one group gave information about the other, was not before 1760, when a South African hunter and traveller by the name of Jacobus Coetzee crossed the Orange River, which, at that time was not called the Orange River, but which was called the Gariep, a Nama term, and I mention that, Mr. President, because Coetzee was the first man to make contact with the Nama people north of the Orange River, that is in the southern part of the region or part of Africa today called South West Africa, and I think it is probably as a result of the information given by this traveller that I have mentioned that an expedition was sent out the very next year, that was in 1761, by the Governor of the then Cape Colony, to explore the region north of the Orange River and to try to make contact with people living there.

Now the leader of that expedition, a man by the name of Hendrik Hop, who also was from Stellenbosch, Mr. President, had with him a cartographer, a man who had to do the mapping of that area, and it is very interesting to note that on that old map one finds an indication of the existence at the time of two identifiable groups of people, namely the Nama—he actually indicated Namaland on that map and also assigned a portion of the Nama desert to the people that he, at that time, also indicated as the Bushmen. So we knew at that time—from the records we could say that we know—that these two groups existed in South West Africa at that time.

About the Dama, nothing was actually known before 1791 when another traveller, Pieter Brand, found them in the more inaccessible regions of the Evongo and Auas Mountains, that is, in the central part of the present South West Africa. And that was about all, Mr. President, that we knew about the ethnic situation in these regions of South West Africa, by the end of the eighteenth century.

As far as the groups farther north are concerned, one does not find any substantial material before the nineteenth century and it was not before 1837, in fact, that what I would call a reliable account in regard to the existence of the Herero came to the fore, as a result of the expedition of Sir James Alexander, and, as far as the people still farther north are concerned, Mr. President—the people I have already referred to as the people in the Kaokoveld, the Ovambo, the Okavango—nothing was actually known about them before the second half of the nineteenth century. It was only in 1851 that Sir Francis Galton and Charles John Andersson attached themselves to a small group of Ovambo, who had come down to fetch copper, and, then, in that way, reached Ovamboland. Andersson later on continued his explorations and it was not before 1860, actually a mere century ago, Mr. President, that we came to know about the people in the Okavango.

I mention these things, Mr. President, so as to indicate that if I have to explain the ethnic background of these people, so as to indicate what one can distinguish in regard to ethnic background among the various groups, one can say that this group is a distinguishable group.

One has, of necessity, to rely also on oral tradition because, in regard to the origin of these people, one cannot say that the people originated by the end of the eighteenth century. They were already there in South West Africa at that time, or, at least, most of the groups were there that we find there today. Now, in regard to the oral tradition, Mr. President, I must admit that, in giving the honourable Court a very brief explanation of that, I am relying on my own research work since not much has really been done so far in regard to the ethnic history of these groups before the eighteenth century.

I have tried my very best to collect, to interpret, and to put on record, as far as I possibly could, the oral traditions in regard to ethnic background and the very first thing, Mr. President, that strikes me in regard to this is that, whereas the Bantu-speaking peoples have preserved much, even in very great detail, about their ethnic background, one can find very little among the Khoisan people, and, in certain cases, one could even say that you practically cannot find anything. They have just one tradition and that is that they have been there for all times. And that applies especially to the Bushmen. So I will simply just conclude, Mr. President, by saying that, in regard to the Khoisan people, I think, on the basis of all available material, one can only say one thing, and that is, that the Khoisan people must have been—that is, the Bushmen, the Nama and I include the Dama also with these people now—that they undoubtedly were the first people to settle in these regions of Africa.

There are many theories, Mr. President, in regard to the basic origin of Bushmen and of Nama but if I have to go into those theories, Mr. President, it will take us back to palaeolithic times, I am afraid.

Mr. MULLER: I do not want you to do that, Professor Bruwer. Will you kindly proceed to indicate to the Court the ethnic derivation of the Bantu groups in South West Africa.

Mr. BRUWER: Mr. President, I have no doubt in my mind from oral tradition that the very first people amongst the Bantu-speaking groups that settled in South West Africa are the people today known as the Ovambo and the Okavango. They have a very clear tradition that they originated somewhere at a lake, which is not identified, but which is, and must be, one of the lakes of the Rift Valley. One can also base that on the factual comparability of the systems of these people with the systems of people in a certain belt in Africa, that is the central African belt of peoples. And this tradition, Mr. President, actually also coincides with the big migrations of the Bantu-speaking peoples in the mid-centuries.

The first geographical link with South West Africa is the Okavango River and from the tradition one gathers, Mr. President, that the Okavango people and the people called the Ovambo came from the east, from that lake, as an entity. They were led by two sisters, but they ultimately decided to separate at the Okavango River, the one group staying behind, mainly on the northern bank of the river, the other group going farther west until they reached the interesting country today called Ovamboland —a country with plains, very good grazing—and then they settled there.

Now, Mr. President, anthropologists usually make use of the genealogical lineages of chiefs to try to date a certain event in the history of a people. Naturally one can only do that approximately, but it is interesting that the people of Ovamboland, the Ovambo people, still remember the lineage of 21 chiefs, that is hereditary chiefs. On that basis I have tried to date

this migration and I would put it during the sixteenth century, giving them a period of approximately 400 years during which they have been settled in the territory today called South West Africa and naturally, of course, the limits of their first area of abode were not divided by any international boundary.

Apparently the second group which entered South West Africa is the group that I have indicated as the Herero and from all available information, Mr. President, one must say that the Herero people entered the areas of South West Africa from the north, across the Kunene River, undoubtedly at a much later date than the people of Ovamboland. The fact that they entered South West Africa from the north, according to my deduction (based on the available information and traditions), is probably also borne out by the very fact that people related to the Herero are also to be found on the northern side of the Kunene River in the Mossamedes Province of Angola and that people ethnically related to the Herero are still occupying the Kaokoveld today.

Now, Mr. President, from the traditions, and also from the available sources during the eighteenth century, it would appear—and I think one could rely on that—that the Herero, by the end of the eighteenth century, were still confined to the area today called the Kaokoveld, because it is only by that time that one finds there are traditions in regard to contact between, on the one hand, the Nama people of the southern part and, on the other hand, the Herero.

The Ovambo also have a tradition, which they still remember very well, that approximately during that time, and they name it by means of the chief who was reigning at that time, the Herero, in the process of migrating southwards also tried to invade Ovamboland, but that they were driven back by an organized force of Ovambo fighters

That, Mr. President, is an indication of the diverse backgrounds. There is just one group, namely the group in the Eastern Caprivi, on which I would like to give some information in regard to their ethnic background.

Now, the people of the Eastern Caprivi, Mr. President, belong to the people of South West Africa to some extent, I would say, as the result of an historic accident, but their entire ethnic background is different from any of the other groups in South West Africa. One of the main things I would mention here (because that has a bearing on their language) is the fact that during the previous century, as the result of the wars stimulated by the Zulu paramount Chaka in the south, there was a tremendous turmoil in what is today called South Africa, but that turmoil had its results also in other parts of Africa, and one finds that certain groups moved northwards, and one of these groups, called the Kololo, moved from the present Orange Free State, through Bechuanaland, through the present Eastern Caprivi, right up to the present Barotseland, part of Zambia; and that is how the Kololo people, as they are called, came into being. They superimposed themselves on the original Lozi of Barotseland and also on the population which at that time was residing in the Eastern Caprivi. Hence the use of the Sikololo or Lozi language in the Eastern Caprivi and, of course, in Barotseland; a language which still has very strong affinities with the original Sotho language used by the Sotho people, or the original Kololo, that is the Kololo of the last century.

That, Mr. President, gives a short indication, and, I think it is possible to say, on the basis of the ethnic background as it is known to us, one can definitely distinguish certain groups of people. It is also interesting that

these groups have, in some cases even over a very long span of time, maintained and also retained their identity as a group. They have retained it by means of their name, they have retained it by means of the area where they settled and where they are still today, and they look upon themselves as being an entity, or community, of people that one could distinguish, by means of their ethnic background, from other similar groups.

Mr. MULLER: In your description with regard to ethnic background of the groups, you have not dealt with two groups that you had mentioned before. One is the Rehoboth people, or as you referred to them earlier, the Rehoboth Basters. Will you very briefly tell the Court something about that population group?

Mr. BRUWER: Mr. President, the Rehoboth people, or Basters as they are sometimes called, entered South West Africa during the previous century across the Orange River; that is, they originated in the northern parts of the Cape Colony of that time.

They moved into South West Africa as a small group of people and ultimately, in 1870, if I remember well, they settled at a place which they called Rehoboth (that is not only one centre, it is a territory) and they actually got this land from one of the Nama groups which had moved a little bit farther north, namely the Swartboois, and as a result of a treaty with this Nama group they were allowed to occupy that piece of territory. These people naturally had been affected by certain systems which were in vogue in the Cape Colony at the time and, as a result of that, they, for instance, drew up a sort of constitution as a people—they call it the *Vaderlike Wette* which one could perhaps translate as the patriarchal laws—and in that way they tried, and definitely also succeeded, to maintain their own identity as a group of people, a community of people, in South West Africa.

Mr. MULLER: Can you tell the Court something about the early settlement of the Europeans in South West Africa?

Mr. BRUWER: Mr. President, after the settlement period I have just described, one, of course, comes to what one could perhaps look upon as being history—where one has certain written records—that is the nineteenth century; and one could say that the nineteenth century is, in fact, in so far as South West Africa is concerned, characterized by two important things, or happenings. The first is the influx of yet other groups.

I have just mentioned the coming of the Rehoboth people. There was also the coming of the people, sometimes called the Orlams, who ultimately superimposed themselves and became part and parcel of the Nama. There was also the coming of the Whites, the Caucasoids or White people, but the first half of the nineteenth century, Mr. President, in South West Africa also saw the contact between two groups of people, namely the Nama and the Herero.

And, Mr. President, it is perhaps best to describe the essence of that contact by a phrase which is still found in the traditions of these people. The Nama being nomads, pastoralists, used to say that wherever you see the spoor of a Nama man, know then that that is Nama-land. And to this, during this contact, the Herero people had a rejoinder, and they used to say: Wherever you see the spoor of Herero cattle, know then that this is Herero-land. In other words, Mr. President, one can perhaps say that there was no real delimitation of areas between Nama and the incoming Herero from the North. And that position, as the result of the contact, brought about a tremendous struggle—I am not going to go into details, Mr. President—a struggle that lasted from 1820 to approximately 1892, that is

even after the period when the Germans had already begun to occupy the territory. And the result of these struggles, on the one hand against the Nama and the Herero, and on the other hand again also sometimes amongst the Nama and Orlams, one could perhaps summarize by saying that there was a continuous change of power. At the one time the Herero came to the fore, then again the Nama came to the fore, and I do not think that one can say that any one of these two groups, during that hundred years of struggle, actually came out as the conqueror, if one could use that word, because the settlement of the Germans came in between.

But I would like, Mr. President, to mention just one example of how well people sometimes remember their mutual struggles. On 22 August in the year 1850, there was a terrible massacre of Herero by the Nama at a place today called Okahandia. And exactly 30 years later, Mr. President, on the same day, a similar massacre took place, at the same place, but this time it was the Herero massacring the Nama. And these unfortunate times, Mr. President, in the history of these people, came to an end only after the occupation by the German authorities. I would like to add, Mr. President, that it is very interesting to note that, in regard to this period of struggle in South West Africa during the nineteenth century, the people up in the northern parts were not materially affected by these struggles. That is one of the interesting factors in summing up the whole position, that you had here people, four groups staying up in the north, not being affected at all by the struggles and wars that went on in the southern part.

Now I think one must of course keep in mind that these people were far apart. Mr. President, in dealing with the various groups one must remember that from the Orange River to the Northern Boundary of South West Africa is nearly 1,000 miles, and I think that was one of the factors, apart from the physical aspects of the country, that had probably helped towards the position that the northern people were not materially affected by the struggles in the South.

Mr. MULLER: I want you to deal next with your third criterion, and that is cultural configuration.

Mr. BRUWER: Mr. President, in dealing with cultural configuration as a criterion of distinguishing between groups of people, I would like to submit that what I mean by cultural configuration is the pattern of culture which came into being as a result of the achievement through the own creative genius of a people and, Mr. President, I would like to stress with your permission the phrase "achievement through own creative genius", because in dealing with the differing civilisations of mankind, in studying them as I have to do as a social anthropologist, it always strikes me that there is no culture, no cultural configuration, no civilisation, whatever the essence of it may be, in which one does not find a quality, a quality which is of an own kind, but which is not of necessity inferior or superior to the quality of another culture. And especially when we come, Mr. President, to the cultures of Africa. I think in using the cultural configuration, as a basis to distinguish between groups, I cannot but say that here again one comes under the impression of the quality of the culture of a people, whether it is a small people or whether it is a big people.

The cultural configuration naturally, Mr. President, includes a variety of things having to do with the way of life of a people being, as I already have said, the sum total of the achievement through that creative genius of a people. It includes, *inter alia*, the language of that people, it includes

the social structure and the social institutions, it includes their economic systems, it includes their political systems, and it also includes their judicial systems.

Mr. MULLER: Professor Bruwer, you have already dealt earlier with the languages of the various population groups. Do you wish to say anything further with regard thereto relative to cultural configuration?

Mr. BRUWER: Mr. President, with permission, yes I would just like to add this one opinion in regard to the African languages, the Bantu languages in this case, by saying that the Bantu languages—and this applies to every single one of them in South West Africa—are languages with a beauty of expression that it is not easy to define, and one of the major achievements in regard to the quality of the cultures of Africa is indeed their achievement through their languages. These languages must not, Mr. President, be looked upon as being primitive languages, if I may use that word in the ordinary sense; they are in fact very complicated languages; they are languages which can be utilized for a great variety of things; they are languages which have in them a quality of expression which I must admit, Mr. President, is very definitely not present in my own language; and when once one comes to the richness of the oral traditions which are in fact carried over through the medium of these languages, one cannot but say that you have here part and parcel of the creative African genius which is something by itself, distinguishable from the creative genius of other peoples, but having a quality in the language which is, Mr. President, so rich, so beautiful, that one cannot but say that you can take the languages as a basis of distinction in regard to these people, because it is also their medium of communication, not only in everyday life, but also in the preservation of those rich oral traditions which I think have not always been discovered.

Mr. MULLER: You have referred to social structures and institutions. Would you explain to the Court briefly the differences between such social structures and institutions among the various population groups?

Mr. BRUWER: Mr. President, as to the social structure and institution of the people: I have to deal with that part of society which regulates, which gives a certain form to society, which in fact is the structural basis of the functioning part of society; and when we have to do, Mr. President, with the structure and the social institutions of these people that we are dealing with here, and when we take the social structure as part of the cultural configuration on which we can then base a distinction as to the groups, we have to do also with rather complicated material; but here again, Mr. President, I shall only point out the more salient features of these social structures and the social institutions.

I would like to state first of all, Mr. President, that in regard to the social structure of the various societies or communities of people in South West Africa, and when one has to do with the basic indigenous groups, it is an interesting phenomenon that the social structure is based primarily on a system of kinship, that is, the system by which people subscribe to kinship relations, the way in which they believe kinship to function.

Now, in regard to the basis of kinship in so far as the social structure and institutions are concerned, there are two major characteristics which I have to mention here, Mr. President, so as to be able to make you understand the differing nature of these kinship systems on which the social order is very often, and to a great extent, based.

Now, the kinship systems in South West Africa are characterized by two factors, the one factor being the classificatory nature of that kinship system; and to explain that term, Mr. President, I shall use a very easy example. It is a term that is usually used in anthropological literature in regard to kinship systems. We speak about a classificatory system as against a descriptive system. Now, by classificatory systems of kinship is meant the phenomenon that, embodied in the kinship system one has a principle that a certain kinship term which is applicable to a certain person is also applicable to rather a great number of other people having, according to the concept of speaker, the same relationship as that original person. If I, for instance, as a speaker, address a certain man as my father, then I will address all the people called brother by the man that I address, as father—I will address all those people as my father. Similarly, if I have a mother, and I call her mother, I will address all the people that she calls sister—as mother.

Now it follows from that, Mr. President, that within the same generation one has an extension of the idea of brotherhood and sisterhood. You will call all the children of the man or men that you call father your brothers and sisters, or the children of your mother and all the women that you call mother your brothers and sisters depending, Mr. President, upon the second factor, or principle, embodied in the kinship term, namely the dogma of descent, if I may put it in that way.

Now, by the dogma of descent I mean the concept to which one subscribes as to whether kinship relationship or—let me call it—blood relationship, is carried through the lineage or line of the mother, or whether it is carried through the lineage or line of the father. Now, in South West Africa, Mr. President, it is extremely interesting that we find both these concepts in regard to the concept or the dogma of descent.

Now, naturally, if a person subscribes to the dogma of descent through the line or lineage of the father, his blood relations will be a certain group of people in society. To the contrary again, or vice versa, if one subscribes to the concept whereby you reckon kinship through the lineage of the mother, then another group of people again would be looked upon as being your blood relations.

Now, we have in South West Africa, Mr. President, if we start off with a smaller entity of people that we have indicated by the name of "bushmen". . .

Mr. MULLER: Professor Bruwer, excuse me. You are going to apply those to the different population groups now, is that not so—the dogma of descent? You are proceeding now to apply the dogma of descent to the different population groups, is that not so?

Mr. BRUWER: I thought, Mr. President, that that would be appropriate.

Mr. MULLER: Professor Bruwer, just before the adjournment you were dealing with what you termed the "dogma of descent". Will you indicate to the Court briefly how that affects the different population groups in South West Africa?

Mr. BRUWER: Mr. President, I have tried to indicate the two principles embodied in the kinship system, of which the dogma of descent is one, and I have mentioned that the dogma of descent may be conceptualized as running either through the lineage of the mother or through that of the father. This dual concept in regard to the dogma of descent gives us

the two systems which we generally indicate as the matrilineal system on the one hand and the patrilineal system on the other hand—the matrilineal system being the system in which descent is reckoned to run through the lineage of the mother, a patrilineal system being the system in which descent is reckoned to run through the lineage of the father.

Mr. MULLER: Which of the groups apply the patrilineal system?

Mr. BRUWER: Mr. President, the patrilineal system is applied by the Bushmen, but not in the sense of a lineage system on account of the fact that they are usually small communities; it is also applied by the Nama, it is applied by the Dama and it is applied by the peoples in the Eastern Caprivi.

Mr. MULLER: Which of the groups apply the other—that is, the matrilineal—system?

Mr. BRUWER: Mr. President, the matrilineal system is applied by the Bantu groups that I have indicated by the name Ovambo and by the name Okavango peoples.

Mr. MULLER: What system is applied by the Herero group?

Mr. BRUWER: Mr. President, the Herero group have a system of themselves in the sense that, for certain purposes, descent is reckoned through the lineage of the father, and one would then say that they apply the patrilineal concept; but on the other hand, again, certain other things are reckoned to be through the lineage of the mother, and in that respect again one could say that they also apply the principle of matrilineal descent. Now in actual fact, and as it is also generally conceived, one does not have to do with a bilateral system but more with a dual system, since descent is only for certain purposes reckoned through the lineage of the mother, and again also for certain other things through the lineage of the father. Now, Mr. President, it must be clear that you now have certain institutions which come into being as a result of this type of kinship, which has a certain bearing on the society. One has for instance, now, a lineage. Where you have the patrilineal system applying —the composition of that lineage will be on a patrilineal basis. Where you have the matrilineal system applying, the composition of the lineage again will be on that basis. Similarly, also, the other entity, which is more often than not indicated by the term "clan", may also be composed on a patrilineal basis or on a matrilineal basis; in other words, on the one hand all members of the clan will be related, either geneologically or conceptually, through the line of the mother, whereas again, when you have to do with a patrilineal society, the composition of the clan will be based on the concept of the patrilineal descent.

Mr. President, I just wanted to add to that: the people themselves, of course, have names by which they indicate these entities in society; thus, for instance, if I am an Ovambo I would say that I belonged to such-and-such a clan, having a name for that clan; and that, then, indicates my relations on the basis of the dogma of descent through the line of the mother. Similarly, where we have to do with a patrilineal people, they also have their names for these clans, and within the society there are many clans; I have, Mr. President, been able to distinguish, for instance, 21 such entities, that we then call clans, amongst the Ovambo.

Now, in regard to the Herero, they also indicate these two entities—that is, the one entity where you are part and parcel of that entity through the relationship with your mother—they have a name for that: they call that the "Eanda", actually. Similarly, with the group related

through your father—your affiliation with that group—they have also a name for that group, namely the "Oruzo".

Mr. MULLER: What bearing does the system or the systems that you have described, have on the customary laws of the indigenous people?

Mr. BRUWER: Mr. President, in the systems as I have studied them the kinship system has a very definite bearing on customary law in the respect of certain specific social institutions. Now, if one takes as an example, Mr. President, the question of marriage, it must be quite apparent that where you have a certain concept of relationship with people, that concept, whether it is matrilineal or whether it is patrilineal, must of necessity influence your approach as to, for instance, a marriageable spouse, because it is a question of certain people being looked upon as being your blood relations and other people again being looked upon as being not your blood relations. Now the difference—and I am trying to indicate how these systems differ among the various groups, Mr. President—lies in this aspect: that among a patrilineal people, I will be able to choose my spouse amongst certain people; among the matrilineal people, again, those very people will be looked upon as being blood relations, and I will certainly be accused of incest if I should marry somebody from that group. This concept functions within lineages; it functions to a very great extent, Mr. President, within clans. Now one has this very interesting phenomenon, especially amongst the matrilineal people, where there are types of people in society on the basis of marriage, namely certain individuals who are looked upon as being what one can perhaps call preferential marriage mates or spouses—in the case of the people of South West Africa, Mr. President, and that is very much stressed, especially in the Okavango, it is preferred that a man should marry the daughter of his uncle. Now, Mr. President, it is immediately clear that on the basis of concept through the lineage of the mother, the daughter of your mother's brother does not belong to your kinship group at all.

The PRESIDENT: May I interrupt just for a moment, sir? Mr. Muller, is all this detail necessary for the purposes of Respondent's case?

Mr. MULLER: With respect, Mr. President, the witness has indicated that there are vast differences between the groups.

The PRESIDENT: That I understand.

Mr. MULLER: He is going into detail to explain what these differences are, and upon that he will eventually, with respect, base his opinion. I can ask the witness if he will try to reduce the subject-matter and leave the detail out, if the Court so wishes. Professor Bruwer, can you continue describing what you were proceeding to do, but without so much detail?

Mr. BRUWER: Mr. President, it boils down to the fact that, in matrilineal society, according to customary law it is possible to marry with certain people, whereas in a patrilineal society those very people would then be looked upon as your blood relations, and this is the bearing that the concept of kinship, based upon a specific dogma of descent, has on customary law in regard to marriage.

Mr. MULLER: Will you briefly describe to the Court any differences in customary law in regard to inheritance and succession, for example, brought about by the application of different systems?

Mr. BRUWER: Mr. President, in regard to succession, for instance, where one has to do with certain positions of status and leadership in

society, these people have what one could call a royal lineage, a royal clan or a royal house in the case of chiefs, and since this position is hereditary the succession will be affected by the system in vogue amongst that specific group. Taking for example a matrilineal group—the Ovambo —a chief can only be succeeded, according to customary law, by either his brother who belongs to the same kinship group or lineage or clan, or by a child of the chief's sister who also belong to the same kinship group. It also happens that a chief may be succeeded by his sister—that, in fact, happens; there are at present three women chiefs or chieftainesses in the Okavango—the principle being, Mr. President, that since it is a hereditary matter, the successor to the incumbent of such a position, in the case of the matrilineal people, must belong to the same kinship group; hence a son would not be able to succeed his father. Whereas, when one has to do with the patrilineal people, it is, indeed, the brother or the son who will succeed, on the basis of this same kinship identity. So we have the two systems whereby succession on the one hand passes ultimately from, if I may may use the words, uncle to sister's child, whereas amongst the patrilineal people it will pass from father to son, that is in an ultimate sense.

Mr. MULLER: Can you just tell the Court whether the different systems that you describe have a marked effect on the differences between the population groups?

Mr. BRUWER: Mr. President, naturally the social orientation of a people conforming to certain systems has a very definite bearing on many things in that society; and on that basis, the factors I have mentioned here and the principles embodied in the systems, differ to such an extent amongst the various groups that one can very easily, on the basis of this factor of the cultural configuration, see that there is a great difference between these various groups of peoples and societies.

Mr. MULLER: Under your heading of cultural configuration you have mentioned differences in the economic systems, political systems and judicial systems of the groups. Will you deal with these very briefly, starting first of all with the differences in the economic systems?

Mr. BRUWER: Mr. President, taking into account the changes that have, of course, been brought about, one could I think distinguish very easily three broad types of economic systems—the system which is generally looked upon as being the more simple system of the Bushmen, the system of hunters and food gatherers; then we have the economic system based on pastoralism, where in some respects it is a nomadic pastoralism; and then we have the third type of economic system which is of a sedentary nature, where people are basically agriculturalists but they also practise animal husbandry.

Mr. MULLER: Do you classify the different groups under the three headings that you have given the Court?

Mr. BRUWER: Mr. President, traditionally, of course, only the Bushmen and, to some extent, the Dama in olden days, comply with the system that I have indicated as hunters and food gatherers. Pastoralists are the Nama, the Dama, and the Herero, also the people in the Kaokoveld who are, to a certain extent, related to the Herero—those are the groups practising pastoralism as a basic economic system.

Mr. MULLER: And the third group, the group practising agriculture and animal husbandry?

Mr. BRUWER: Mr. President, the third type of economic system is

mainly confined to the northern territories; it is practised by the Ovambo; it is practised by the Okavango; and it is practised by the people of the Eastern Caprivi—that is where one has agriculture together with animal husbandry.

Mr. MULLER: Can you tell the Court how the different economic systems which you have just described affect the concept of land rights and the material cultures of the people—very briefly, please?

Mr. BRUWER: Mr. President, the economic systems certainly have a definite bearing on certain concepts in regard to the whole question of land utilization and land rights. If I take, for instance, the more simple system of the Bushmen, one does not find any indication of the utilization of land, for instance, on an individual basis, but one does find that a group of Bushmen look upon an area as their own place of hunting, but on a communal basis. Similarly, when one has to do with the pastoralists in South West Africa, one finds that their whole concept of land is based on the communal use of the land for grazing and other purposes. Now, when one comes to the more sedentary type of people—that is the Ovambo and the Okavango and also the people in the Eastern Caprivi—one finds that, apart from the fact that certain areas which are used for grazing purposes and utilized on a communal basis, there is also a system of what I can perhaps best describe as the individual utilization of a specific piece of land by a specific individual—in other words, all other individuals in society are excluded from that piece of land which you utilize and work for your individual purpose.

That, Mr. President, is the basic influence of the systems on the concept of land. Of course, in some respects it is much more complicated than I have put it here, but that is the basic principle embodied in the three systems.

As far as material culture is concerned, Mr. President, one finds that, in the case of the Bushmen, material culture is, naturally, of a very simple nature; to some extent that also applies to the pastoralists; whereas as soon as you come to the sedentary type of people one has to do with a more complex material culture. For instance, if we take the question of housing, the Bushmen being nomads and hunters would put up a little hut in the bush today and stay there for a day or two and then they would move on and put up another hut elsewhere. When, for instance, you come to the Ovambo, you find very elaborate structures of abode, indeed, very elaborate, showing that the material culture is very definitely influenced by the economic system. Then, in regard to material culture, Mr. President, one also has the differences in physical features of a specific part of a country—for instance, the people living in proximity to a river, as do the Okavango people and the people in the Eastern Caprivi, they have their whole material culture and their economic systems influenced by their proximity to a river. The Okavango and the Caprivi peoples have, for instance, canoes which they can use, whereas you do not see that type of thing, for instance, in Ovamboland. They also have a culture influenced by the proximity to rivers. Naturally, Mr. President, the material cultures in regard to, for instance, the system of inheritance is also influenced by the systems that I have already described. One can only inherit material things in a matrilineal society through your uncle or in the lineage of your mother; whereas in regard to the patrilineal people inheritance flows again through the lineage of the father. Where you have the dual system, Mr. President, as amongst

the Herero, certain things are inherited through your mother, certain things are inherited through your father.

Mr. MULLER: Professor Bruwer, will you indicate whether there are differences in the political systems of these people? Do not go into detail, I want you to deal with it very briefly.

Mr. BRUWER: Mr. President, the political systems—and we have here in mind the indigenous institutions on a political basis—are a wide range of types actually, coinciding to a great extent with the type of society that one has. Where you have a very simple society, as for instance in the case of the Bushmen, one can hardly discern any real organized form of what one could call a political system; leadership is based on things like age, experience—the experience of age or the wisdom of age—sometimes also on the man's ability in the hunting grounds; the group is small and there is no elaborate political system, Mr. President, not perhaps because they have not the creative genius but, I suppose, because it was not necessary.

Now, coming again to the more complex societies, as we have amongst the Bantu people, one can have a very complex form of political structure; if I take the example of the Ovambo very briefly, Mr. President, one has to do first of all, basically, with a royal leadership based on a royal clan—in other words, on a hereditary concept. Now, this again is something which one would like to explain in detail because I think it is very often misinterpreted, but this is the first consequence—a hereditary leadership influenced by the kinship systems that I have already described.

But then one has a gradual decentralization of political leadership. Now, Mr. President, it is interesting that in the case of the Ovambo there is only one hereditary position and that is the position of a chief. Headmanship, or being a headman of a district, or being the leader of a ward, these positions are not hereditary at all. The headman is headman as a result of the choice of the people in that area. They may change—it is a question of the popular consent of the people. These headman actually form the ruling council, if one may put it like that, together with the chief. I have not come across, in Ovamboland, a system which—at least to a great degree—I would not describe as being essentially something on the lines of democracy, but then an African democracy, the will of the people, in other words leadership on the basis of the acceptance of the people; it is especially in regard to the decentralization of power in this type of political system Mr. President, that we have, among some of these societies, and on which basis one could also distinguish that society, a far more elaborate type of political institution than, for instance, among a group like the Bushmen.

Mr. MULLER: What conclusions do you draw from your study of the cultural configurations of the different groups? Would you state it very briefly please?

Mr. BRUWER: Mr. President, I am very sorry, I did not hear that question.

Mr. MULLER: I shall repeat that. What conclusions do you draw from your study of the cultural configurations of the different population groups?

Mr. BRUWER: Mr. President, if I take into account the pattern that I have tried to indicate to the honourable Court, if I take into account the qualities inherent in the different systems, and, if I take into account the functional value, the varying systems of value inherent in these various

systems, then I can only say, Mr. President, that there is no doubt in my mind that we have to do with a variety in regard to cultural configuration, we have to do with a variety on the basis of language, we have to do with a variety in regard to social structure and institutions, we have to do with a variety in regard to political systems and we have to do with a variety even in regard to the application of customary law.

Mr. MULLER: Professor Bruwer, you also told the Court that one of your criteria would be the habitat of these people of the different groups. Can you briefly describe to the Court the position which obtained at the time when the Mandate was assumed in 1920 as to the habitat of the different groups?

Mr. BRUWER: Mr. President, I shall attempt to do it. I was only six years of age at the time of the assumption of the Mandate, and I have to do it on the basis of my study, naturally being interested in regard to all the deeds and dealings which affected the peoples of South West Africa and by name, the indigenous people, in whom I am very much interested.

Now, Mr. President, from what I can deduct, having in mind all the available sources, one must say that at the assumption of the Mandate you really had to do with a heterogeneous population—you had to do with a population in which there were a variety of communities complying to certain systems, having certain systems of value inherent in themselves and also having certain functional institutions which were very definitely functioning at the time. I think of the people up in the north, for instance. I told the honourable Court that they were not affected by the position in the south.

But then, Mr. President, if one takes into account the Territory known as South West Africa at that time, and also today, a name that came into being as a result of Charles John Andersson, who first mentioned the name, South West Africa, in regard to this Territory, I find that for practical reasons in 1920, at the assumption of the Mandate, one can say that the country was divided into two worlds actually. As a matter of fact, one even sometimes noticed that physically on the map by means of an indication of that division. Now you had the southern part of the Territory, you had the northern part of the Territory. In the southern part of the Territory, Mr. President, were residing at that time, a number of different groups; we had the Nama there, the Dama, we had the Basters, we had the Coloured people, we had the Caucasoid people and we had Herero people residing in the southern sector.

Now, on the basis of those various groups, one notices from the available sources and information that the country, during 1920, was sub-divided in regard to the southern sector that I have just mentioned. It was sub-divided, firstly, into—in the central part—farms and certain townships that came into being and that were occupied also on a basis of individual land rights which came into being during the process of settlement of the Caucasoid people, in this case, mainly the Germans. But in the southern sector, one also finds that you had, at that time, certain, what I would call limited areas, set aside for certain groups. These areas are very often referred to as being Reserves, having been reserved for the people.

Now, Mr. President, if I remember well, at that time which was in 1920, we had certain Reserves put aside for the Nama, namely the Reserve call ed Berseba, the Reserve called Bondels, the Reserve called Soromas, the Reserve called Fransfontein and the Reserve called Zessfontein. Then, also, we had the Territory of Rehoboth, generally also known as the Rehoboth

Gebiet, in which the people were living who are generally known as the Basters or the people of Rehoboth.

But then, Mr. President, one also finds from the available sources that the Herero people at that time, that was during 1920, were absolutely landless, having been deprived of their land as the result of the rebellions and wars at the beginning of the twentieth century, that was between 1903 and 1907, if I remember well, Mr. President. So that was the position in the southern sector.

But in the northern sector, during that period of German occupation and to a great extent also during the period of the short span of time of the military occupation by the South African forces from 1915 to 1920, the northern sector of the country was not materially affected, with the result that in 1920 one still had the position, Mr. President, that the Kaokoveld people were staying in the Kaokoveld, the people of Ovamboland were staying in that area, the people of the Okavango were living in the Okavango area and the people of the Eastern Caprivi were living in the Eastern Caprivi.

The Bushmen, Mr. President, during this long period of struggle between other groups, were generally trying to get refuge in the more inaccessible parts; and at that time one also finds that the Bushmen were actually between what one could call the southern sector, and the southern part of the northern sector occupied by the Bantu people. They were mainly residing in that area.

Now, Mr. President, if I have answered the question, that, in my opinion was the position at the assumption of the Mandate basing my opinion on the available sources, Mr. President.

Mr. MULLER: Would you briefly state what policy was adopted at and after the assumption of the Mandate with regard to the different population groups?

Mr. BRUWER: Mr. President, it would appear to me, from the available sources that I have studied, that, at the assumption of the Mandate in 1920, being confronted with a Territory of this nature, one had to decide in regard to administration, one had to decide in regard to the allotment of land, one had to decide on the technique of development, and, as is usual, Mr. President, in the case of governments, commissions are generally appointed to go into the problems of a country at a certain time; and we also find that in this case, a commission was appointed, in 1920, and this commission was also extended in 1921—a commission appointed to advise as to an approach to this Territory which had now to be administered and which had now to be developed, a Territory with the characteristics that I have already tried to indicate. A very basic question on which the commission of 1921 advised was, in fact, Mr. President, the allotment of land to various groups in South West Africa, including also the landless Herero at the time.

And one finds, Mr. President, if you go into the published sources, that legislation was passed, since 1923 actually, acknowledging the rights of groups in areas that they already had, areas that were recognized actually by the Germans, but also creating and defining other areas, the so-called Reserves, and, Mr. President, from what I can gather from the information, this process went on for a long time, until ultimately one had 23 such Reserves acknowledged for, defined, delimitated and assigned to the various groups in South West Africa.

I also think that one can perhaps say as an opinion that you had the

foundation laid there for a specific approach, that is, an approach based on the individualistic nature of the various groups in that territory.

This, Mr. President, was indeed the position that one finds by the end of 1963, when yet another commission was appointed, the commission of enquiry into the affairs of South West Africa, of which, as I have told the honourable Court, Mr. President, I have been a member.

Mr. MULLER: Professor Bruwer, may I just interrupt. I do not want you to explain to the Court the details of the recommendations of this commission—that information is before the Court. Can you very briefly tell the Court the main principal recommendations made by the commission?

Mr. BRUWER: Mr. President, the Odendaal Commission, as it is popularly called on account of the fact that Mr. Odendaal was the chairman of that commission, made extensive tours in the territory; they called for evidence and, on the basis of all the information that this commission could find at that time, and that was submitted to them, the commission had to recommend—according to the request of the Government—a further phase of development, especially in regard to the various indigenous groups. The commission had to do, and also found that you have to do, with a *de facto* position, namely a position where for a generation the individual nature and the individual areas of habitat, also called Reserves, of certain groups, and also of course the individual nature of farms and townships and of the functioning institutions, had actually existed and one now has a basis on which you have to recommend a further phase of development.

Now, Mr. President, from what the commission could gather in regard to the approach itself, that is, approaching on an individualistic basis, recognizing the human factor in regard to development—from what the commission could gather from the evidence submitted to that commission, the commission was very definitely impressed by the fact that the majority of the people of the various groups that submitted evidence to the commission wanted to retain their areas, they wanted to retain their identity, and they wanted to develop as a community.

Naturally, the commission, in accepting this basis of approach, at once found it unfeasible with the idea of community development if you have a great number of areas and people are staying in a small area here and a small area there. As I have already said, there were 23 such areas, Mr. President, if I remember well; and that was the basis on which the commission defined their concept of what they called "homelands". That is, they recommended a greater consolidation of areas of habitat, and on that basis now a community development recognizing the human factor inherent in that community; in other words, the achievement through that creative genius I have already spoken about, as the basis to go on with the entire process of development in the modern sense of the word.

It must be remembered, Mr. President, that the commission had to do with a comprehensive five-year plan, but if I am permitted to say so, the commission also very definitely knew that on the basis of its recommendations they would be building on a concept, mainly a concept of recognizing different communities, and basing the development on that community and keeping in mind the wishes of the majority of the people.

Mr. MULLER: Professor Bruwer, will you state your opinion as to whether there is an inclination amongst the people of South West Africa towards forming an integrated whole—one unit.

Mr. BRUWER: Mr. President, I cannot say that because I have never

come across anything that convinced me of such a desire, either in the past or in the present. It must have been clear to the honourable Court in my very brief explanation in regard to the ethnic background that, notwithstanding the fact that these groups had stayed in close proximity to one another, in some cases for a long span of time, they had never really inclined towards a unitary system or one society, one centralized form of government, Mr. President. But neither the commission, nor I myself in the capacity as research worker, have ever been impressed by facts or by possibilities in regard to such an inclination, because I simply have not come across them. I admit that there are individuals and that there also are certain political organizations that have expressed such a desire, but it is my earnest deduction and my conviction that they do not represent the wishes of the majority in any one of these groups, neither the wishes of the majority within the population as such.

Mr. MULLER: Can you in this particular regard tell the Court about your experience as Commissioner-General of the Bantu people, or the Native people, of South West Africa?

Mr. BRUWER: Mr. President, I have had experience as Commissioner only for one year, and I have tried to give guidance where I possibly could in regard to the initiation of the technical development in South West Africa, and also by name in Ovamboland.

Now, Mr. President, the honourable Court will recall that in regard to the political development recommended by this commission, the Government of South Africa shelved that recommendation for the time being, I suppose; but I was very much interested, Mr. President, to find that after the White Paper on the recommendations of the commission was published by the South African Government, the Ovambo people came forward with a very strong request to me as Commissioner-General, to the extent that they wanted the Government to carry on also with the recommendation of that political development in Ovamboland, and with the consolidation of Ovamboland as a definite homeland and territory of abode for the Ovambo people. This request was submitted to me and in my capacity as a Commissioner-General I also transmitted it to the Government of South Africa. That is the only example of this nature that I have as practical experience; as a Commissioner-General I naturally concentrated mainly on Ovamboland, for the simple reason that many of the great development projects were going on there, and that my place of abode was also in Ovamboland.

Mr. MULLER: Will you state to the Court what in your opinion are the basic advantages of the policy of separate development which is applied in South West Africa.

Mr. BRUWER: Mr. President, the question embodies the use of a term "separate development", and I take it that I must take that policy to mean a policy applying an individualistic approach to a community of people, and recognizing the human factor in that community, and developing on that recognition that community as a community.

Now, Mr. President, if my interpretation then is correct, I can honestly say that I can mention certain advantages of such an approach. I do not want to go into any philosophical discussion, Mr. President, in trying to give my reasons, but it must have been clear to the honourable Court that I do have respect for the achievements of the African peoples as peoples, and naturally, when you recognize by means of the separate development—if you recognize the configuration of the people as a

people, based on those differences that I tried to mention, you undoubtedly respect the systems of value of that people, and that in my opinion is a very great consideration as a social anthropologist, as a scientist, but also as an ordinary human being also belonging to a specific group of people.

But, Mr. President, where one has to do with a factual position, as one has in South West Africa, you have to recognize certain rights and certain values that have been based on an individualistic approach over centuries. One has, for instance, the question of land rights, or assumed land rights then, Mr. President, you have the concept of these groups claiming certain areas as being their territories of abode; but in recognizing, especially where one has to do with a situation like that in South West Africa, especially in 1920, it is to me natural, and it is also logical, that one should offer that essential protection if you have to administer the people, and your practical and factual situation boiled down to the fact that you had to do with various peoples, each one having rights which you now had to protect, you had to offer the essential protection.

But, Mr. President, if we look at South West Africa, if we have in mind the position during the nineteenth century, if we keep in mind even the position that existed by the beginning of this century, where you had—on what basis it might have been is not of concern here—one of the groups of South West Africa, the Herero, absolutely deprived of everything, can one say that if you did not recognize certain rights, if you did not protect certain rights, if you did not also hand back certain things to people who looked upon it as being their possession, could one say that it would have been possible for the peaceful development that we had in South West Africa?

Mr. President, I told the honourable Court yesterday that I have travelled through quite a number of territories in southern Africa, and I can, without any doubt, and purely as a matter of objective evaluation, say that there is no territory in southern Africa so difficult to develop, physically and otherwise, as this very Territory of South West Africa. And I must say, notwithstanding the fact that I am also South African, Mr. President—I do it as a scientist, on the basis of my declaration—that the successes that have been achieved in South West Africa, the peace that has existed there over the generation that we have been busy, could only in my opinion have come into being as a result of this respect that was given to the human factor in communities, and if I may put it in that way, also then the dignity of specific groups of the people of South West Africa.

But, Mr. President, I can mention another advantage in my opinion of this approach, and that is that this approach—and I am talking about the approach called in the question separate development—does not only at any given time, as it does at present, comply with the wishes of the majority of people within a group, but it also, to my opinion, Mr. President, has that flexibility of adaptation in an evolutionary way to the changing situations and changing conditions that of necessity come in the history of any territory and of any people. And that flexibility, Mr. President, does not enforce anybody to abandon that heritage, and to these people it is a sacred heritage, that sacred heritage of their own creations through their own genius. And, Mr. President, this is to me one of the greatest advantages of such an approach under given circumstances, with a given situation and where you have to do with a variety

of people. I cannot see that for the interests of these people one can say that I must now destroy everything, and I must now start with something alien to everybody; and on that basis, as a result of the flexibility of this approach, to keep in mind the human factor, the human values, differing as they may be, and build on that basis towards your ultimate future, I give my opinion.

Mr. MULLER: Professor Bruwer, you have indicated to the Court the various areas occupied by the different population groups. As a matter of fact, of course, there are in the southern portion of South West Africa a number of the indigenous people living in what is generally regarded as the European area. What provision is made for them in the scheme or system of separate development?

Mr. BRUWER: Mr. President, it is naturally true that there are a substantial number of people of various groups staying especially in the area of—supposed to be then—the Caucasoids or Whites. Now, Mr. President, I have already indicated that the entire approach, to me, appears to be, according to my deduction, that the rights and privileges of the various groups were given to them protected and ensured on the basis of the territorial units that came into existence. And if one has to apply that, Mr. President, according to all rules of logic, I think one must also apply it to this group, on that basis of now ensuring the rights of that specific group against possible encroachment by others. But then we must never forget, Mr. President, that in doing so you have already given the rights to those people in their specific area of abode, and what is excluded for them here in this one area, now in this specific case, that is to say the Caucasoid or White area, is naturally also excluded for the Caucasoids or Whites, in their areas, that is the areas of other people. For instance, it may be, Mr. President, that I would personally like to, say, go and reside in Ovamboland, perhaps one day when I am finished with my work, because I like the people, I am interested in them, but then I will be encroaching on the rights of the Ovambo people, and that is the basic reason for my contention for this type of approach whereby you ensure protection in an area for a certain group, and that protection is a protection for every single group and applies also in cases where one has members of other groups staying within the society of a specific group.

Now, Mr. President, it is true, and it is also a phenomenon, that this type of thing functions on a very broad basis. I have found for instance the interesting phenomenon that in the areas of the people where I have done research work you may also find, and one does also find, that there are Bushmen working for the Bantu people, but they are not absorbed in the society. In Rehoboth, for instance, I have found that there are, say, Dama people, and Nama people even, but they cannot attain citizenship of the Rehoboth area; they are excluded by the Rehoboth people themselves on the basis of their old patriotic laws; they are not citizens of Rehoboth.

It is the strange phenomenon, Mr. President, that a group of people certainly wants to maintain its unity, and if that was not the case, then surely after 400 years we would not have had the problem that we have in South West Africa in regard to the variety.

Mr. MULLER: Professor Bruwer, finally, will you state to the Court your opinion as to what the effect would be if the present measures of differentiation on the basis of membership in a group were to be done away with?

Mr. BRUWER: Mr. President, I did not get the question very well, I am afraid.

Mr. MULLER: Then I shall repeat it to you. Will you state your opinion as to what the effect would be if the present measures of differentiation in South West Africa, based on the membership in a group, were to be done away with?

Mr. BRUWER: Mr. President, prediction is naturally based on opinion. I have quoted certain, what in my opinion are, advantages of a certain approach, having in mind the situation as I know it and as I interpret it. Now, Mr. President, naturally if you do away with this system at a specific moment, or let us say momentarily, you discard an approach that has been going on not only during the period of the Mandate, but long before that. If you discard that, Mr. President, then naturally all the advantages that I have explained as being my opinion, will disappear. In practice all the essential measures of protection will fall away. There would be no protection of land rights, there could be no protection of language rights, I am afraid; now what can be then the predictable consequences of something like that?

Mr. President, if we had to take as an example what happened and did happen in the previous century, then one would immediately say that there would be a violation of rights, or assumed rights, and such violation would undoubtedly lead to friction, and perhaps even more than friction, perhaps even struggle; but there is also this other predictable consequence, Mr. President, and that is that one will destroy that which I have pleaded for as being the achievement by people themselves, and I do not think that I would ever be able to agree to an approach where one destroys a people even through other than physical means, Mr. President; but as far as South West Africa is concerned, I also think that the one group, either on the basis of numbers or on the basis of economic strength, will undoubtedly dominate the other group if you have not got protective measures; and I also think, Mr. President, that one can say that if you have now to start a novel or a new system, an alien system, you will very definitely retard the process of evolutionary development that has been going on for the last 40 years approximately after the assumption of the Mandate.

Mr. MULLER: I have no further questions at the moment, Sir.

[Public hearing of 5 July 1965]

The PRESIDENT: The hearing is resumed. Mr. Muller, would you recall the witness to the stand?

Mr. MULLER: Mr. President, I have no further questions to put to the witness.

The PRESIDENT: I recognize the Agent for the Applicants.

Mr. GROSS: The Applicants would wish to cross-examine this witness, Mr. President.

The PRESIDENT: Certainly.

Mr. GROSS: Dr. Bruwer, I shall endeavour to speak slowly and distinctly, and if you would be good enough, Sir, to let me know if I am speaking too quickly, or if you wish me to rephrase my questions, will you please not hesitate to do so?

I should like to start, Dr. Bruwer, by asking you, with respect to the matter of qualification, whether there is a distinction between a sociolo-

gist and a social anthropologist as a matter of scientific discipline, and if so, what the distinction would be?

Mr. BRUWER: Mr. President, I think there is a very clear distinction: the social anthropologist mainly confines his study to what one may perhaps call the organic societies, whereas the sociologist, as I understand it, confines his studies mainly to the ordinary type of society, or what one could call the western type of society; but, Mr. President, if I could perhaps give my own opinion, it is very difficult really to say exactly where the one ends and the other one starts—it is very difficult.

Mr. GROSS: There is a degree of overlap, is there not, would you agree, between the two disciplines?

Mr. BRUWER: Whether I would agree between the two disciplines?

Mr. GROSS: Well, let me just ask you: what was the basis upon which the Odendaal Commission report was studied and considered from the point of view of sociology—was there a sociologist connected with the Commission?

Mr. BRUWER: Yes, Mr. President, the Secretary of the Commission was a trained sociologist.

Mr. GROSS: You were a member of the Commission, I believe you testified, did you not?

Mr. BRUWER: That is correct.

Mr. GROSS: And you signed the report of the Commission?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: In connection with your duties on behalf of the Commission or in respect of its work, did you make recommendations on the basis of sociological studies of your own?

Mr. BRUWER: Yes, Mr. President, I definitely advised the Commission as to the institutions of the various peoples as they exist, according to my studies.

Mr. GROSS: Now, I should like to ask you one or two questions about the Odendaal Commission as to which you generally testified. How many members of the Commission were there?

Mr. BRUWER: Mr. President, the Commission consisted of Mr. Odendaal as the Chairman, Dr. van Eck, Professor Snyman, Dr. Quin and myself, and then the Secretary, Dr. Claassen, and also an Assistant Secretary, Mr. Weideman, and then Mr. Allen was also aiding the Commission in regard to its work, where it was necessary.

Mr. GROSS: Were any of these distinguished gentlemen who composed the Commission residents of South West Africa?

Mr. BRUWER: No, Mr. President, none of the Commission members except the Assistant Secretary, who was residing at the time in South West Africa, resided in South West Africa.

Mr. GROSS: Were there any members of the Commission who are generally classified as "non-White" under the census categories of South Africa?

Mr. BRUWER: No, Mr. President, not that I know of.

Mr. GROSS: Are you doubtful about whether there were or not, as members of the Commission?

Mr. BRUWER: Mr. President, according to my own reckoning all the members of the Commission are classified as "Whites".

Mr. GROSS: How large a staff did the Commission have, Dr. Bruwer?

Mr. BRUWER: Mr. President, the staff of the Commission, if I take that to mean the people who helped with the ordinary office work—we had

six ladies, but the number of the staff differed from time to time according to the pressure of work at that specific time of the Commission.

Mr. GROSS: You do not need to bother with detail, unless you wish to Dr. Bruwer. Were any members of the staff persons who were classified as "non-White"?

Mr. BRUWER: Mr. President, no, not that I know of.

Mr. GROSS: You would know, would you not, Dr. Bruwer?

Mr. BRUWER: I said "no", Mr. President.

Mr. GROSS: Thank you. I turn now to the terms of reference of the Commission, Dr. Bruwer, and call attention particularly to the first paragraph, which reads as follows in defining the task of the Commission:

> ". . . to enquire thoroughly into further promoting the material and moral welfare and the social progress of the inhabitants of South West Africa, and more particularly its non-White inhabitants . . ."—

that is a correct reading of the terms of reference in that respect, is it not, Sir?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: Did the Commission, pursuant to that term of reference which I have just read, make enquiries into considerations affecting the moral welfare of the inhabitants of the Territory?

Mr. BRUWER: Mr. President, yes, if I understand by "the moral welfare of the inhabitants of the Territory" the general spiritual welfare, the Commission did.

Mr. GROSS: Did the Commission, so far as you know, and I would ask you to speak for yourself unless you wish to speak with regard to other members of the Commission as well—did you, let me ask you first, approach the task as a member of the Commission in the respect I have just mentioned on the basis, or with regard to, the following excerpt which I shall read from the report itself; do you understand my question, Sir?

Mr. BRUWER: Yes, Mr. President, I think I do.

Mr. GROSS: I read from page 427, paragraph 1431, of the report as follows:

> "The moral and economic principles of a modern economic system are different from those of traditional groups where the *group* and not the *individual* is the focal point. The modern economic system and the traditional system are therefore not comparable or readily reconcilable. Their problems are different, their human values and motivations are different. Consequently there has to be a differentiated policy . . ."

Keeping in mind that approach, or that conception, if I may call it either of those terms, did that conclusion reflect a consideration or considerations by the Commission relevant to the moral welfare of the inhabitants, let us say, of the Police Zone, the southern sector?

Mr. BRUWER: Mr. President, I think it did.

Mr. GROSS: Now, on what basis, or standards or criteria, did you as a member of the Commission consider the matter in the light of moral welfare and social progress in relation to the conclusion I have just read; what standards or criteria did you use?

Mr. BRUWER: Mr. President, the position that confronted the Commission in regard to the population groups in the southern sector of South West Africa was, indeed, a very complicated problem, and the

Commission, having had regard to the basic problems—problems of unemployment that sometimes came to the fore, problems in regard to housing, and other problems in regard to what I would call the moral well-being of people—and keeping in mind the fact that people more often than not can adapt themselves to a certain situation in a better way when they understand the norms and values of that society, recommended also in regard to the southern population that there should be an expansion, there should be an extension, there should be a more closely linked society where people understand one another and where they understand the principles underlying that society, and on that basis the Commission was quite clear in its mind that for the moral well-being of these people they should be developed as communities.

Mr. GROSS: Dr. Bruwer, when you refer to "these people" would you be more specific, please, as to which people you are talking about...

Mr. BRUWER: The people that were at the time not staying in what one could call an "integrated" community.

Mr. GROSS: For example, a non-White who was living as a servant in the home of a White, let us say, in Windhoek. Would that be one among the category of people to whom you refer?

Mr. BRUWER: That may be one, Mr. President, but naturally also it does not mean that such a man may, of necessity, be in a position where he is not part and parcel of a community. He may perhaps just have been working there for a certain time, he may just be employed there.

Mr. GROSS: How much time would you say must elapse from the point of view of sociology or social anthropology before he ceases to be a person to be regarded as a member of a group, of a social unit, rather than as an individual?

Mr. BRUWER: Mr. President, according to my own opinion, I doubt very much whether one can within one's own lifetime really dissect oneself from a background in which one was born.

Mr. GROSS: Let us say that you, as a member of the Commission, are making an inquiry into the extent to which this individual has dissected himself from the background into which he was born. What standards or criteria would you apply as a social anthropologist, in making such a determination?

Mr. BRUWER: Mr. President, I would find out whether that man is still linked to either lineage or a clan that is, or, if I take the two things, are represented in this community, and if he still looks upon himself as being a member of such a lineage or member of such a clan or a member of such a kinship group, then I would still take him to be an individual being still attached to his group.

Mr. GROSS: Is the question, or of the extent to which he looks upon himself in that respect, a matter for his determination in whole or in part?

Mr. BRUWER: Mr. President, it all depends how one approaches it. I think that he as an individual will probably have some opinions about it, but the mere fact that he still belongs to a community still makes him an individual of that community.

Mr. GROSS: Now, therefore, the Commission of which you were a member, and you in particular as a member of the Commission, were required, were you not, to make decisions of a rather important consequence and scope with respect to whether a particular individual or series of individuals viewed as such had become the focal point of the modern economy of the southern sector? I use the phrase used in the

Odendaal Commission report which I have just recently quoted at the record.

Mr. BRUWER: Mr. President, I did not get the question. I got the framework of the question but I did not get the question.

Mr. GROSS: Let me try to clarify it and please do not hesitate to ask me to restate, particularly if I become too involved.

In the excerpt I read from the Odendaal Commission report, a distinction is drawn between the group and the individual as to what are called "focal points", and the statement is made that in the modern society the individual rather than the group is the focal point. I asked you, and repeat the question in a revised form, whether you, as a member of the Odendaal Commission, considered the matter in the light of determining whether an individual or series of individuals had become focal points in a modern economy, or whether their group was still the focal point from the standpoint of your Commission's recommendations.

Mr. BRUWER: Mr. President, the Commission certainly did discuss this matter, but the Commission came to the decision that the individuals still form part and parcel of a community—a community of people.

Mr. GROSS: This is true of all of the inhabitants of the southern sector?

Mr. BRUWER: Mr. President, that is true. There is only one case that I can think of where the Commission came to a decision that one has to carry on in a specific way and that was in regard to only one group of people.

Mr. GROSS: I did not hear the last part of the answer, Dr. Bruwer.

Mr. BRUWER: That was in regard to one group of people.

Mr. GROSS: I am not talking about groups of people at the moment, Dr. Bruwer. May I invite your attention to the question, with respect to the individual person as the focal point as distinguished from the group as the focal point. I am using the phrase used in the Commission report. What did you as a member of the Commission take as a basis for your judgment concerning whether a particular individual in the southern sector had become a focal point in the sense used in the Commission report?

Mr. BRUWER: Mr. President, I have already tried to answer that question by saying that the mere fact that an individual was still part of a community by belonging on the basis of kinship and on the basis of his use of the language to a certain group, but naturally it was not possible to go to every individual and ascertain whether that specific one, single, individual still complies to it—that I do not think was possible for the Commission, Mr. President.

Mr. GROSS: Do you consider, as a social anthropologist and as a member of the Odendaal Commission, that there are any individuals categorized as non-White in the southern sector who have attained the status of the focal point as an individual?

Mr. BRUWER: Mr. President, the focal point, that is where one can now say that it is the criterion of the modern economy that complies, I think that one could well say that there may be individuals of that nature.

Mr. GROSS: Now, what would the criteria be, if any, on the basis of which a determination could be made with respect to whether a particular individual has attained that status, if you would concede it to be a status?

Mr. BRUWER: Mr. President, the considerations of the Commission there, if I remember well, were, firstly, that if one approaches on the basis of giving certain rights and privileges in a certain area to a group,

then you must also protect that from other similar groups that you have given similar rights and privileges, and this approach, as I have tried to explain, was based on a factual position, having regard to the existing areas that were allotted to people and where people practise certain rights and privileges, and that was the general framework within which the Commission recommended.

Mr. GROSS: Perhaps we can approach this from another angle and receive further elucidation on this complex matter, to understand better what the actual phrases and conclusions employed in the Odendaal Commission report in this respect mean, or are intended to convey. In your testimony last Friday you testified in response to a question concerning the effect of doing away with "the present measures of differentiation in South West Africa", that, in terms of your response, the advantages of what you describe as a "certain approach" would disappear. That is a fair reading of your testimony, is it not, sir?

Mr. BRUWER: It appears so, Mr. President.

Mr. GROSS: That is on page 265, *supra*, of the verbatim record of Friday, 2 July. Having in mind the expression you used, "a certain approach", I should like to ask you to comment as to whether the following statements, appearing in the Rejoinder, **V**, are relevant to, or reflect the certain approach which you had in mind. I read from the Rejoinder, **V**, pages 251-252:

> "The only possible way out . . . is . . . that both, *i.e.*, the White man and the Bantu, accept a development separate from each other. The present Government believes in the domination *(baasskap)* of the White man in his own area, but it equally believes in the domination *(baasskap)* of the Bantu in his area."

I should like to continue reading. I shall identify the source before I conclude my question. I should like to continue reading the same statement from the same page.

> "South Africa is at the crossroads. It must be decided whether it will go in the direction of a multiracial society with a common political life or whether it will bring about total separation in the political sphere.
>
> I also see to it that I choose a course by which on the one hand I retain for the White man alone full rights of government in his area, but according to which I give to the Bantu, under our care as their guardians, a full opportunity in their own areas to put their feet on the road of development along which they can make progress in accordance with their capabilities. And if it so happens that in future they progress to a very high level, the people living at that time will have to consider how further to reorganize those relations."

I should like, specifically, to call your attention to the expression "the present government believes in the domination *(baasskap)* of the White man in his own area, but it equally believes in the domination *(baasskap)* of the Bantu in his area". This, as you may recognize, is a statement made by the Prime Minister of the Republic of South Africa, in 1963, in the House of Assembly. Is the statement I have just quoted relevant to, or part of what you describe as a "certain approach" in your testimony?

Mr. BRUWER: Mr. President, I would not be able to say whether that

is relevant. When I used the word *et al.*, an approach, I had in mind the approach of developing communities on the basis of recognizing the human factor, the systems of value as I tried to explain, in the process of development.

Mr. GROSS: Dr. Bruwer, I think perhaps . . .

The PRESIDENT: Had the witness finished his reply?

Mr. GROSS: I beg your pardon, sir. If I have interrupted you, I apologize. Had you finished, sir?

Mr. BRUWER: Not yet, Mr. President.

Mr. GROSS: I beg your pardon.

Mr. BRUWER: Mr. President, I also want to say that in respect of the quotation there, two major groups are put in juxtaposition against one another, if I may use that word. For instance, now, I think we said the White man and, on the other hand, the Bantu. Now, I have tried to indicate to the Court that we have in South West Africa, not only White people and Bantu but also other people. The approach that I spoke of was the approach based on my conviction as a social anthropologist, that one should *not*, at a specific moment of time—I think I used the word "momentarily"—discard those values but that you should make use of the values, and that on those values you should base your development of that community.

Mr. GROSS: Do you intend that to be a full reply in respect of the question concerning whether the policy of domination by the White man in his own area reflects a part of, or all of, the approach which the Odendaal Commission used in reaching its recommendations?

Mr. BRUWER: Mr. President, I would put it in this way, in answer to the question, that it was to the Odendaal Commission and also to me, in the type of analysis that I made, a question of exercising one's rights and one's privileges within an area assigned to you.

Mr. GROSS: Exercising one's rights and privileges . . .

Mr. BRUWER: In the area that is looked upon as belonging to you, Mr. President.

Mr. GROSS: The exercise of an individual's rights and privileges, or a group's rights and privileges, or do you distinguish between the two?

Mr. BRUWER: Mr. President, I do not distinguish between the two, since a community or a group is necessarily composed of individuals, so if it is a question of exercising rights and privileges of a group in an area, it also means the exercising by every individual of that group, the exercising of the rights in that area.

Mr. GROSS: You say that groups are always composed of individuals. Are rights of individuals always determined by membership in a group?

Mr. BRUWER: Mr. President, may I start off by saying that if I said that a group is composed of individuals, then the definition of such a group to me, as a social anthropologist, is, of course, where the individual is integrated into that group, as an organic group, by means of the various factors that I have tried to explain. Now, on that basis I would very definitely say that the group is composed of individuals, and that every one of those individuals has a part in the rights and privileges of that group.

Mr. GROSS: Is a White person, a person classified as White, who lives in South West Africa, in a different position by reason of the fact that he is a member of the White group, just by reason of that fact alone, in any respect?

Mr. BRUWER: Mr. President, as far as I know, in regard to the information that one finds in publications, it would appear to me that there are certain rights assigned to White people staying in South West Africa, in their area or in the area that is assumed to be their area.

Mr. GROSS: What area is that, sir?

Mr. BRUWER: The central part of South West Africa, comprising certain individual farms and townships where one also has individual ownership of plots of land and houses.

Mr. GROSS: Is that area commonly referred to as the southern sector or Police Zone?

Mr. BRUWER: No, Mr. President, the southern sector or the Police Zone also comprises a number of other areas, apart from that which is usually looked upon as being the White area.

Mr. GROSS: What is the identifying characteristic or what are the identifying characteristics of the "White areas" of the southern sector?

Mr. BRUWER: Mr. President, I would say the individual land tenure is a very deciding factor, and also the urban communities that one finds in that area.

Mr. GROSS: They are regarded as White because there are Whites there or because Whites own land there? Did I understand your answer correctly?

Mr. BRUWER: Mr. President, I would think that it is generally called the White area on account of the fact that Whites have individual land tenure in that area.

Mr. GROSS: Therefore, would a White person who did not own land be in a different category from a White person who does?

Mr. BRUWER: Mr. President, no, I would not say that.

Mr. GROSS: This is the only distinction, is it, that makes it a White area or justifies the use of that term?

Mr. BRUWER: That is how I understand it, Mr. President.

Mr. GROSS: What is the total population of the southern sector?

Mr. BRUWER: Mr. President, I cannot remember everything offhand but the total population of South West Africa, if I remember well, is about 526,000. Now, of that population, the northern part would be about 240,000, Mr. President, plus . . .

Mr. GROSS: The information furnished to us by the Odendaal Commission report, makes it approximately 240,000—you would accept that as an approximation, would you?

Mr. BRUWER: I would accept that, Mr. President.

Mr. GROSS: Thank you. Could you advise the Court approximately how many of these 240,000 are classified as White persons, in the southern sector?

Mr. BRUWER: Mr. President, if I remember well, the figure is somewhere around 73,000 for the census of 1960.

Mr. GROSS: So that approximately 170,000 or 160,000, in round numbers, are classified as non-White? Is that correct?

Mr. BRUWER: Mr. President, yes, if one has them classified in a category but not in groups.

Mr. GROSS: Would you please explain that? On what basis are they classified as White or non-White?

Mr. BRUWER: Mr. President, I think the basis I have given in the answer. As a social anthropologist, of course, I do not classify people on

that basis, I classify them as belonging to a group and then I give the name of the group.

Mr. GROSS: As a member of the Odendaal Commission, as well as a distinguished social anthropologist, did you consider the classification adopted by the Government with respect to the rights, duties and privileges of individuals, in South West Africa?

Mr. BRUWER: We did, Mr. President.

Mr. GROSS: Are you familiar with those classifications?

Mr. BRUWER: Mr. President, if the classifications were put to me I would know whether I am familiar with them or not.

Mr. GROSS: May I read from the Memorials of the Applicants, I, p. 109, the following census classifications, and ask if they were before you when the Odendaal Commission considered the matter of the moral welfare and social progress of the individuals? The first category is Whites who are defined as follows:

> "... 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."

Was that categorization of Whites known to you in your consideration of the problems?

Mr. BRUWER: Mr. President, it appears to me as if the description here is on the basis of exclusion.

The PRESIDENT: Of what?

Mr. BRUWER: On the basis of exclusion.

Mr. GROSS: The description excludes persons who, although in appearance are obviously White, are generally accepted as Coloured persons. Did you take into account this classification of White persons in your consideration, as a member of the Odendaal Commission, with regard to the rights, duties and privileges of inhabitants?

Mr. BRUWER: Yes, Mr. President, we did. We have here to do with two groups of people or rather, according to that classification then, the Whites on the one hand, and then on the other hand, the Coloureds. Now, in regard to the Coloured population of South West Africa, Mr. President, it would have been noticed that the Commission did *not* recommend an area for the Coloured people.

Mr. GROSS: Dr. Bruwer, I am not talking about groups or areas, I am trying to engage you (and I hope I am not confusing you by my questions), with respect to the individual person. I am referring to a census classification which refers to an individual and states that if, although he is obviously White, he is generally accepted as Coloured, he is Coloured. Did you take that into account in considering your recommendations to the Government?

Mr. BRUWER: Yes, Mr. President, we did, when we were dealing with a group of people in the population of South West Africa that is known as Coloureds.

Mr. GROSS: If an individual person is obviously White, but generally accepted as Coloured, this classification puts him in the Coloured category—that is correct is it not?

Mr. BRUWER: Perfectly correct, Mr. President.

Mr. GROSS: Do his wishes or preference have anything whatever to do with the decision that is made with regard to him, as an individual?

Mr. BRUWER: Mr. President, that I would not be able to say or to tell because the classification of the various people of South Africa is regulated, if I remember well, by one or other law, in South Africa, and the Coloured people from what I would gather from the available information that I have, and from the descriptions, are generally described by means of exclusion, Mr. President.

Mr. GROSS: On the other hand, Dr. Bruwer, Natives are defined by inclusion, are they not, in the following respect; I read the census categories from I, page 109: "Natives: persons who in fact are, or who are generally accepted as members of any aboriginal race or tribe of Africa." That is a rather inclusive description, is it not?

And Asiatics are defined as "Natives of Asia and their descendants". With respect to that classification, the place of birth appears to establish the category—"Natives of Asia", or descendants of persons born in Asia. Is that a correct understanding of this category?

Mr. BRUWER: To me, that would appear to be a correct understanding, Mr. President.

Mr. GROSS: I will ask your opinion about that classification, as a social anthropologist, shortly, but for the sake of completeness I should now like to read the classification of "Coloureds" from the same page, page 109, of the Memorials: "Coloureds.—All persons not included in any of the three groups mentioned above."

That then, would you say, is fairly to be called a residual category?

Mr. BRUWER: Yes, Mr. President, and as far as the Coloureds is concerned then on the basis of exclusion, if I understand that part of the reference well.

Mr. GROSS: Did you say, "on the basis of exclusion", sir?

Mr. BRUWER: Coloureds are apparently identified on the basis of exclusion from others.

Mr. GROSS: And so if a person is obviously White, but generally accepted as Coloured, he is Coloured, and I believe you testified as to your opinion that that was because he was Coloured. Did I understand you correctly? What is the basis of that classification, scientifically or anthropologically?

Mr. BRUWER: Mr. President, in answering the question of what the basis is I would very definitely say the basis here is sociologically, if I may put it that way, but not physical anthropologically, of necessity, I have already referred to the fact, Mr. President, that I am not a physical anthropologist and I would not like to explore all the avenues used by physical anthropologists to classify people in a specific group or family of mankind, but as far as the Coloureds are concerned, to me it would appear as if that is a sociological classification.

Mr. GROSS: As to which, if I recall your testimony correctly, the view or wish, or will, of the individual himself has no relevance. Is that a correct rendering of your testimony?

Mr. BRUWER: Mr. President, I would not put it that way. I would not say, yes, because as far as I understand that law, in regard to the question of classification of people, people have the right to make representations in regard to the question of classification. Now, if I remember well, Mr. President—that is not my main line, of course, not my discipline—from what information I have in regard to this question of classification in South Africa, there are apparently two guiding lines in regard to the question of classification.

The first is the ethnic background, if one may put it like that, and the

second is the question of general acceptance or whether you are attached to this group or that group.

That is how I understand it, Mr. President.

Mr. GROSS: Therefore, might I ask you this—I address this question to you as a member of the Odendaal Commission. What would be the situation with respect to a person who, in the words of the census category, is obviously White, but who, let us say, moves to an area where he is not previously known and therefore is not generally accepted or rejected on any basis other than his individual quality and perhaps appearance? Would such a person be a White or a Coloured if, in his home area or his former area of residence, he had generally been accepted as Coloured?

Mr. BRUWER: Mr. President, I do not know of cases like that, but I suppose if he had been accepted as a Coloured by the Coloured community then he would be taken as a Coloured.

Mr. GROSS: And that is irrevocable so far as he is concerned in manner of classification and its effects; is that correct?

Mr. BRUWER: I did not . . .

Mr. GROSS: Is that irrevocable so far as he is concerned with respect to such rights or duties or limitations which may be placed upon him by reason of the fact that he is not White?

Mr. BRUWER: That is by deduction, Mr. President.

Mr. GROSS: This is an assumption, then, upon which the Odendaal Commission report presumably has considered the moral welfare and social progress of individuals in that category, if any?

Mr. BRUWER: That is so, Mr. President, but again on the basis of the approach to the group.

Mr. GROSS: Dr. Bruwer, would you attempt—if you would be good enough to—when we are speaking about individual persons or persons in a particular social context, to distinguish to the extent possible between the individual as such and the individual as a group. I state that as a preliminary to my next series of questions, all of which relate to the Police Zone.

There are, as I understand—correct me, please, if I am wrong—approximately 125,000 persons who are classified as non-White living outside Reserves or so-called "home areas" in the Police Zone. Is that correct, Sir?

Mr. BRUWER: Mr. President, from my recollection of the figures the Commission had before them that seems to me to be correct.

Mr. GROSS: Now these approximately 125,000 persons who live in the Police Zone or southern sector outside Reserves or home areas, do they reside in what you describe as the "White area"?

Mr. BRUWER: Mr. President, they certainly are employed in that area.

Mr. GROSS: Do they therefore spend a good portion of their lives in the "White area"?

Mr. BRUWER: It would be possible, Mr. President, that some of them have been staying there for quite a part of their life.

Mr. GROSS: Did you make enquiries into that matter when you surveyed the situation of the Police Zone with respect to the Odendaal Commission programme?

Mr. BRUWER: Mr. President, we did enquire into the position in so far that we tried to establish whether there is a movement from the Reserves to the urban areas and back again, and the Commission very definitely got the impression that there is such a movement of people from the so-called Reserves to the urban areas.

Mr. GROSS: You mean that more people are leaving the Reserves to come

to the areas outside the Reserves, or more people are going to the Reserves from the areas outside? Is there a tide one way or the other?

Mr. BRUWER: No, Mr. President, I would say that if one compares the figures for various censuses then one would say that there is a greater move actually from the Reserves to the urban areas, except, of course, in the case of the northern territories where the movement is approximately the same over the years.

Mr. GROSS: Now, with respect therefore to these approximately 125,000 persons who live outside the Reserves in the Police Zone, do they, or many of them, occupy the same physical areas, geographically speaking?

Mr. BRUWER: In the White area, Mr. President?

Mr. GROSS: Yes, in what you have described as the "White area".

Mr. BRUWER: Yes, I would say that they occupy physically the same area in the sense that they are on the farms and they are in the urban areas.

Mr. GROSS: And do they constitute a majority of the persons in those areas?

Mr. BRUWER: They constitute a majority in the sense, Mr. President, that they are, if one puts them in the one category that has been called non-White, in the majority.

Mr. GROSS: The census categories to which I referred, Dr. Bruwer, distinguish between "Whites", "Natives", "Asiatics" and "Coloureds". I am referring to the category described as "Natives" in the census category. Do the Natives, as there described and defined, constitute a preponderant majority, or a majority, of the total population in the so-called "White area"?

Mr. BRUWER: Mr. President, as a factual position, and if by the term Native is then understood the members of the various groups like Nama, Herero, Dama, and so on, if the term Native includes those people, then they are, at a specific moment, a majority in the so-called White area.

Mr. GROSS: Do laws and regulations pertaining to the individuals in these areas refer to, or do they depend upon, their census classification?

Mr. BRUWER: Mr. President, the answer is, yes. From what I know about the various laws, they depend on that classification.

Mr. GROSS: Are there any laws or regulations, of which you are aware, which are applicable to certain portions of the Bantu population in South West Africa which do not extend to all who are classified as Natives?

Mr. BRUWER: Mr. President, yes, if I recollect there are certain regulations in regard, for instance, to the migrant labour of the Ovambo.

Mr. GROSS: As distinguished from the migrant of what other group?

Mr. BRUWER: As distinguished, Mr. President, from the migrant labour of the Okavango, because the people of the Okavango, as far as I know, can also migrate to other territories, for instance, South Africa, whereas that is not the case with the Ovambo people.

Mr. GROSS: What would be the reason for that distinction?

Mr. BRUWER: Mr. President, I would not be able to give the reason since I have not gone into all the different considerations that probably accounted for the difference in this respect.

Mr. GROSS: You do not know the answer to that question, I take it. There are, according to the Odendaal Commission report—I cite paragraph 113 at page 31 and following—numerous references of which I shall quote one or two examples, and ask your comment with respect to the significance of the phraseology used. On page 31 at paragraph 113

of the Odendaal Commission report, it is stated as follows, and I quote:

> ". . . Large numbers [this refers to Damara] were absorbed in the economy of the southern part of the country and displayed exceptional aptitude as employees."

Would you describe what is meant, or intended to be conveyed, by the phrase "absorbed in the economy", which I have just quoted from the report?

Mr. BRUWER: Mr. President, I take that to mean that the large number of the Damara then is employed in the economy of this White area.

Mr. GROSS: The "White area" being so characterized because of the ownership, by Whites, of land, is that so?

Mr. BRUWER: That would be correct, Mr. President.

Mr. GROSS: In the Odendaal Commission report at page 425 in paragraph 1421, the phrase is used: "The White economy." Would you describe the basis upon which that characterization or description is laid?

Mr. BRUWER: Mr. President, I think the term "White economy" would probably mean the money economy, the economy based on money and with specific reference to this area then called the White area. I would take it that it has to do with the economy of farming and also with the economy of industries and the general type of economic development that one finds in what one can perhaps call this modern type of society.

Mr. GROSS: And do the persons classified as "non-White" serve in any capacity in that "White economy"?

Mr. BRUWER: Mr. President, they serve in the capacity of employees, as far as I know.

Mr. GROSS: Do they, as employees, have any relevance to whether the economy works or survives?

Mr. Bruwer: Mr. President, I did not get the question.

Mr. GROSS: Does the fact that the persons classified as "non-White" serve as employees in the so-called "White economy" have any relevance to the question whether the "White economy" survives or thrives?

Mr. BRUWER: Mr. President, I am not an economist but if I have to give an opinion based on my ordinary evaluation of the situation, I would very definitely say that the fact that the, if we put it in inverted commas, "non-Whites" are working in the White area is a very important contribution towards the economy of that area.

Mr. GROSS: Then your description in the Odendaal Commission report of the "White economy" refers to those who employ non-Whites and the economy is characterized by that description for that reason, is that correct?

Mr. BRUWER: Mr. President, I would not put it in that way, it would appear to be like that but one can also put it in another way, and say that you have here a situation where certain people are busy learning, they are busy getting into something new which is alien to what they have been used to, and one can therefore also look upon this form of economy, although it is then called the White economy, as a school of learning for these people.

Mr. GROSS: Now, with respect to the alien character of the so-called "White economy" in the case of non-Whites, I refer to page 33 of the Odendaal Commission report, paragraph 127, from which I quote: "Approximately half of the Herero are absorbed in the diversified economy of the Southern Sector of the country, . . ." From your observations, as a

member of the Odendaal Commission, in your enquiries in the southern sector, are you able to say approximately how many of these Herero persons you would regard as not alien to the economy, in the sense in which you use the term?

Mr. BRUWER: Not alien to the economy, Mr. President?

Mr. GROSS: You describe the relationship, as I understood, of so-called non-Whites in the economy as a relationship of being alien to whatever the opposite would be, or the correlative would be. Did I understand you correctly? If not I would be glad to rephrase my question.

Mr. BRUWER: Yes, I think so, Mr. President, but I did not get the question very well.

Mr. GROSS: Well, that is because I did not ask it very well, I am afraid. I would like to refer to what I understood you to say when you answered my question with regard to the designation of this as a "White economy", despite the fact that its survival, or at least its success depends upon non-White labour. I understood you to say that you regarded it, and that the Odendaal Commission report refers to it, as the "White economy", because those who are not White are alien to it. Is that a correct description of your testimony?

Mr. BRUWER: Mr. President, what I meant is that the White economy, the money economy, is alien to the basic economic systems of these people.

Mr. GROSS: Now, you are talking about Hereros working and, as the Odendaal Commission report said, who are "absorbed in the diversified economy". Are you, sir, addressing yourselves to those people in connection with the reply you just gave me?

Mr. BRUWER: I am addressing myself to the basic Herero culture, Mr. President, the culture of pastoralists, which I would not call a money type of economy.

Mr. GROSS: You are referring to the Herero culture, but we will refer to an individual Herero, let us call him Thomas, and he is absorbed in the diversified "White economy". Does he serve a purpose there, does he make a contribution there to the success of the economy?

Mr. BRUWER: Mr. President, I think I already said that he would be making a contribution to that specific type of economy then.

Mr. GROSS: Now does his individual presence in that relationship lead you to question, or does it affect your nomenclature with regard to designating this as a "White economy"? I speak to you both as a social anthropologist and as a member of the Odendaal Commission.

Mr. BRUWER: Mr. President, what I understand by a White economy is the money economy, as against the other three economies that I tried to explain to the honourable Court the other day—that is where one has to do with the whole factor of money coming into the picture—but I am a social anthropologist, of course, not an economist, so perhaps my definition is not very clear; but the White economy, as far as I can understand the use of the word in this sense, means the money economy.

Mr. GROSS: Does the designation, Dr. Bruwer, have anything whatever to do with the—I quote again from Dr. Verwoerd's comment—"domination by the White in his own areas"; does the description of the economy as a "White economy" have any relevance to that characterization by the Prime Minister?

Mr. BRUWER: Mr. President, with this proviso that I stress again the question of certain privileges and certain rights that people look upon to have in certain areas.

Mr. GROSS: By reason of being White and non-White?

Mr. BRUWER: By reason of belonging to different groups, Mr. President.

Mr. GROSS: I am referring to—could you answer my question, yes or no—by reason of being White and non-White?

Mr. BRUWER: Yes, Mr. President, from what I gather.

Mr. GROSS: Do you, as a member of the Odendaal Commission, rely upon impressions which you gather, or considerations which are based upon study and knowledge?

Mr. BRUWER: Mr. President, we relied on all information that we could lay our hands on.

Mr. GROSS: Did the information upon which you relied bear upon the following statement in the Rejoinder filed by the Respondent—**VI**, page 283—in which, referring to the Job Reservation Act, the Rejoinder states:

> "The principles embodied in this Act are in accord with Respondent's general policy of conferring priority rights on the different population groups in their respective areas"?

My question is whether the designation of the southern sector, or the Police Zone, as the "White area", means that "priority rights", in the language of this pleading, are conferred upon the Whites in that sector?

Mr. BRUWER: Mr. President, no, I would not say that it is correct if one uses the term the "southern sector" or the "Police Zone", because in the Police Zone one also has certain areas assigned to other people; for instance, one has the Rehoboth Gebiet, and one has also the so-called "Reserves" for the Herero; so that I would not say that it is correct if the term "Police Zone" or "southern sector" is applied, because what I understand the Police Zone to be, Mr. President, is the area south of the so-called "Red" line, that is, the area in the north where there is no more land utilized on an individual land tenure basis—that is, where one does not find any more farms.

Mr. GROSS: Dr. Bruwer, I invite your attention to the areas outside the Reserves where, as you have testified, some 125,000 persons classified as non-White reside—I am addressing my questions to that area. Leaving aside the Reserves, do you regard the "priority rights" to which this passage quoted from the Rejoinder refers, as being based upon White membership or White classification?

Mr. BRUWER: That is how I understand it, Mr. President.

Mr. GROSS: Therefore I come back to the statement by Prime Minister Verwoerd concerning "White domination" in "his area", in the "White area", and ask how it is determined which area is White from the standpoint of domination, or if you prefer, "priority rights"? Do you understand my question, sir?

Mr. BRUWER: I understand the question, Mr. President, and I would say that it is based on the area—call it, then, in the southern sector—excluding those areas where other groups have got rights, and excluding, to my opinion, also areas that are looked upon as being Crown land or State land.

Mr. GROSS: Therefore what your answer to me is, if I understand you correctly, that the 125,000 persons living in the so-called "White economy" and serving it are in a position where their rights are of lower priority than those persons classified as White in that same area; is that a correct version of your testimony?

Mr. BRUWER: Mr. President, yes, I would say their position is different, altogether different.

Mr. GROSS: The position is different—sir, is that what you said?

Mr. BRUWER: Yes.

Mr. GROSS: In what respect is the position different, and whose position is different from what?

Mr. BRUWER: Mr. President, the position of the non-Whites, using that term, is different from that of the Whites in that area as we have now defined it in the sense that the "Whites" in that area have certain rights and privileges which the "non-Whites" have not in that area.

Mr. GROSS: Would you repeat the last part of your answer, if you do not mind, sir?—I did not catch it.

Mr. BRUWER: Whereas the "non-Whites", putting that in inverted commas to indicate the category of people, have not; in other words, in that area the "Whites" have certain rights and privileges which the "non-Whites" have not; that is the two categories of people.

Mr. GROSS: In other words, the answer to my question as to priority rights is "Yes, the Whites have priority rights in areas described as White areas"—is that correct?

Mr. BRUWER: By this quotation?

Mr. GROSS: Yes. Now, who determines the extent of the "White area" in which this priority or, in Prime Minister Verwoerd's words, "White domination", occurs—who determines the extent of that area from time to time?

Mr. BRUWER: Mr. President, that is determined by an historical process, but the ultimate determination would naturally be in the hands of the Government who administer that area.

Mr. GROSS: And is that Government in the Republic of South Africa?

Mr. BRUWER: That Government is in the Republic of South Africa, Mr. President.

Mr. GROSS: Is there participation in those decisions by the non-Whites affected by the decisions?

Mr. BRUWER: Mr. President, that will of course take us in to a long explanation.

Mr. GROSS: Well, may I rephrase the question to avoid a long explanation? For the deference to the Court, with your permission, Mr. President, I withdraw that question.

Dr. Bruwer, I have one or two more questions, with the President's permission, with regard to the delimitation of the southern sector, the "White area". On the basis of what criterion is the extent and the boundary of the southern sector determined?

Mr. BRUWER: Mr. President, from what I can gather from the historical process the boundary of the southern sector has been determined on the basis of farms existing at the time, and also places, for instance, like Namutoni and Okaukuejo, that at the time of the German occupation were looked upon as the northern points of control of that area—that is how I understand that delimitation, Mr. President.

Mr. GROSS: Could you say, Dr. Bruwer, whether my understanding is correct that the perimeter, the boundaries, of the southern sector have been changed from time to time within recent years?

Mr. BRUWER: Mr. President, yes, that boundary has changed; according to the information that I have, it very definitely has changed.

Mr. GROSS: Could you advise the Court, Dr. Bruwer, on the basis of

what criteria or standards those changes were made by the South African Government?

Mr. BRUWER: Mr. President, I would not be able to give reasons that I do not know of, but as far as I can see, judging the situation from what knowledge I have, one had the situation by 1920, and also during the process of delimiting the various areas for the indigenous people as I tried to explain previously, that a certain stretch of country was unoccupied, and according to what I can see is that the farm area was extended northwards, if I may put in in that way, then—shifting the original line north, if that is an answer to the question, Mr. President—that is how I interpret the position.

Mr. GROSS: That was the purpose, if I understand you correctly—in order to extend the farming area of the southern sector—did I understand your response correctly, sir?

Mr. BRUWER: That is correct, Mr. President, according to how I interpret the position.

Mr. GROSS: When you testified on 2 July—I refer to page 261, *supra*, of the verbatim record of that day—you referred to the necessity to protect land rights and language rights. The extension of the southern sector —did it or did it not have any effect upon the land rights of individual persons of any race?

Mr. BRUWER: Mr. President, as far as I know the position, the people in the north had occupied areas up to a certain—one could not call it a boundary, because there were no defined boundaries, but up to a certain place southwards. The area in between the so-called "Red" line of that time and the southern area or the southern limit of the occupied areas in the north were looked upon as being State land or Crown land, not actually occupied by people except the Bushmen, as I told the honourable Court the other day.

Mr. GROSS: Is it correct or not, Dr. Bruwer, that persons classified as non-White may not own land in the southern sector?

Mr. BRUWER: Mr. President, I think it is substantially correct, again if we qualify the southern sector.

Mr. GROSS: Pardon me, sir—I am talking about the southern sector; could you answer the question "yes" or "no" whether non-Whites are permitted to own land in the southern sector?

Mr. BRUWER: Mr. President, as far as I know they are permitted to own land in the southern sector.

Mr. GROSS: Now, I am talking still about the areas of the southern sector outside of the Reserves: are the non-Whites permitted to own land in the southern sector outside of Reserves?

Mr. BRUWER: Mr. President, the Commission was told by the officials of the Administration that it is possible for people under this category "non-Whites" to buy land in the southern sector outside the Reserves, and that would also include the Rehoboth area in the term "Reserves".

Mr. GROSS: So that your understanding is that outside of the Reserves (including the Rehoboth area as a Reserve), non-Whites may under certain circumstances own land, acquire title to land—is that correct?

Mr. BRUWER: That is my understanding, Mr. President.

Mr. GROSS: Do you know, sir, what those circumstances are?

Mr. BRUWER: Mr. President, no, I would not be able to recall the circumstances.

Mr. GROSS: Are non-Whites, or persons classified as non-White, en-

titled to obtain permanent residential rights or ownership in the urban areas in the Police Zone or southern sector, outside of Reserves?

Mr. BRUWER: Mr. President, not that I know of, except the possible qualification that the buying of land that we were told about may perhaps also apply in the urban areas.

Mr. GROSS: Perhaps the Odendaal Commission did not enquire into that question, Dr. Bruwer? I would like to point out to you, sir, that the Counter-Memorial, **III**, page 294, states: "Natives are not entitled to obtain permanent residential rights or ownership in the urban areas in the Police Zone." Assuming that to be a correct statement in the Respondent's Counter-Memorial, what would your explanation be for that restriction?

The PRESIDENT: What do you mean by what would his explanation be—terms of policy . . .?

Mr. GROSS: Thank you, Mr. President—on the basis of what policy considerations is such a restriction based, if you know?

Mr. BRUWER: Mr. President, if I can give my opinion as to the basis, or the policy, on which such considerations are based, then I would say that it is based on the differentiation between the two categories of people that have been mentioned here—that is, the non-Whites on the one hand and the Whites on the other hand, keeping in mind the whole question of the privileges and the rights of a group of people in a certain area.

Mr. GROSS: Just to understand the last comment, "keeping in mind . . . the privileges"—are the privileges to which you referred those reserved to the Whites in the southern sector outside the Reserves?

Mr. BRUWER: That is what I had in mind.

Mr. GROSS: Now I should like to turn to your statement in your testimony on page 265, *supra*, of the verbatim record of Friday, 2 July, in which you referred to "a certain approach" as underlying the recommendations of the Odendaal Commission report and the policy of separation. Keeping in mind the phrase "a certain approach", I should like to read the following brief statement by Prime Minister Verwoerd which is set forth in the Rejoinder filed by the Respondent, and which appears at **VI**, page 41 of the Rejoinder; the quotation reads as follows:

> "The Bantu must be guided to serve his own community in all respects. There is no place for him in the European community above the level of certain forms of labour."

I ask you, if you will, sir, to state whether that is relevant to the approach to which you referred in your testimony as the basis, or one of the bases, for your response to Mr. Muller's question.

Mr. BRUWER: Mr. President, I think it is relevant to that approach in so far as the approach that I have been speaking about is certainly based on the existence of various groups of people.

Mr. GROSS: "The existence of various groups of people"—in what respect, sir, would you clarify that comment?

Mr. BRUWER: Mr. President, the existence of various groups of people on the basis that I have already tried to indicate their distinguishability to the honourable Court.

Mr. GROSS: Do I take it, then—I do not wish to argue with you, sir, I want to make sure I understand you—that the statement which I have just quoted from the Prime Minister to the effect that there is no place

for the Bantu in the European community above the level of certain forms of labour—do I understand your response to be that that restriction or sealing arises out of the fact that he is not White, or if that is not the answer, would you please indicate what the answer is?

Mr. BRUWER: Mr. President, I can make no other deduction from the quotation than that it is based on the fact that the one is, as it is called there, European, which probably then means White and the other one is Bantu.

Mr. GROSS: Is any distinction made with respect to the fact of being a Bantu, or being classified for this purpose as a Bantu, between the various cultures or cultural configurations of those constituent groups that make up the Bantu?

Mr. BRUWER: Yes, Mr. President, there are very definitely distinctions.

Mr. GROSS: With respect to the fact that no Bantu can rise above the level of certain forms of labour, does that ceiling or restriction have any relationship to the group or faction to which an individual belongs, other than the fact that he is a Bantu?

Mr. BRUWER: No, Mr. President, any Bantu, according to my knowledge of them, can rise to any position in the same way as any person in any other nation or group can rise, as I know them.

Mr. GROSS: This statement by the Prime Minister, may I remind you, states that there is no place for the Bantu in the European community above the level of certain forms of labour. Is it your testimony that this is incorrect and that a Bantu in a European community can rise to a position higher than certain forms of labour?

Mr. BRUWER: Mr. President, I do not know exactly what is meant by certain forms of labour and naturally, my previous answer was a general statement. I thought it was a general question, Mr. President. Now, as far as the so-called European areas are concerned—or the European area then —I have to deduct from the facts as I know them, that there are certain restrictions in regard to the question of employment, but on the other hand again, there are also indications. Now, if we take for instance, the question of teachers, of Bantu-speaking people who are teachers in a so-called European area then, I know of no ceiling in regard to their rise to a certain position in their schools.

Mr. GROSS: Are there any non-White teachers in any but non-White schools?

Mr. BRUWER: Are there any non-White teachers in any White schools?

Mr. GROSS: In any schools other than non-White schools?

Mr. BRUWER: I do not know of such cases, Mr. President.

Mr. GROSS: Is the limitation or restriction of a non-White teacher to a non-White school based upon considerations which take into account his ability, or his race?

Mr. BRUWER: Mr. President, I would say that it takes into account his connection with a certain group of people. If the word "race" is used, then I would say no.

Mr. GROSS: Is the characterization or term "Bantu" a racial designation?

Mr. BRUWER: Mr. President, it is not a racial classification. It is a classification based on language considerations and on anthropological or social anthropological considerations. Now, naturally, if one is a physical anthropologist, you will also say that the Bantu belongs to a certain race of the human family.

Mr. GROSS: May I ask you, sir, whether the fact that no non-White teacher teaches in a so-called White school is based upon factors of social anthropology?

Mr. BRUWER: It is based on those factors, Mr. President.

Mr. GROSS: Could you—excuse me, had you finished, sir?

Mr. BRUWER: Not really, Mr. President. It is based on social anthropological factors, Mr. President. It is a question of language, for instance, which I used as one of the criteria of the distinction of people.

Mr. GROSS: If a non-White person who is referred to as a Bantu speaks Afrikaans or English or both, does the fact that he also speaks a Bantu language relate to the policy which precludes him—if this is the policy—from teaching at a White school? Does that have any bearing on the question?

Mr. BRUWER: No, Mr. President, it has not got a bearing. The inference there, in my opinion, would be that he is teaching in the schools where Bantu languages are used.

Mr. GROSS: But if he also speaks English or Afrikaans or both, what relevance does his language capacity have to do with the policy which precludes him from teaching at a White school?

Mr. BRUWER: Mr. President, his language would not have any relevance to that position. The only relevance would be, then, his attachment to a certain group.

Mr. GROSS: Suppose he disclaims attachment to such a group, as an individual, does that then enter into the decision or policy of the Government?

Mr. BRUWER: Mr. President, I am afraid I did not get the question very well.

Mr. GROSS: If the individual disclaims his connection with a group and says I would just like to be a teacher and forget for a moment that I am a Herero, can he disclaim his link with the group in order to achieve the right to teach at a White school?

Mr. BRUWER: I do not know of cases like that, Mr. President.

Mr. GROSS: Do you know whether or not that is inconsistent with the policy, fiat, regulation, or law, which precludes him because he is non-White?

Mr. BRUWER: As I understand the policy, it is inconsistent with that policy.

Mr. GROSS: Is the fact that so-called "Natives"are limited to certain positions in mining enterprises, based upon cultural configuration between the various non-White groups? Can you answer that, yes or no?

Mr. BRUWER: No, Mr. President, it is not relevant to the cultural configuration, apart from the question of abode.

Mr. GROSS: If, therefore, a non-White or so-called "Native"may not become a mine overseer, does that restriction have anything to do with any factor other than that he is classified by law as a Native?

Mr. BRUWER: No, Mr. President, I cannot see what it has got to do with any other factor. It is a categorization of groups.

Mr. GROSS: And his rights to rise above a certain form of labour in the mine, therefore, depend upon the—shall we call it ethnic group—to which he belongs? Is that correct?

Mr. BRUWER: That is correct, but only then in the area of the other group, because . . .

Mr. GROSS: I am talking, sir, about the southern sector, I am talking

about one particular area. Let us confine ourselves, if you will, to that; then, perhaps, we can discuss other areas if you wish. Now let us take the case of a mine in what you have described as the "White economy" or "White area" and I refer to the Rejoinder, **VI**, at page 231, in which it is stated that there are certain "posts which Natives may not be appointed to" in mining enterprises, including Manager, Mine overseer, Shift boss, Surveyor and several other categories. I should like to ask you . . .

The PRESIDENT: Mr. Muller.

Mr. MULLER: I want to indicate here, that my learned friend, Mr. Gross, has not quoted the reference to page 231, correctly. The reference there is to "posts which Natives may not be appointed to in such enterprises". Now those are mines belonging to Europeans. I would like that to be quite clearly put to the witness.

Mr. GROSS: That they are mines belonging to Europeans. Let that be the assumption of the question and may I address myself to the enterprises owned by Europeans, in the sector we are discussing. And I refer again to this quotation or statement, from the Rejoinder. So far as you know, as a member of the Odendaal Commission, is this restriction based upon anything but membership in an ethnic group?

Mr. BRUWER: Mr. President, no it is not based on anything other than the fact that certain people belong to a certain group, having certain rights and privileges, in certain areas, whereas again, other people belong to another group, but in this specific respect as quoted there, I do not know of any other consideration apart from the fact that you have to do with two groups here.

Mr. GROSS: The only consideration is that there are two different groups in the same area.

Mr. BRUWER: That is correct.

Mr. GROSS: Do you know, Dr. Bruwer, whether "Natives", as the word is used in the Rejoinder and in the laws, may own mines in the southern sector outside of Reserves?

Mr. BRUWER: I do not know . . .

The PRESIDENT: The question which you put to the witness—surely that must depend upon laws and regulations, whether they can or cannot own mines?

Mr. GROSS: Mr. President, may I rephrase my question to ask whether the Odendaal Commission enquired into the legislation pertaining to this matter, as a basis for reaching its recommendations concerning policies to which this witness has testified? Did the Odendaal Commission make enquiries concerning this matter?

Mr. BRUWER: Mr. President, the Odendaal Commission, the members of the Odendaal Commission who were experts in the economic field undoubtedly made analysis of all the various legislation in regard to the question of ownership and certainly also of mines, and nothing was submitted to the Commission, of which I am aware, that there is a possibility for the so-called non-Whites then, to possess a mine in the area defined as the southern sector, excluding the reserved areas.

Mr. GROSS: The reference I am about to make is again, to your testimony, in the verbatim of 2 July, at page 264, *supra*, in which you described certain areas of South West Africa, if I understood the phrase correctly, as "Caucasoid" areas. This is the correct spelling?

Mr. BRUWER: Mr. President, the correct spelling is Caucasoid, which, in my opinion, is just another word for Whites.

Mr. GROSS: That is, a synonym for "White". In the Odendaal Commission report, at page 315—I refer to paragraph 1285—reference is made to the fact that the "members of this developed sector are White". As one who was a member of the Commission, and signed the report, could you advise the Court what the significance is attributable to the phrase "the members of this developed sector are White"? What constitutes membership in the developed sector?

Mr. BRUWER: Mr. President, membership in the developed sector, as I understand it, constitutes the question of whether one has certain rights or privileges in that sector.

Mr. GROSS: And those who are of lower priority are regarded in the sense of the quoted language as not being "members" of the area, of the sector. Is that correct?

Mr. BRUWER: It is correct, Mr. President, with this proviso, that I would not subscribe to the phrase. I would rather put it in the way that members who do not have those rights and privileges are excluded.

Mr. GROSS: Now, are there any but non-Whites, persons categorized as non-Whites, who are in the category of exclusion or non-membership, whichever phrase you wish?

Mr. BRUWER: Mr. President, from what I understand in this so-called White area all people falling under that category sometimes called non-Whites, are excluded, in regard to rights and privileges in the broad framework thereof.

Mr. GROSS: When the report of the Odendaal Commission therefore refers to the absorption of non-Whites in the economy, is the word "absorption" there taken to have a different meaning from "membership", both words being used in the Odendaal Commission report?

Mr. BRUWER: Absorption in regard to membership?

Mr. GROSS: May I clarify my question, sir? Do you wish me to? I shall be glad to.

In the Odendaal Commission report, to which I have referred, on pages 31 and 33, reference is made to the absorption, and that word is used in the English text, of certain non-Whites into the economy. The section from which I just quoted states that the "members of this developed sector are White". I am asking you if you would be good enough to tell the Court what is the distinction between the two concepts, if any, of absorption into the economy and membership in the sector?

Mr. BRUWER: Mr. President, as I understand it to mean, one can absorb people in regard to an economy by attaching value to their contribution to that economy which is also of profit for themselves. But I also understand it in this context and in the context of the framework of the approach to mean that that would not of necessity mean absorption in any other way; that is on, for instance, a sociological level.

Mr. GROSS: And as to membership, the term "member of the community", you have testified as I understand it that you prefer another word. Am I correct in that understanding?

Mr. BRUWER: I think that is correct, Mr. President.

Mr. GROSS: And what word did you say you preferred?

Mr. BRUWER: I prefer participation as against the word absorption.

Mr. GROSS: As against the phrase "the members of", what phrase or word do you prefer to the phrase used "the members of"?

Mr. BRUWER: Mr. President, no, it was in regard to the qualification of

being of lower status or something. It was not for a question of membership that I wanted another phrase. I accept that.

Mr. GROSS: You accept that? Well, then, may I ask you—perhaps my memory is faulty, I thought and understood you to be referring to that phrase—my question had intended to ask you, sir, what the significance is of the concept or expression "the members of this developed sector are White"? In what sense is a non-White excluded from membership?

Mr. BRUWER: The non-Whites, Mr. President, appear to me to be excluded on the concept of not being members of that community.

Mr. GROSS: Well, perhaps we could approach it from a different angle. Is a person classified as White automatically a member of the developed sector?

Mr. BRUWER: A member for all purposes I should think, yes, Mr. President.

Mr. GROSS: Is he, therefore, as a member, entitled to rights and priorities?

Mr. BRUWER: Yes, Mr. President.

Mr. GROSS: Is a person classified as non-White automatically excluded from membership and therefore rights and privileges?

Mr. BRUWER: As I understand it, Mr. President.

Mr. GROSS: Did the Odendaal Commission inquire into this matter with respect to 125,000 persons in the Police Zone?

Mr. BRUWER: Mr. President, the Commission took into account all the information that it could gather. The Commission was aware of measures of differentiation based on this category that has been mentioned here and, keeping in mind the sociological position and the assumption of rights of groups, the Commission now based its approach on the concept, if we may again use that word, Mr. President, of ensuring that every individual has rights and privileges although it may be in another area.

Mr. GROSS: You appear to refer here, if I understand you correctly and please do correct me if I am wrong, that the higher priority automatically assigned to a White in the southern sector, the modern sector, is balanced by the fact that in the traditional sector, in the less-developed sector, the Native has a higher priority over Whites. Is that what you mean by referring to other areas? We are talking now about the southern sector outside of the Reserves in order to avoid confusion on that point.

Mr. BRUWER: That I understand, Mr. President. Mr. President, I would say that according to my opinion and basing my opinion on the framework of the process of development, or a process of development, I would say that there is that balancing factor.

Mr. GROSS: Now, are there any other factors other than this balancing factor or equivalents which account for the automatic exclusion from membership in the White sector of a non-White?

Mr. BRUWER: No, Mr. President, there is to my knowledge no other basis on which this is done.

Mr. GROSS: Now, Dr. Bruwer, how many Whites are there in Ovamboland?

Mr. BRUWER: Mr. President, I do not know the exact number just at present, but during the period of the Commission they must have been somewhere around 300.

Mr. GROSS: And how many non-Whites are there in that area?

Mr. BRUWER: In the area of Ovamboland?

Mr. GROSS: Yes, in Ovamboland.

Mr. BRUWER: Mr. President, according to the best of my knowledge, giving a round figure, I would say 240,000.

Mr. GROSS: Now, the two or three hundred Whites, I have forgotten the number you cited, but approximately of that order, who reside in Ovamboland, are they deprived of rights, for example, above certain forms of labour in Ovamboland?

Mr. BRUWER: Mr. President, they are certainly deprived of certain rights. Now, they do serve there, in Ovamboland, in their capacity as people who have to do certain work in Ovamboland.

Mr. GROSS: What sort of work, for example, did your inquiries disclose that they were engaged upon?

Mr. BRUWER: Mr. President, there are missionaries who are doing mission work in South West Africa and some of them originate in other parts of the world, for instance in Finland. Then there are government officials, and then there are also people busy with the shops in Ovamboland, doing trade in Ovamboland.

Mr. GROSS: And, sir, of what rights are those Whites deprived?

Mr. BRUWER: Mr. President, they are deprived of their rights to buy land in Ovamboland. They are deprived of the right to have any participation in the political institutions of the people in Ovamboland.

Mr. GROSS: Did you not say, sir, that some of the Whites there were government representatives or officials?

Mr. BRUWER: They were government officials, Mr. President, giving guidance in regard to the administration.

Mr. GROSS: Apart from the disability imposed upon them as Whites to buy land, what other rights, if any, are they deprived of?

Mr. BRUWER: They are deprived, Mr. President, of the right to participate in the political institutions of the people in Ovamboland.

Mr. GROSS: Now, is this the deprivation of rights, if we may call it that, what you have asserted to be the off-setting or compensating factor for the deprivation of rights of non-Whites in the southern sector?

Mr. BRUWER: Yes, Mr. President.

Mr. GROSS: Are there Whites in other areas outside of the Police Zone or southern sector, other than Ovamboland?

Mr. BRUWER: Yes, Mr. President, there are also Whites in the Okavango, there are Whites in the Kaokoveld, there are also Whites in the Eastern Caprivi.

Mr. GROSS: Now, how many such persons are there in total, in the aggregate, approximately?

Mr. BRUWER: Mr. President, I do not know the exact number at present, but I do not think that there can be more than between three and four hundred altogether.

Mr. GROSS: I would like to turn to other lines of considerations which emerged from your testimony. It has reference to the field of social anthropology I believe, sir. At page 246, *supra*, of your testimony of 2 July you indicated, stated, that there was what you called difficulty in classifying persons who are members of the Dama group. You stated that "they speak the language of the Nama, but if you take again the criterion of perceivable physical differences, then you would say that you have to deal with a man comparatively the same in physical features as the Bantu group". Is this statement from an anthropological point of view true of all Namas or Damas or only certain individual persons?

Mr. BRUWER: Mr. President, I would say it is true of all Damas that a

difference does exist, that they speak the Nama language, but on the basis of perceivable physical features again, they are a dark people.

Mr. GROSS: Your testimony then was applicable to the entire group, without exception?

Mr. BRUWER: That is correct, Mr. President, as far as I know.

Mr. GROSS: Have there, to your knowledge, been offspring of members of this group, the Dama group, and other groups, let us say the Herero?

Mr. BRUWER: Mr. President, I think that there certainly must have been offspring, not only of Damas and Hereros but probably also others, and that is one of the ways which the coloured people for instance came into being to a certain extent, over a long period of history, people that today are called Coloureds.

Mr. GROSS: Now if a Dama man, let us say and, for example, a Herero woman marry and have a child, on what basis is the determination made of the classification to which that child belongs?

Mr. BRUWER: Mr. President, I would think that one would classify such a person more probably than not on the basis of residence and possibly on the basis of the group of his mother.

The PRESIDENT: Are there many such instances that you know of?

Mr. BRUWER: Not so very many, Mr. President, I know of.

Mr. GROSS: I would be prepared to submit for the record a number of which I have personal knowledge. If there is any question in the witness's mind concerning the existence of this, may I ask you, sir, would this be regarded as an unusual phenomenon in the southern sector?

Mr. BRUWER: Mr. President, is it a question of admixture that is meant?

Mr. GROSS: Yes, sir.

Mr. BRUWER: Mr. President, I would not say that it is a very strange phenomenon in the southern sector. A simple fact that one for instance has Coloured people, apart from Coloured people that migrated from South Africa, would probably indicate that it is a phenomenon, but on the other hand again, if one takes into account that the Coloured population is only—if I remember well, Mr. President—just about over 12,000, then the phenomenon is not a total phenomenon.

Mr. GROSS: Dr. Bruwer, in your reference to the characteristics by which you would distinguish a Dama as a member of the Bantu group for one purpose, and of the Khoisan by reason of language for another, is there any account taken in respect of the mental endowment or capacity in making the determination as to which group he belongs?

Mr. BRUWER: I think one has to consider, Mr. President, . . .

Mr. GROSS: Are there any distinctions from a social anthropologist's point of view? Are there distinctions in mental capacity or any other aspect of capacity which depend upon his membership in one group or the other?

Mr. BRUWER: Mr. President, no, I do not subscribe to the opinion of, if I have the word "mental" correct, inequality of a man where there may be differences on account of the fact that he belongs to one or other group. I think the inherent possibilities of man are comparatively the same, Mr. President.

Mr. GROSS: Now therefore would you, remembering the census classification to which I referred and read into the record, and on the basis of which rights and duties are allocated and allotted, would you say that membership of an individual, in one group or the other, has any relevance to the assignment of rights to him?

Mr. BRUWER: Mr. President, it has, as I have tried to explain. The assigning of rights, as I understand it, in South West Africa, is based on the attachment of an individual to a group or a community.

Mr. GROSS: At page 39 of the Odendaal Commission report, in a footnote to table XVII, the Commission indicated that Bushmen and Nama had been "transferred" from Coloureds to Natives. Are you familiar with that reference in the Odendaal Commission report?

Mr. BRUWER: Mr. President, I think what is meant there is that in regard to the department having to do with them they have come under the department of Bantu affairs.

Mr. GROSS: This has nothing to do then with their classification in the census?

Mr. BRUWER: No, very definitely nothing.

Mr. GROSS: In the testimony which you gave on 2 July, from pages 251 through 258, *supra*, you described the various criteria which went into cultural configuration "as a basis to distinguish between groups", and you discussed language, social structures, social institutions, and so forth. And at page 256 of the verbatim record you were asked to tell the Court whether the different systems that you describe have a marked effect on the differences between the population groups, and you stated in response thereto (to save the Court's time I will not read it in full unless you wish me to for clarity) that the social orientation of a people conforming to certain systems has a definite bearing on many things in that society, and the principles embodied in the systems differed to such an extent amongst the various groups that one can very easily, on the basis of this factor of the cultural configuration, see that there is a great difference between these various groups of peoples and societies. Now, among the approximately 125,000 persons living outside the Reserves in the southern sector, would you say that your response to this question, with regard to cultural configuration, applies to those people in the southern sector?

Mr. BRUWER: Mr. President, the people employed in the southern sector?

Mr. GROSS: Yes, the people who live in the southern sector, work there, and live and die there, outside the Reserves.

Mr. BRUWER: Mr. President, many factors still apply according to my knowledge of the people.

Mr. GROSS: How would you apply these criteria? There is a great difference between these various groups of peoples in societies; how would you apply this to individual Natives, for example, who were born and lived their lives on a so-called White farm?

Mr. BRUWER: First of all, Mr. President, I will find out whether that man looks upon himself as belonging to a certain group by means of the name he applies to himself. I will ask him, do you look upon yourself as belonging to say, for instance, the Bushmen group, or belonging to the Herero group, or belonging to the Dama group, and I will then mention all the groups if necessary, Mr. President. If he says yes, then I will take it that he still looks upon himself as part of a certain specific group of people.

Mr. GROSS: Now, in the sense in which you have just used the word "part" of the group, what relevance or connection does his being a "part" of that group have to do with his life on the farm?

Mr. BRUWER: Mr. President, I would say many things; because for instance, of kinship. The question of how this man applies a certain system

of kinship, also on the farms, whether he subscribes to the one system or whether he subscribes to the other system, and I have never come across any instance, Mr. President, on farms, and usually when I do research work I speak with people wherever I come in contact with them, whether it is on a farm or a Reserve or in a town, and I have not come across any individual that did not tell me that his system of kinship is like this.

Mr. GROSS: The basis of the distinction, on the basis of the factors you have mentioned, then have to do with his attitude toward such matters as kinship and any other customs; how do they affect his relationship to his employer or his life on the farm?

Mr. BRUWER: Mr. President, I would not know how it affects his relationship with his employer on the farm, because I have not studied that type of relationship.

Mr. GROSS: Is there any relevance to this matter of distinction between groups, in respect of a person who has been born and lives on a so-called White farm? Is there any relevance to the economic or political society in which he plays a part as an individual?

Mr. BRUWER: Mr. President, yes, I think these things are relevant in regard to his subscription to a specific system. May I quote perhaps only one example, Mr. President. If we take the question of marriages, for instance, now polygenous marriages, in the White group where Roman Dutch Law applies, there is not this phenomenon of having more than one wife, whereas that is a phenomenon that one comes across amongst the other groups on farms, and even in towns I have come across that, Mr. President.

Mr. GROSS: The rights and privileges allotted to such an individual by law and regulation, do they have any connection with his cultural configuration?

Mr. BRUWER: Mr. President, no, they only have connection with the fact that this man does not belong to the group, to that specific group in that section in the southern part of South West Africa, excluding the Reserves.

Mr. GROSS: You referred in your testimony on page 243, *supra*, of the verbatim of 2 July, to the comparison of differing civilizations—this is the phrase you used—and the important factor, as you described it, of *territorial abodes*. Does either of those factors, or criteria, have any relevance to the individual and his family who spend their lives on a White farm in the southern sector?

Mr. BRUWER: Mr. President, it would not have any relevance to an individual family, apart from the fact that he would be looked upon as belonging to a group and in that sense it will have relevance, but not on him as an individual or as an individual family on the basis of abode.

Mr. GROSS: Does your answer to my question, Dr. Bruwer, involve the point or the consideration that all individuals in South West Africa are looked upon as members of a certain group?

Mr. BRUWER: Yes, Mr. President, I think that is correct.

Mr. GROSS: And that the census categories therefore, to which I have referred, establish a membership in a group for every individual. That is correct?

Mr. BRUWER: That is correct, Mr. President, as I understand it.

Mr. GROSS: And is it correct that the purpose for assigning or attributing membership in a group to an individual is in order to determine his rights, or is it for some other purpose? I am talking about the southern sector outside the Reserves.

Mr. BRUWER: Mr. President, I can only say that as far as I can see and evaluate the situation it is for the purpose of determining his rights either in one area or in the other area.

Mr. GROSS: One area within the sector I am discussing, sir? I am talking about 125,000 people in the southern sector, outside the Reserves.

Mr. BRUWER: Yes, then it would be correct, Mr. President, that in that case it would be a question of not assigning rights to him there.

Mr. GROSS: A question of the classification of every individual in that sector outside the Reserves in order to determine the allotment of rights, privileges, or other incidents of his social or political life—is that correct?

Mr. BRUWER: That is how I understand it, Mr. President.

Mr. GROSS: And is that, sir, the way the Odendaal Commission understands it?

Mr. BRUWER: That is the way the Odendaal Commission understood it, Mr. President, and that is also the reason why they tried to put into practice, or to put into a working process, something which they thought would assign rights to everybody on the basis of the group to which he belongs.

Mr. GROSS: In the sector that we are referring to, outside the Reserves, is there any law or regulation of which you are aware which determines a person's rights, privileges, or duties on the basis of his individual capacity, apart from his membership in a group?

Mr. BRUWER: Mr. President, not that I know of. There may be, but I do not know.

Mr. GROSS: The Odendaal Commission made enquiries into this question. Would you, sir, as a member of the Odendaal Commission, regard this factor as having any bearing upon the moral well-being and social progress of the individuals in this area?

Mr. BRUWER: Mr. President, that question, or that problem, which is a very important problem, was certainly discussed by the Odendaal Commission very, very, thoroughly, but the Odendaal Commission, with all the information, keeping in regard many factors, came to the conclusion that the moral well-being of an individual must not be dissected from the moral well-being of his people..

Mr. GROSS: "His people", refers, Dr. Bruwer, to the fact that he is, let us say, obviously White but generally accepted as Coloured? That assignment to the Coloureds is one of the factors that you have in mind when you refer to "his people"?

Mr. BRUWER: That is one of the factors.

Mr. GROSS: Does the individual have any voice in the matter whatever?

Mr. BRUWER: Mr. President, in framing the general process of development in South West Africa, the Odendaal Commission tried to establish the wishes of people, not of one group only—not of the Whites only, or the Coloureds only, or the Nama only—but met every group of people, and the Commission also invited information from all possible sources. And in evaluating the position and in being confronted with a very great problem, Mr. President, a very great problem, the Odendaal Commission, on the basis of their study of the information and on the basis also of their acceptance of the evidence that was given to them by the various groups of people, now on the basis of the consensus of opinion, the Odendaal Commission recommended the process within the framework they have recommended, namely giving people rights and privileges on the basis of

their group identification, that is on the basis of the group to which they belong.

Mr. GROSS: May I remind you, Dr. Bruwer, that my question was whether the wishes of the individual had any relevance to the assignment of his rights and duties. Does that have any relevance to the assignment of his rights and duties? You understand my question, sir?

Mr. BRUWER: I do not follow the question . . .

Mr. GROSS: If an individual says, hypothetically, "I would like to rise above a certain level of labour", or he says, "I would like to be a member of the White Community", do his wishes as an individual in that respect have any relevance to the decision taken with respect to him by Government?

Mr. BRUWER: Mr. President, I would say that it certainly has relevance, but it will be subject to the position of the group in which he finds himself. In other words, say, for instance, an individual is accepted by a group, then there would be no problem of assigning to him the same rights and privileges of that group, as I understand it.

Mr. GROSS: The individual in the southern sector, living on a White farm, having been born there, wishes to have certain rights corresponding to those of the Whites in that area. By what standard or criterion is it determined that, irrespective of his personal wish, he is a member of a certain group, which membership then determines his rights? What are the criteria upon which such a decision is made?

Mr. BRUWER: Mr. President, as far as I can see, the only criterion is the fact that the area, or the farm on which this man finds himself now, is in the area of Whites.

Mr. GROSS: Does that then affect the decision with respect to him as an individual, he wishing to have rights higher than those allotted to his group?

Mr. BRUWER: Mr. President, no, it would not be respecting his wishes in that sense, but his wishes will then be made subject to the general pattern that you have in that society.

Mr. GROSS: His individual quality or ambition is subordinated to the group allotment, is that a fair characterization of your response?

Mr. BRUWER: It appears to be so, Mr. President. That is a correct interpretation.

Mr. GROSS: I would like to refer to the Odendaal Commission report again. This arises out of your testimony on 2 July, with regard to the value of separate development which, I believe, is another term for *apartheid*. In that connection I refer to page 429 of the Odendaal Commission report, in particular paragraph 1437—I should like to refer to a rather lengthy section which I shall not read in full, at some risk of reading out of context—I should like to ask you one or two questions with respect to what appears there.

Reference is made to "The second phase, namely where the non-White groups have increasingly to be given the opportunity . . . to find an outlet for their new experience and capabilities". Then reference is made to the necessity of affording them "protection against the more effective competition of the White group". And then reference is made to the following comment:

> "These advantages of special advancement and special protection cannot be brought about in an integrated community without openly subscribing to discrimination, which is not feasible, and

is in any case undesirable under the circumstances on moral and ethnic grounds."

Having signed this report, I should like to ask you, Dr. Bruwer, what meaning you attach to the word "discrimination" in that context, which is said to be "undesirable under the circumstances on moral . . . [as well as] ethnic grounds"?

Mr. BRUWER: Mr. President, the meaning that I would attach to the term "discrimination" would be where one differentiates between people. In some cases it may be that the individual may feel certain detrimental effects of such differentiation or discrimination, but that is the only meaning I can attach to the term "discrimination", that it makes a difference between people in regard to certain things, in regard to, in this case for instance, rights and privileges.

Mr. GROSS: Therefore, if I understood you correctly, Sir, when reference is made, in the passage cited, to the "undesirable" aspects of discrimination "on moral and ethnic grounds", do I understand your answer to be that there are criteria or standards upon which judgments may be made with respect to whether discrimination exists?

Mr. BRUWER: Mr. President, my answer to that question would, of course, depend on the degree. I make a distinction between to discriminate against people and to discriminate between people. To me it is a different concept. Discrimination against people, I would not agree to that, but I can see that under given circumstances it may be for the well-being of people that discrimination between people should be made, but keeping always in mind, Mr. President (and I only give my own personal opinion here), that any individual has, naturally, a human dignity.

Mr. GROSS: If it is within the field of social anthropology, what would you, as an expert in that discipline, suggest to the honourable Court in respect of certain criteria or standards that could be applied to determine whether, in a given context, discrimination was "against people" or "between people"?

Mr. BRUWER: Mr. President, if I had to explain what I mean by discrimination between people and discrimination against them, I would —for instance, take as an example—we have been talking, Mr. President, this afternoon in regard to the southern sector of South West Africa—now, say, for instance, that these measures of differentiation that a non-White may not buy land or get hold of land in the southern or White sector, if that had excluded him altogether from rights and privileges of land I would have said now you are discriminating *against* people and to that I would not be able to subscribe. My conception of discriminating between people is where you have to do with sentiments, you have to do with problems—you have to do with a very complicated problem sometimes—you have to keep all these things in mind and now you have to find out what is the best, not for one individual only, but you have to find out what is the best given the whole and entire situation. If one now finds that according to things that are factual—you have a factual situation—now you want to start with a process, but you have a position here where certain people in society are excluded from certain rights in that society and in that area (and, Mr. President, I do not deny that that situation is there—that is the situation the Odendaal Commission very definitely had to do with), but now I want to establish a basis whereby I can assign to these people rights and privileges which will be protected and ensured in the same way as the rights and privileges that I now

protect and ensure against these people who are in society, on that basis of differentiation, Mr. President, then I would say it is differentiation *between* people.

I have already said, Mr. President, that I can quite see that any individual or a certain individual may very definitely find or feel that against him one has now discriminated, in other words, you have now discriminated *against* him. But, when he now receives, on the other hand, rights and privileges then he must immediately—and you exclude these other people there now—agree, well at least the discrimination *against* is now discrimination *between*. That is how I understand the concept, Mr. President.

[Public hearing of 6 July 1965]

The PRESIDENT: The hearing is resumed and I call upon Mr. Gross to continue his cross-examination.

Mr. GROSS: Mr. President. Dr. Bruwer, I suggest that, if I speak too quickly and if you raise your hand, I will slow down; please do not hesitate to do so.

At the adjournment yesterday, Dr. Bruwer, I believe you were discussing the problems created by the necessity to afford protection to non-Whites in the southern sector against what is described as the "more effective competition" of their White neighbours; your comments were being addressed to the finding in the Odendaal Commission report at page 429, paragraph 1437, and I quote:

> "The advantages of special advancement and special protection cannot be brought about in an integrated community without openly subscribing to discrimination, which is not feasible, and is in any case undesirable under the circumstances on moral and ethnic grounds."

Have you, Dr. Bruwer, completed your comments, or did you wish to continue, sir?

Mr. BRUWER: Mr. President, as far as I can recollect I had practically finished my comments. The only addition that I wanted to make was to the effect that the essence of that quotation, naturally, is conceived within the idea of ensuring rights of people in their own areas, on the basis that I have already tried to explain to the honourable Court.

Mr. GROSS: Do I understand from your answer just given that this reference, or finding, which I have quoted does not apply to non-White individuals in the White economy or southern sector outside of the Reserves?

Mr. BRUWER: Mr. President, it applies to the interests of everybody according to the considerations of the Commission.

Mr. GROSS: Could you answer my question "yes" or "no" to avoid a possible misunderstanding, Doctor? Does this finding relate to non-Whites in the southern sector outside of the Reserves?

Mr. BRUWER: Yes, Mr. President, that is correct.

Mr. GROSS: Thank you. Therefore perhaps we could clarify your previous answer that this relates to conditions in areas other than the southern sector. That was my understanding.

Mr. BRUWER: Yes, Mr. President.

Mr. GROSS: It applies then to both areas: outside of the southern sec-

tor, and the so-called "White-area" or "White economy"? That is correct, is it? Now I will be directing your attention, if the Court please, to the situation within the southern sector, so that there may be an avoidance of misunderstanding. I would repeat that I am referring to the non-Whites who live and work in the southern sector outside of the Reserves, totalling some 125,000 persons in the non-White category.

Now, I should like to draw your attention to paragraph 1437, to which I have just referred, which is on page 429. This paragraph concludes with the finding that the advantages of special advancement and special protection—

> "cannot be achieved in a framework of integration, and the traditional non-White groups must therefore be given separate geographical areas in which the aim of special advancement can be carried *into practice*".

Having in mind that we are talking now about non-Whites in the southern sector outside of the Reserves, what is the meaning attributed by the Commission to the phrase "framework of integration"? In this context what does the word "integration" signify, if you please, sir?

Mr. BRUWER: Mr. President, the word "integration" as I understand it, and I also take it that that is how the Commission understood it, is a society where you have integration of people belonging to various groups, that is an integrated society, that is how we understood it.

Mr. GROSS: Could you enlighten the Court by defining the word "integration" without using it?

Mr. BRUWER: Mr. President, I would say that integration would be where you create a society by giving rights and privileges to members of other groups, who have already got their rights and privileges in another area, in that specific society of another group. I would call that an integrated society.

Mr. GROSS: Does integration consist in giving rights or privileges to certain groups in a society? Is that correct?

Mr. BRUWER: That is how I would interpret it, Mr. President.

Mr. GROSS: Is it not true, Dr. Bruwer, that every individual in a society has certain rights and privileges as a human being?

Mr. BRUWER: That is correct, Mr. President; every individual certainly has rights and privileges.

Mr. GROSS: Well, what sort of rights and privileges must be denied before you can say that a society is not integrated?

Mr. BRUWER: Mr. President, if a society is not integrated in the general sense of the meaning, I would say it is a society where certain people do not, for instance, have political rights, where they do not have ownership rights, that I would call a type of society where you have not got total integration. Of course, there are also other possible means of describing it, because one can, in my opinion Mr. President, distinguish between what I would perhaps call, say, legal integration as against integration at the heart. There are also these two smaller differences in my opinion in regard to integration. In other words one could say that a society is integrated politically, it is integrated economically, but then it may still be an open question whether the society is integrated on a human basis, that is, whether the one group accepts the other group at heart.

Mr. GROSS: This is basically, if I understand your comment, a matter

of feeling or attitude on the part of one group with respect to another. Does that constitute an element of integration?

Mr. BRUWER: Mr. President, I would very definitely say from my experience that that certainly constitutes a factor of integration.

Mr. GROSS: Dr. Bruwer, suppose, as in the southern sector outside the Reserves, the attitude of one group (let us say the White group) with respect to the non-White group is one of integration into the economy, by the use of indispensable services—would you describe that as an economically integrated society?

Mr. BRUWER: Mr. President, according to the position in South West Africa, I would not describe that as an economically integrated society, because what I understand by economic integration would be that one would have all the rights and privileges connected with the economy of that country. That would also include, for instance, land rights. Now, in South West Africa I do not know of any examples, Mr. President, where in a, call it then, non-White area, that is an area that has been assigned to one of the various population groups in South West Africa, for instance, one could say that a White person is totally economically integrated, because I don't know of any cases where they have ownership right of land, and I take that, Mr. President, as being part and parcel of an economic system.

Mr. GROSS: Dr. Bruwer, certainly you must feel free to answer the question in the best way you can, but I would invite you to confine your remarks, if possible, to the questions relating to the White economy, so-called, in the southern sector. The frequent references to other areas may confuse the Court. I'm afraid they sometimes confuse me, and I would like to avoid that.

With reference to the situation in the sector we are talking about, if we may confine ourselves to that, we come back to the phrase "framework of integration" which in the Odendaal Commission report concludes "cannot be achieved". I should like to ask you why it cannot be achieved. Is there any inherent reason why it "cannot be achieved" in the sense in which you use the term "integration" in this sector?

Mr. BRUWER: Mr. President, there is certainly no inherent reason, if one now evaluates the various people in that society—that is, in the southern sector—but the considerations of the Commissioners were that one has to protect the rights of a certain group in a certain area, and therefore, Mr. President, my answer to the question actually is "no, there are no inherent reasons—that is, that one would say the one group cannot achieve the same economic advancement, for instance, as the so-called White economy".

Mr. GROSS: I think you used the phrase "a certain group"—we are talking, as you know, about the White sector, so-called, outside the Reserves; by "a certain group" do you mean the White group?

Mr. BRUWER: Mr. President, I mean the White group on the basis of the information that I have.

Mr. GROSS: Yes. So that what your answer comes down to, if I understand you, and please correct me so that the Court may not be misled by my question: integration in your sense of the word cannot be achieved in the southern sector, the modern economy of the Territory, because of the requirements you perceive to protect the White group—is that a correct summary, sir?

Mr. BRUWER: That is correct.

Mr. GROSS: Therefore the question I come to now is whether, when you refer in the Odendaal Commission report to absorption of certain non-Whites—for example, half of the Hereros—the word "absorption" is used in a different sense than, let us say, would be conveyed by the phrase "economic integration"?

Mr. BRUWER: It certainly is, Mr. President, as I understand it; if I may explain, Mr. President—the integration then being a total integration, that is, waiving all measures of differentiation, whereas the absorption in this case would mean absorbing them in the sense of employment and in the sense of giving them the necessary training for use in their own areas.

Mr. GROSS: Would you regard limitations imposed on the freedoms of people by reason of their colour or race as a form of discrimination against such persons?

Mr. BRUWER: Mr. President, as I explained yesterday, I would look upon it as being a measure of differentiation between people; if one uses the phrase "against", then I must start giving an explanation of my answer, whether it is yes or no. I have told the honourable Court that I distinguish between differentiation *between* and differentiation *against*; the one, to my opinion—differentiation against—being negative, detrimental. The meaning that I attach to differentiation between would be that one gives rights and privileges to people, but then on a different basis.

Mr. GROSS: Dr. Bruwer, I hesitated to interrupt you but I would like to repeat the question, and ask you if you could answer it as briefly as you feel warranted: would you regard limitations imposed upon the freedoms of people by reason of their colour or race as a form of discrimination?

Mr. BRUWER: Mr. President, I would regard such a form of differentiation as discrimination.

Mr. GROSS: Do you identify and make synonymous the words "differentiation" and "discrimination", for all purposes?

Mr. BRUWER: Mr. President, it all depends; I would not really make a basic difference between the two words differentiation and discrimination.

Mr. GROSS: You would not make a difference between them?

Mr. BRUWER: No.

Mr. GROSS: I began this line of enquiry yesterday, as you will recall, by reference to the sentence using the term "discrimination" in the Odendaal Commission report—would you substitute the word "differentiation" for "discrimination" in that sentence—would it make any sense?

Mr. BRUWER: Mr. President, I cannot recollect the entire sentence now.

Mr. GROSS: I will try to find it for you. It is at page 429, paragraph 1437, and it reads as follows:

> "These advantages of special advancement and special protection cannot be brought about in an integrated community without openly subscribing to discrimination, which is not feasible, and is in any case undesirable under the circumstances on moral and ethnic grounds."

Now I ask you, if you make a synonym of the two words "differentiation" and "discrimination"—does the sentence I have just read make any sense? Would you say, normally, "without openly subscribing to differentiation"?

Mr. BRUWER: Mr. President, in that sentence I do not think one can use the word "differentiation", apparently.

Mr. GROSS: Well, this is the context of my question; that is why I would like to come back to my question, and use the word "discrimination" in the sense in which it is used in the Odendaal Commission report. Coming back to that, therefore, I take it that your answer makes clear that there are at least some situations in which the two words are not synonymous. Now I ask you therefore, again, whether the imposition on the freedoms of people by reason of their colour or ethnic origin is a form of "discrimination" within the meaning of the word as used in the report, and just cited?

Mr. BRUWER: Mr. President, within that meaning my answer would be "yes".

Mr. GROSS: Thank you. Now, what is the significance of the phrase "wiping out differences" which appears at page 427 of the Odendaal Commission report in the following context—I will not quote the entire, lengthy paragraph, but will summarize it briefly: the Commission concludes that it would not be desirable to "wipe out the differences between the groups", to which is contrasted what is called "complete socio-economic integration". Are these the true and only alternatives: wiping out the differences on the one hand, and complete socio-economic integration on the other? Is there any in-between ground, which the Commission does not refer to, but which nevertheless exists in your opinion?

Mr. BRUWER: Mr. President, I would say no, because if you wipe out something then it no longer exists—that is my understanding of the term "to wipe out".

Mr. GROSS: May I repeat my question, sir? The Odendaal Commission report, in the passage I have just quoted in part from paragraph 1434, states that it is not desirable, on the one hand, to wipe out differences between groups nor, on the other hand, is what is called "complete socio-economic integration" possible. I have asked you whether there is any middle ground between those two extreme statements of position; the Commission referred to none—can you suggest any to the Court?

Mr. BRUWER: Mr. President, as I have just now said, it depends on what one understands basically by the words "to wipe out". Now, if my interpretation of the words is correct, I would say if something is wiped out—for instance, if I have written something on a blackboard and I wipe it out—then it no longer exists, so one cannot say that there is anything in between, because now you have erased something that existed.

Mr. GROSS: Do you attach any significance at all to the phrase "wipe out the differences between the groups" as used in the Commission report —is it just a jumble of nonsense, or does it have a meaning in this context?

Mr. BRUWER: Mr. President, I think what the Commission had in mind there in using the phrase "to wipe out differences"—is to waive, if I have the correct word there, all measures of differentiation. Naturally one cannot wipe out certain things, because how could you possibly wipe out, for instance, the physical differences between people?—that is not possible; but I think what the Commission had in mind with that phrase certainly was the taking away of all measures of differentiation.

Mr. GROSS: The elimination of all measures of differentiation between groups would include, for example, the elimination of the matrilineal system, as distinguished from the patrilineal system—is that what you have in mind when you refer to eliminating differences, or differentiation?

Mr. BRUWER: No, Mr. President, what I had in mind was eliminating the differences, the measures of differentiation—we are talking now, Mr. President, of the southern sector outside the Reserves—between people within a society on the basis of allotment of rights or non-allotment of rights.

Mr. GROSS: Do I understand you to mean, Dr. Bruwer, that in referring to "wiping out the differences between the groups" you mean eliminating differential treatment on the basis of freedoms and liberties?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: Thank you. Now with respect to socio-economic integration the word "complete" is used in the paragraph to which I have referred—"complete socio-economic integration". That would suggest, would it not, sir, that there is a partial or qualified socio-economic integration—is that a correct rendering?

Mr. BRUWER: It seems as if the word "complete" would imply that possibility, Mr. President.

Mr. GROSS: You were familiar with the drafting of the Odendaal Commission report, were you not, sir?

Mr. BRUWER: Yes.

Mr. GROSS: Would it be appropriate to ask whether you drafted this section of the report?

Mr. BRUWER: Mr. President, I drafted the chapters on the population; I drafted the chapter on the physical aspects of the country; and I drafted the chapter on the educational part; those were the parts that I was responsible for.

Mr. GROSS: Now I believe that, as has been stated by the Prime Minister—I quote from the *House of Assembly Debates*, Third Session, Second Parliament, 8 May 1964, column 5633—in discussing the report:

> "All the members signed the Report as a whole, and the allegation that each one was just responsible for his own portion of it is not true. Each one drafted his section of the Report, but thereafter the Commission as a whole sat and discussed every letter and every sentence and every chapter of the whole Report jointly. They not only assumed joint responsibility by signing the whole Report, instead of each one just signing his own section of it, but in fact they jointly went through this Report over and over again, and they all subscribed to the Report as a whole."

Is that a correct statement, sir?

Mr. BRUWER: That is a perfectly correct statement, Mr. President.

Mr. GROSS: Now then, when you qualify your answer with respect to the meaning attached to words and phrases by reference to "I gather" or "I assume", are you now reconsidering the meaning attached to the word at the time you read it and subscribed to it?

Mr. BRUWER: Mr. President, I am certainly not reconsidering my explanation of the term and what it implies; that naturally was done only to give an indication of what one understands by a word in a certain context.

Mr. GROSS: Now when you signed the report, which contained the phase "complete socio-economic integration", did you, in approving those words, have in mind a distinction between complete "socio-economic integration", on the one hand, and some qualified form of "socio-economic integration", on the other? Can you answer that "Yes" or "No"?

Mr. BRUWER: No, Mr. President, I cannot think that we had anything other than complete in mind.

Mr. GROSS: Is anything less than "complete socio-economic integration" possible as a sociological or anthropological phenomenon?

Mr. BRUWER: Mr. President, my answer to that question is yes, since there is such a thing, of course, as cultural change and it is not impossible that there can be integration on the basis of that cultural change.

Mr. GROSS: Now how do you recognize, for example, when a non-White in the southern sector, outside the Reserves, who has been absorbed in the White economy, is eligible for this degree of integration, for the status of integration? What criteria or standards do you apply?

Mr. BRUWER: Mr. President, if I had to apply a criterion, I would say that when he subscribes to everything inherent in that society in which he is residing, and when that society accepts him as being one of its own members, legally as well as at heart.

Mr. GROSS: By subscribing, do you mean taking some kind of an oath, or making some sort of a declaration? Would you describe your meaning more precisely?

Mr. BRUWER: Not necessarily, Mr. President. One would certainly evaluate the way of life of such an individual, one would evaluate his acceptance of all the norms and standards of that society; in other words, one would take into account whether this man has totally dissected himself from another group and from another culture, has accepted the culture—and if I mean culture, Mr. President, I have in mind the sum total of everything—and that he has now also been accepted by that society, legally or by law, as well as at heart, because I do make that distinction, Mr. President.

Mr. GROSS: And you are talking now about individuals, are you not, Sir?

Mr. BRUWER: I am talking about individuals as well as groups, Mr. President.

Mr. GROSS: You are talking about individuals as well as groups. At what age does the individual become judgeable by this standard?

Mr. BRUWER: At what age, Mr. President? Is that the question?

Mr. GROSS: Yes. Is there an age factor?

Mr. BRUWER: Mr. President, I do not think one could say there is an age factor.

Mr. GROSS: Is a child integrated in the sense in which you use the term at the age, let us say, of six or seven? A White child?

Mr. BRUWER: It would be possible. A child is certainly integrated in the society.

Mr. GROSS: So that the individual subscription does not determine so much as the colour, or race, or fact of birth? Is that correct?

Mr. BRUWER: No, Mr. President, I would not say that is perfectly correct.

Mr. GROSS: The White child, at the age of six, can be integrated, in the sense in which you use the term then, on what basis or criteria other than the fact that he is White, or classified as White, and not generally accepted as Coloured?

Mr. BRUWER: Mr. President, on the basis that that child has been born to elders being part of a society and being now legally accepted as the child of those parents it is, in our legal system in any case, always recognized that a child belongs to the same group and the same society as his parents.

Mr. GROSS: So that if the law were amended, or changed, in that respect, the non-White Child would also become a member of the group, or society, by reason of the new legislation? That would be possible?

Mr. BRUWER: That would be possible, Mr. President.

Mr. GROSS: And if a family of non-Whites is born on a farm owned by a White, and the White child plays with the non-White child, of four years each, one is a member of the society—integrated—the other is not a member of the society—non-integrated—is that what you would say the meaning of this phrase is in the Odendaal Commission report?

Mr. BRUWER: That is, Mr. President. I cannot find the essence of the question actually. If a child of non-White parents plays with a child of White parents on a farm . . .

Mr. GROSS: Let me formulate it for you, to avoid confusion, so that you do not have to labour reconstructing my question. I think I made it too long and I apologize to the Court.

I am talking about a family classified non-White born on a farm owned by a White; that is where the members of that family spend their working lives. The children play together with the child of the White owner. I asked you whether the mere fact of one child being White and the other child being non-White determines that one is a member of the society and the other is not. Is that a correct statement?

Mr. BRUWER: Mr. President, it is correct, but there are also other differences. Mr. President, I myself, during all my childhood, always played with non-White children as children, and yet when it comes to certain things we automatically find that I belong to that group and the other one belongs to his group. But it is, if one takes only into account the question of whether one now belongs to a certain society and the other one belongs to another society, then a question, as I have also already agreed to yesterday, of being classified on the one hand as White and on the other hand, with the necessary qualification, as non-White.

Mr. GROSS: Dr. Bruwer, I will turn to another line of questions now, and perhaps come back to this in another context.

At page 117 of the Odendaal Commission report, reference is made, in paragraph 441, to the result which would follow from accelerated development, greater opportunities, in the homelands in the southern sector and the following statement is made, that "greater opportunities for employment in the homelands in the southern sector [and I quote now], will result in a great migration to those areas".

I call your attention to the words "a great migration", from the present areas outside the Reserves to the new projected homelands in the southern sector, and I ask you, as a member of the Odendaal Commission, in the light of this prediction of "a great migration", what effect would such a migration have on the workings of the White economy, if any?

Mr. BRUWER: Mr. President, I have already told the honourable Court that I am not an economist, but on the basis of the discussions of the Commission—I can well recollect that this position was discussed, that is the possibility of when one now develops in the areas of the other groups to such an extent that you have then this possibility of a great migration, that is people returning to their own homelands to make their living there and to build up an economy there, there is the possibility that there may be effects in regard to the economic sector of the so-called Whites then. But, Mr. President, the Commission, in all the interests of the people that they could think of, accepted the possibility that it is not only one group

that may be affected, but all the groups will be affected, and similarly, in this respect, the White group, or the White economy, may also be affected. That was the basis of the discussions of the Commission as far as I recollect it, Mr. President.

Mr. GROSS: Could you say, from your recollection of the discussions in the Commission on this point, at which every word of the report was discussed, at what level of migration the White economy would cease functioning altogether?

Mr. BRUWER: Mr. President, I do not think that one could say that there is any level of migration at which the White economy will cease to function altogether, because one must always remember that any people, and that also applies to the White people, will devise means and measures by automation, or whatever it may be, so as to cope with a situation where one has not got enough manpower and then there is naturally also the natural increase.

Mr. GROSS: I am inviting your attention to this question, Dr. Bruwer, because of your testimony yesterday, in which I believe you stated the view that the White economy could not thrive or even survive, without the use of non-White labour. Did I correctly understand your testimony?

Mr. BRUWER: Mr. President, I cannot recollect exactly what I said yesterday. I have not yet read the verbatim record.

Mr. GROSS: Let me state that as a question to you, today, to eliminate any problem about our mutual recollection of yesterday. Will you take it as a fresh question? Can the White economy thrive or even survive without the use of non-White labour?

Mr. BRUWER: Mr. President, at this moment, I would say no, it would not be able to thrive or possibly survive, but that does not mean that that answer will apply always.

Mr. GROSS: Now I want to invite your attention to this matter as precisely as possible. It may go to the heart of the problem, and may give perhaps, clearer understanding of the Odendaal Commission report. Do you foresee any practical possibility that the White economy can survive or thrive without some non-White labour?

Mr. BRUWER: Mr. President, that again is a question for an economist. My opinion, as a layman in this respect, would be again, that at this moment, I cannot foresee that possibility. But when one has to do with a migration, one has to do with a process—that is how the Commission conceived it—and you would have to make that type of adaptation to cope with your new problem again.

Mr. GROSS: Can you give me an unqualified yes or no answer to the question: does the Odendaal Commission, or do you as a member of the Commission, foresee the practical possibility of the White economy surviving and/or thriving without the use of non-White labour? Can you answer that question, yes or no?

Mr. BRUWER: If it is at this moment, then my answer is no, Mr. President.

Mr. GROSS: Now then, can you answer yes or no to the question in terms of the foreseeable future?

Mr. BRUWER: No, Mr. President.

Mr. GROSS: Therefore, let us take it even more precisely . . .

The PRESIDENT: What is meant by the answer, Mr. Gross? His answer was no, but was it no that he could not answer the question, or no that he cannot foresee the possibility?

Mr. GROSS: I was perhaps expecting an answer and thought I heard it, Mr. President. Thank you, sir. Would you then clarify any possible confusion? Do you foresee the possibility that the White economy can thrive or survive without the use of Black labour?

Mr. BRUWER: Mr. President, again I speak as a layman, but my personal opinion is that it is possible that the White economy could survive, without the labour of people coming from other groups.

Mr. GROSS: Do you mean by that answer of "could survive" that you are indulging in a theoretical exercise, or are you expressing a judgment, as a member of the Odendaal Commission that has made recommendations with respect to the future of these people?

Mr. BRUWER: Mr. President, I gave my answer on the basis of my own personal opinion.

Mr. GROSS: Now will you state your view, as a member of the Odendaal Commission, having subscribed to this report on this fundamental assumption?

Mr. BRUWER: Mr. President, in regard to South West Africa, I would again say that the Odendaal Commission certainly foresaw the possibility that the White sector would have to do, one or other time, during a long process perhaps, without non-White labour, if I could use the word non-White then.

Mr. GROSS: The Odendaal Commission based its recommendations, if I understand you correctly, on the assumption that at some time in the future, the White economy would operate without non-White labour. Is this a correct version of your testimony?

Mr. BRUWER: That is a correct interpretation, Mr. President.

Mr. GROSS: And what time span did this conclusion cover?

Mr. BRUWER: Mr. President, the Commission certainly did not consider a span of time.

Mr. GROSS: Is this an important factor in the life of an individual living today?

Mr. BRUWER: It may well be, Mr. President.

Mr. GROSS: Could such a span extend, let us say, for 300 years possibly?

Mr. BRUWER: That is also possible, Mr. President.

Mr. GROSS: Therefore, in taking account of the possibility of the operation of the White economy without non-White labour, you did not take account of the time factor, or is that an incorrect appreciation of your testimony?

Mr. BRUWER: No, Mr. President, the Commission saw this entire approach in a framework that would be working according to a process, but there was no time span mentioned or time limit in regard to when this must happen, or when that must happen.

Mr. GROSS: In your testimony on 2 July you referred to the importance which you attached to the human factor in determining the rights and duties of inhabitants. Is that correct?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: Do you regard the question of the time in which a programme or an objective can be accomplished, as a relevant human factor?

Mr. BRUWER: It may well be, Mr. President.

Mr. GROSS: Do you have any doubt about it, sir?

Mr. BRUWER: I have no doubt about it.

Mr. GROSS: Therefore, if I understood you correctly, the Odendaal Commission report recommending and foreseeing this substantial, this

"great migration", did not have in mind any time span in which its programme would take effect. Is that correct?

Mr. BRUWER: Mr. President, it is correct to a certain extent, on the question of time, but as I said, it is envisaged as a process.

Mr. GROSS: Could I ask you then, Dr. Bruwer, whether, as a member of the Odendaal Commission, as the former Commissioner-General in charge of the indigenous inhabitants' affairs, as a social anthropologist and as a distinguished expert, would you express an opinion whether any premise of the Odendaal Commission report and its recommendations would become invalid if any non-Whites were to remain in the "White economy" or in the White sector, let us say for 100 years, to state a time? You understand my question?

Mr. BRUWER: Mr. President, there was one word that I did not get, I am very sorry.

Mr. GROSS: I would be glad to repeat it, Sir, in view of its importance. Do you, in the light of the various qualifications that I have set forth (and which are in the record), consider that it is a premise or assumption underlying the Odendaal Commission report, that there will, at some time, be—shall we call it—a total evacuation of non-Whites from the White sector? Will you answer that question yes or no?

Mr. BRUWER: Mr. President, naturally yes, on the basis of the broad conception, but that does not, of necessity, mean that there would be no—using this phrase—non-Whites in a so-called White area, for purposes of employment. We were thinking, Mr. President, of rights and of privileges and of possibilities and of the development of a community, but we certainly did not have a special time limit when we could possibly say, Mr. President, that for instance for 20 years hence or 50 years hence or 100 years hence, that you had not got a single one of a certain group in the area and society of the other group, because that—my opinion was asked—in my opinion, would have been pure speculation.

Mr. GROSS: As a member of the Odendaal Commission, and in signing its report, I take it, sir, that you and the other distinguished members of the Commission did not rely upon speculation? That is correct, is it not, sir?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: And we are obtaining your views, for the benefit of the Court, in order to elucidate and understand better the ideas, the words and phrases and their significance, as used in this very important report. Is that not correct, sir; is that understood to be the objective?

Mr. BRUWER: I understand that, Mr. President.

Mr. GROSS: Now, in the context of that objective of my question, I would like to come back again to the question I asked before, and which I undertook to reformulate. If it is not foreseeable that the White economy will be operating without Black labour, or non-White labour, then is an important premise or basis of the Odendaal Commission report not invalidated? May I state it affirmatively, if you have difficulty? Is it one of the premises of the Odendaal Commission report, that the White economy, so-called, will operate without the services of non-Whites in the foreseeable future?

Mr. BRUWER: No, Mr. President, it was not in the mind of the Odendaal Commission that the economy in the White sector would operate without the so-called non-White labour within the foreseeable future, the Commission having recommended naturally for the next five years basically.

Mr. GROSS: The Commission's recommendations for a five-year programme envisage, do they not, an ultimate pattern for the territory. Is that correct?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: Is that ultimate pattern, to which we are addressing ourselves now, one in which there will be no non-Whites in the White areas?

Mr. BRUWER: Mr. President, I must say no to that question because as I have already tried to explain, the Commission did not consider any possibility where in the foreseeable future, there would be a law forbidding any non-White to come for instance, and work in the White area, and on that basis I would say no: my answer to that question would be no.

Mr. GROSS: Thank you. Now, with respect then to the explanations or justifications made for the limitations on freedoms of the non-Whites presently in the White area—with respect to justifications or explanations made for those limitations, which refer to the situation of total separation—would you say that this situation has any basis in the foreseeable future?

Mr. BRUWER: Mr. President, yes it has that basis of differentiation.

Mr. GROSS: The doctrine of apartheid or separate development as I understand it (correct me if I am wrong) pre-supposes an ultimate situation in which there will be total separation of White and non-White. Is that correct?

Mr. BRUWER: Mr. President, the doctrine of apartheid, I do not know what is meant by that phrase.

Mr. GROSS: You do not know what is meant by apartheid? What phrase do you prefer, sir?

Mr. BRUWER: If, what is meant, Mr. President, is the system or policy, or approach of separate development, and if by that policy it is understood, as I have tried to indicate to the honourable Court previously my acceptance of that approach, that people are recognized on the basis of their unity, on the basis of their territory, on the basis of their institutions and that their development according to a process takes these things into account, and if rights are ensured for certain people within the framework of that approach, then I would say, if I may then quote the term, that would then be the doctrine of apartheid. But, Mr. President, as a social anthropologist, I would not use the word "doctrine" because what I believe to be a doctrine, if my understanding of the term is correct, is something which is absolute, something which is an absolute unchangeable concept.

Mr. GROSS: Would you prefer the word "policy"?

Mr. BRUWER: I would prefer the word "policy", Mr. President.

Mr. GROSS: Now, would the "policy" of apartheid or separate development be comprised or reflected in the following statement by the Prime Minister of the Republic in the *House of Assembly Debates*, the Third Session, the Second Parliament on the 8 May 1964, at column 5641, in which the Prime Minister referred, and I quote as follows, to the concept that:

> "... the limitations imposed on the freedoms of people (as we find practically over the whole world where anybody lives in the territory of somebody else) fall away as soon as everybody can enjoy his own freedom in his own territory".

And then the Prime Minister went on to say—this was all *à propos* of the Odendaal Commission report, as you know: "Human rights will have more opportunity to develop to the full in terms of our policy when separation takes place . . ." Now, I invite your attention first to the phrase "limitations imposed on the freedoms of people". I believe that you testified earlier that you would consider that as a form of discrimination. Is that correct?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: Now, with regard to the phrase "as soon as everybody can enjoy his own freedom in his own territory", does that envisage or contemplate total physical separation?

Mr. BRUWER: Mr. President, not necessarily, because I think one can have your rights and your freedoms and your privileges in your own country, although you may be working or you may be employed in another country.

Mr. GROSS: I am not certain that I understood that, sir, perhaps we could approach it slightly differently. Prime Minister Verwoerd's statement, which I have just quoted, refers to, and I quote again:

> "Limitations imposed on the freedoms of people [will] fall away as soon as everybody can enjoy his own freedom in his own territory."

In calling your attention to those words, I asked whether this contemplated total physical separation as a part or element of the policy of apartheid or separate development?

Mr. BRUWER: Mr. President, I cannot of course say what the honourable Prime Minister had in mind, but my own deduction would be that if one says that "limitations on freedom fall away", then that would have applied that separation.

Mr. GROSS: By "separation" I am referring, and I want to know whether you are, too, to the physical phenomenon by which people take up space. I am talking about physical separation; in that use of the term, does the policy of apartheid contemplate as an ultimate goal the physical separation, in different territories, of Whites and non-Whites?

Mr. BRUWER: Mr. President, the policy, as I understand it, certainly contemplates that.

Mr. GROSS: Total separation?

Mr. BRUWER: Total separation, Mr. President. But I again qualify what I want to clearly point out, Mr. President, that total separation, physically, the term that was used here, would then mean that nobody of the one group would ever be able to enter the territory of the other and, Mr. President, to that sort of definition to a total physical separation, I would not be able to answer yes, because I do not think that that is what is implied.

Mr. GROSS: Do you, by "enter", mean temporarily visit?

Mr. BRUWER: Temporarily visit, Mr. President, and even staying for a time for the purpose of earning a living. I would like, Mr. President, to exclude that type of thing in regard to this phrase "total physical separation", because I do not think that one can apply the term "total physical separation" in regard to this policy. It would for instance, Mr. President, then also mean, if I may explain to make clear my answer, that as a White man I would also not be able then to go into the area of say, one or other of the other people. I cannot see how this total physical separation in this sense, can be implied in the term.

Mr. GROSS: Let us then take the case, Dr. Bruwer, of a non-White who, as you say, works for a living in the White territory or area—to use *Prime Minister Verwoerd's expression, in the "territory of the White"*—that person is, while he is in that territory, subject to the imposition of limitations on his freedoms, under this statement of the Prime Minister. That is correct, is it not, sir?

Mr. BRUWER: It appears to me to be correct, Mr. President.

Mr. GROSS: Is it the opinion of the Odendaal Commission that, so long as a non-White is in the White territory, he must be subject to limitations upon his freedoms?

Mr. BRUWER: That, Mr. President, was certainly the consideration of the Odendaal Commission on the basis of the broad approach of the problem that I have tried to indicate.

Mr. GROSS: Therefore, it would seem to follow that if the non-White, who might spend his entire working life, or longer—beyond his retirement—in the White area, would be subject to imposed limitations on his freedoms so long as he was physically present in the White area. Is that correct?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: And is it, or is it not, proposed by the Odendaal Commission that the cure for that situation, shall we say, is physical removal to his own territory where, in the words of the Prime Minister, "human rights will have more opportunity to develop"? Is this the only therapy that can be applied to this situation?

Mr. BRUWER: Mr. President, that was according to the considerations of the Odendaal Commission, taking into account all the aspects of the very complicated problem and having in mind the interests of the people, according to what the Odendaal Commission could find out; that was, in their opinion, with all that information, at that time, at this stage in the history of the peoples of South West Africa, the best possible approach.

Mr. GROSS: This "best possible approach", as I understand it, involves the perpetual imposition of "limitations . . . on the freedoms of people", in the Prime Minister's phrase—limitations on the freedom of non-Whites in the White sector, so long as they live. Is that statement correct?

Mr. BRUWER: Mr. President, I again say that I do not know what the Prime Minister had in mind, but measures of differentiation in regard to this broad approach and broad concept would certainly, in my opinion, have to be carried on with as long as you have this approach.

Mr. GROSS: Do you regard the phrase "measures of differentiation" as a synonym to the phrase "imposed limitations on freedom?" Do they mean the same thing, those two phrases?

Mr. BRUWER: Mr. President, when I used the term "Measures of differentiation", I had in mind measures of differentiation as conceived by a society at a certain time, as I have tried to explain, to protect itself against other societies. And may I add, Mr. President, for clarity's sake, I can quite foresee that when a society, as a people, decides that these measures of differentiation must now fall away, that that could of course possibly be done and therefore I cannot subscribe to the qualificative "perpetual" because that would, in my opinion, Mr. President, depend on the society itself.

Mr. GROSS: Now, Dr. Bruwer, do you regard the imposition of limitations upon the freedom of individuals as consistent with the promotion of their moral well-being and social progress?

Mr. BRUWER: Mr. President, I cannot say yes or no to a question of that nature because, naturally, one must keep in mind a certain situation. Now, if one has to start, Mr. President, explaining what one means by moral and social well-being, I am afraid, Mr. President, it would take me a very, very long time to explain exactly to the honourable Court what I mean, but I shall be brief. In imposing then limitations, Mr. President, in regard to the freedom and privileges and rights of certain people within a society, in this case then the non-Whites as against the Whites, as I have already indicated to the honourable Court, that also happens in other societies where this question of "White" or "non-White" does not come into the picture.

Now, Mr. President, what is the moral well-being, if we take that term, what is the moral well-being of a person? There are, in my opinion, a vast number of factors which contribute to the moral well-being of somebody and those factors, also in my opinion Mr. President, sometimes differ in different societies. Now, it is the same in regard to the social well-being. Social well-being one may perhaps define it as being the well-being of the man within a social group. That is his social well-being. But, Mr. President, to conclude, if any measure imposes limitations on the one group . . .

Mr. GROSS: Freedom? Limitations on freedom?

Mr. BRUWER: Limitations on freedom, Mr. President. If any limitations of freedom are imposed on an individual, or even on a group of individuals, Mr. President, I can quite see that that may perhaps make those people unhappy. I can quite see that. On the other hand, again, you may have to do this when you have to evaluate a situation, not on the basis of one single individual, but on what is best in the interests of all the people. Now, if you differentiate, as I say, Mr. President, I admit and I agree that it is possible that certain people will not be happy. But on the other hand again, if you do not have those limitations then others would again say that they are not happy. And now, in regard to these limitations, Mr. President, and the moral well-being of people, it was the honest conviction of the members of the Odendaal Commission and, Mr. President, if I may, with your permission, say that, as far as my colleagues are concerned I did not know them before that time, but I came to know them on this Commission as honourable men who really tried to find a solution.

Mr. GROSS: Mr. President, I have no objection to the witness continuing if the Court wish. I would like to ask other questions, and I raise the question whether this is now being responsive to my question.

The PRESIDENT: Well, I think it generally is, Mr. Gross. Your question was very much at large.

Mr. GROSS: I have raised the question, yes, sir.

Mr. BRUWER: Mr. President, I am sorry. I beg your pardon. I just wanted to explain that the Commission really tried to find a solution for a very complicated and a very difficult problem. The Commission was certainly not under any illusions, Mr. President, in regard to the fact that some people may certainly perhaps feel that they would not be happy, but in regard to the general approach as the Commission saw it, the Commission was of the conviction that it would be in the moral and social well-being of all the groups of South West Africa.

Mr. GROSS: Dr. Bruwer, with respect to the matter under discussion

before the recess, with respect to the limitations imposed upon the freedoms of certain groups by other groups in South West Africa: in the view of the Odendaal Commission, who, what body, makes the decisions regarding the extent and degree of the limitations imposed? How is that determined?

Mr. BRUWER: Mr. President, under the present system, the deduction is that the limitations are imposed by the administering body.

Mr. GROSS: And does the administering body include representatives of any of the groups whose freedoms are limited?

Mr. BRUWER: Not in South West Africa, Mr. President.

Mr. GROSS: We are talking about South West Africa. The decisions are made by administration, which then is controlled by one group. That is correct?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: And it is controlled by the group whose happiness is, in your terms, determined to a large extent by the limitations imposed on the freedoms of the other group. Is that correct?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: What safeguards, if any, does the Odendaal Commission report suggest, to avoid the possibility that the group imposing the limitations on freedom may be unduly influenced by its own advantage or its own concept of happiness?

Mr. BRUWER: Mr. President, the entire basis of the recommendations of the Odendaal Commission is exactly to prevent that thing from happening. The basis of the Odendaal Commission report, as the honourable Court will recollect, is that each group should be able to decide for themselves, within their own areas, according to their rights and their privileges.

Mr. GROSS: Dr. Bruwer, could you address yourself to the question: what safeguards, if any, are suggested by the Odendaal Commission to assure against the decisions of the dominant group limiting freedoms on the basis of its own happiness, rather than on the basis of the welfare of the other group?

The PRESIDENT: Mr. Gross, I think that the word dominant, for the purpose of giving a factual reply, ought not to be included at the present moment.

Mr. GROSS: Yes, Mr. President. I would like to refer to the terms of Prime Minister Verwoerd's characterization of the "domination or *baasskap*, of the White man in his own area", as set forth in the Rejoinder, V, page 252. In the context of my question, Dr. Bruwer, I am referring to the "White man" exercising "domination" in the phrase of the Prime Minister. Now, may I put my question to you in those terms? What safeguards, if any, are suggested by the Odendaal Commission report to assure against the White man in South West Africa attempting to achieve domination by measures which do not unfairly restrict the happiness and welfare of the other group?

Mr. BRUWER: Mr. President, by safeguarding the interests of the groups in the areas that then would be theirs, and where they would then be the dominating group, if I may also use that term. In other words, where they will then dominate in the same way as the Whites are now dominating in their area.

Mr. GROSS: Do I understand your answer then to be that unless the non-White physically moves to his own territory, where he can dominate,

there is no safeguard to protect him against limitations upon his freedoms, so long as he is in the White area? Is that correct?

Mr. BRUWER: Mr. President, it is correct in regard to the limitations that are there at present.

Mr. GROSS: Are there limitations contemplated for the future, so far as you know?

Mr. BRUWER: I do not know of any, Mr. President.

Mr. GROSS: Did the Odendaal Commission consider whether the present limitations were just right, or should be expanded or contracted?

Mr. BRUWER: Mr. President, in regard to these limitations, from what the Odendaal Commission could recollect, some of these limitations even had a bearing in areas outside that area that was then delimitated as the White area, and the Odendaal Commission, as the honourable Court will also recollect, also offered criticism in regard to certain things and recommended improvement, and even change, of certain such measures.

Mr. GROSS: Certain what, sir?

Mr. BRUWER: Certain such measures of differentiation.

Mr. GROSS: Do you mean to eliminate or modify limitations upon freedoms of the non-Whites? Is that what you are referring to?

Mr. BRUWER: That is what I am referring to.

Mr. GROSS: Could you give an example of a limitation imposed on the freedom of non-Whites, in the White area, which the Odendaal Commission recommend be repealed or modified?

Mr. BRUWER: Mr. President, not in the White area. As I have said, there were limitations having a bearing wider than the White area.

Mr. GROSS: I do not understand your answer, sir. With respect to the non-White in the White sector, were any recommendations made by the Odendaal Commission with regard to the release of limitations upon his liberties or freedoms?

Mr. BRUWER: Mr. President, not that I can remember at the moment.

Mr. GROSS: Then going back to my earlier question. Did the Odendaal Commission consider that the presently imposed limitations on the freedoms of these people of whom we are speaking, were just right, did not need addition, did not need subtraction—did the Odendaal Commission adopt that view?

Mr. BRUWER: Mr. President, the Odendaal Commission adopted the view that one has the position whereby you have a situation of limitations imposed on these people, and they adopted the view, furthermore, that these limitations were conceived so as to ensure rights of a certain group in a certain area.

Mr. GROSS: Would you mind substituting a specific term for the word "certain", for the clarification of the Court?

Mr. BRUWER: For instance, land rights, Mr. President.

Mr. GROSS: The people, the group—would you mind specifying for the Court, when you say a "certain" group and "certain"groups, what groups you are referring to?

Mr. BRUWER: Mr. President, we are referring to the southern sector outside the Reserves, and that would then mean ensuring the rights of the White group in that area, and in the same way assuring the interests and the rights of the non-Whites in their areas.

Mr. GROSS: Dr. Bruwer, is it fair to say that your conception of the problem of the rights of individuals in the White sector must always be weighed and measured against what is happening or what is not

happening in another sector—is this your approach, the approach of the Odendaal Commission?

Mr. BRUWER: Mr. President, taking all the factors into account, that was the approach.

Mr. GROSS: That is the approach?

Mr. BRUWER: That is the approach.

Mr. GROSS: Could the approach be summarized to be described as one of equivalent rights—Black here, White here—without reference to the quality or character of the action that takes place in each such territory? Do you understand my question?

Mr. BRUWER: Yes, Mr. President, and my answer is no, because it was not a question of Black and White—it was a question of various groups, Mr. President.

Mr. GROSS: What is "a question of various groups" in the context of Prime Minister Verwoerd's statement that the White man dominates in his area, and the Bantu dominates in his area—these are the two groups of which we speak, is that not correct?

Mr. BRUWER: No, Mr. President, we are speaking of many more groups in South West Africa.

Mr. GROSS: I am speaking of two groups, then—would you be good enough to address your comments to the groups of which we are speaking? It is true, is it not, Dr. Bruwer, that rights are allocated and freedoms are limited in the White sector on the basis of whether an individual is a "Native" or whether he is a "White"—is that correct?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: As far as the Native category is concerned, is it relevant to this question whether he is a Herero or a Nama, for example?

Mr. BRUWER: Mr. President, I would say no, since a collective term is used in that quotation.

Mr. GROSS: If you will, please, sir, stay with this usage in this context which seems relevant. Now, to come back to my question—is it your conception, or the approach of the Odendaal Commission, that the rights and duties of the non-Whites in the White zone are to be offset by the rights or duties of the Whites in the Black zone or Black territory—that this is the criterion which is to govern in each case—the relative balance of the rights? I do not understand your reference to the situation outside the White sector when I ask you to discuss the situation within the White sector. May I restate this in the form of a clearer question? I asked you, or intended to ask you, who is to determine the rights and the imposition of limitations upon the freedom of the non-Whites in the White sector? Your reply was "the administration"; you said that that was controlled by the White group, and that the other group was not represented in it; this is correct so far?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: I then asked you or intended to ask you, on the basis of the Odendaal Commission's recommendations: what safeguards, if any, were recommended to assure that the White group in terms of the domination objective referred to by the Prime Minister would not abuse its power by imposing undue limitations on the freedoms of the non-White group; what was your answer to that question, or if you feel you have not answered it, what is your answer to it now?

Mr. BRUWER: Mr. President, my answer to that would be, first of all, that the Odendaal Commission recommended the creation of councils in

the so-called White area there representing the non-White groups, if we then use the collective term, so that there is a body that can see to it that the interests of the people represented by that body are looked after; but naturally, Mr. President, the entire concept of the Odendaal Commission in safeguarding the interests of the people of South West Africa was on this basis of ensuring that in the future, with this system, there cannot be a domination by the White group of any other group.

Mr. GROSS: In your testimony on Friday, 2 July—that is, on page 265, *supra*—you testified as follows, and this is in the context of a long paragraph, and I will endeavour not to quote it out of context, but to be brief; you said:

> ". . . as far as South West Africa is concerned, I also think that the one group, either on the basis of numbers or on the basis of economic strength, will undoubtedly dominate the other group if you have not got protective measures . . .".

Now, substituting the phrase "protective measures" for the word "safeguards", what recommendations, if any, were made by the Odendaal Commission with respect to "protective measures" to assure that the non-Whites would not be dominated—the word you used—by the Whites on the basis of their economic strength?

Mr. BRUWER: Mr. President, the basic safeguard that the Odendaal Commission made to protect the rights of the non-White peoples so that they may not be dominated by the Whites was, or is, the recommendation in regard to the various homelands, where the possibility for the White group to go and buy up land on its possible or probable economic strength could not be possible.

Mr. GROSS: Could I put it to you that the answer you have given tells the Court nothing about what protective measures are recommended, if any, by the Odendaal Commission with respect to the non-White who does not move outside the area in which he lives? Are there any protective measures recommended by the Odendaal Commission with respect to the unnumbered non-White individuals who do not take advantage of the opportunity to go to Ovamboland, let us say?

Mr. BRUWER: Mr. President, the Odendaal Commission did not, as far as I can recollect, recommend measures safeguarding the interests of those people other than on the basis of giving it to them, or wanting them to accept the safeguards and the rights on that broad basis of recommendation of the various homelands.

Mr. GROSS: If I can pierce through the meaning correctly—correct me if I do not—what you have just testified to sounded as if you were saying that unless a non-White should go, physically leave the White sector, no protective measures were recommended by the Odendaal Commission with regard to his welfare or well-being in the White sector? I am talking now about limitations upon his freedoms.

Mr. BRUWER: Mr. President, in regard to the limitations of freedom, naturally the question of education and of hospitalization, and that sort of thing, provisions are made for that, but what I had in mind when I said that the Odendaal Commission did not recommend the safeguarding of the interests of those people is that they did not recommend, for instance, that non-White people must now be given the right to be able to participate in the political institutions of that White group, or of having now the right to buy up land in the urban areas. In other words, these mea-

sures, Mr. President, which the Odendaal Commission recommended as having to be exercised in the areas of these people, and in connection with their community of people, there were no recommendations as far as I can recall, Mr. President, in regard to the removing of such limitations.

Mr. GROSS: When you referred in your testimony (on p. 265, *supra*, of the verbatim record of 2 July) to "protective measures" (in your phrase) which were necessary in order to avoid (again your words) "domination" by one group or the other—I ask you again, what protective measures, if any, did the Odendaal Commission recommend to assure against "domination" (in your phrase)? Were any recommendations made by the Odendaal Commission to protect against "domination" (in your phrase)?

Mr. BRUWER: Mr. President, the recommendations made by the Odendaal Commission as protective measures for domination of the one group by the other group were those recommendations that assigned to a group of people a certain area in which they would have the only say in regard to certain matters, such as land rights and these things, and in which the other group would not be able to exercise such rights. The Odendaal Commission conceived that in that way then the interests of the one group would be safeguarded and protected against domination by any one of the other groups.

Mr. GROSS: So that the only protective measure recommended by the Odendaal Commission to assure against domination of the non-Whites by the Whites was that the non-Whites could, and it was hoped would, leave the White area? Is that correct?

Mr. BRUWER: Basically that is correct, Mr. President.

Mr. GROSS: That is the basis upon which the Odendaal Commission recommendations rest?

Mr. BRUWER: Yes, Mr. President.

Mr. GROSS: Now, with respect to those non-Whites who are living in, and working in, the White sector, is the Court to understand you correctly to say that the Odendaal Commission made no recommendations with respect to the nature, or scope, or content of limitations upon the freedoms of such people so long as they remain in the White sector? Is that correct?

Mr. BRUWER: That is basically correct, Mr. President.

Mr. GROSS: Is it incorrect in any aspect?

Mr. BRUWER: Mr. President, I would not say it is incorrect, but I think it is incomplete in one aspect, in the sense that these people now have the freedom to make use of rights and privileges in certain areas.

Mr. GROSS: Is this another way of saying they have the privilege of getting rights and freedoms if they leave the White sector and go elsewhere?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: Thank you. Now, I should like to address the following questions to you, as a member of the Odendaal Commission, as an expert, and as a former Commissioner-General for Native affairs, or for indigenous peoples, with respect to South West Africa.

I invite your attention to the following quotation from the Odendaal Commission report, page 427, paragraph 1433:

> "It is a universal characteristic of man to identify himself with the population group which has the same ethnic and socio-cultural background as he has . . . Consequently, a group gives preference to its

> own group members . . . so that members of another group are handicapped or excluded from the activities of the group, other members being admitted only in so far as they are supplementary to the group and not competitive."

My first question, based upon that quotation from the Odendaal Commission report, is whether the groups referred to are the White and the non-White groups in the Police Zone, or southern sector?

Mr. BRUWER: Mr. President, no. The group referred to in that quotation appears to me to be, for example, Ovambo.

Mr. GROSS: When the Odendaal Commission report, in the excerpt I have just quoted, says—now I am talking about the southern sector, the "White area" of the southern sector outside the Reserves—that, on the basis of "a universal characteristic of man", a group gives preference to its own group members so that members of another group are handicapped, or are excluded from the activities of the group—other members being admitted only in so far as they are supplementary to the group and not competitive—I ask you whether this applies to the relationship between the White group and the non-White group in the southern sector?

Mr. BRUWER: Mr. President, as far as I can see, it also applies there.

Mr. GROSS: When you signed the report did you come across this language?

Mr. BRUWER: Yes, Mr. President.

Mr. GROSS: Was that your understanding of it at that time?

Mr. BRUWER: That was my understanding at that time too.

Mr. GROSS: Therefore, the members of the—I am paraphrasing it, tell me if I do so incorrectly—non-White group are handicapped, or are excluded from the activities of the White group, other members being admitted (that is non-White group members) only in so far as they are supplementary to the White group and not competitive? Is that a fair paraphrasing, or interpretation, of this quotation?

Mr. BRUWER: Yes, Mr. President, I think it is a fair interpretation.

Mr. GROSS: Now, in respect of admitting—and this is the phrase used—"admitting" members of the non-White group in so far as they are "supplementary" to the White group "and not competitive", would you explain to the Court what is meant by "admitting" in that context?

Mr. BRUWER: Mr. President, in that context I would say the word "admitting" means allowing them in that area.

Mr. GROSS: Allowing him physically in the area?

Mr. BRUWER: In the area.

Mr. GROSS: I call your attention again to the exact quotation.

> "Consequently, a group gives preference to its own group members . . . so that members of another group are handicapped or excluded from the activities of the group, other members being admitted only in so far as they are supplementary to the group and not competitive."

Now you have explained, I believe, have you not, that this includes—let me ask you to put it in your own terms and state again, if you will, what is meant by the word "admitted" in this context?

Mr. BRUWER: Mr. President, allowing them in that society I should say.

Mr. GROSS: Allowing him in what sense? That I take to be a synonym with "admitted".

Mr. BRUWER: In a technical sense.

Mr. GROSS: For what purpose?

Mr. BRUWER: In the society for the purposes, as stated there, in a supplementary way. That would then be, in this case, Mr. President, as a man who participates in the employment in that area.

Mr. GROSS: Is this just another way of describing the admission of non-Whites physically into the White area for the purpose of labour?

Mr. BRUWER: That would appear to be correct, Mr. President.

Mr. GROSS: I would like to ask you now, in referring to the phrase "universal characteristic of man" (that phrase is used in the Odendaal Commission report): *is this a sociological, or is it a social-anthropological* phrase, or what is the technical, or scientific meaning, if any, which you would attach to it?

Mr. BRUWER: Mr. President, it appears to me to be a sociological concept. Naturally, as a social anthropologist, I would also say that it is a phenomenon—people tend to be organized on the basis of groups, on the basis of peoples, on the basis of nations.

Mr. GROSS: Dr. Bruwer, I would like to make myself clear. I am talking now about the phrase "universal characteristic of man" and let me put this question to you, if I may. Does this phrase mean that there are certain characteristics which are applicable to men as men, to people as people?

Mr. BRUWER: Yes, Mr. President, I think that is the meaning of the word.

Mr. GROSS: Now, the phrase "universal characteristic of man" then presupposes, does it not, that there are certain qualities which reside in the individual, which qualities are shared generally by other individuals even of other groups by reason of their common humanity? Is that correct?

Mr. BRUWER: Yes, it appears to be correct, Mr. President.

Mr. GROSS: Now, with respect to the "universal characteristic of man", the phrase quoted from this paragraph of the Odendaal Commission report, I should like to address the following questions to you as a social anthropologist, as a member of the Odendaal Commission and as former Commissioner-General of the indigenous groups of South West Africa.

Taking the individual as "the focal point" I quote from the Odendaal Commission report, *rather than the group, in the modern sector of South* West Africa, would you say that the following were universal characteristics of man shared by all men, all inhabitants of the territory regardless of colour:

> "1. A desire for individual human dignity and respect as an individual human being, without regard to his group."

Would you characterize that as a "universal characteristic of man"?

Mr. BRUWER: Mr. President, yes, that should be a universal characteristic of man, if I understand the description well.

Mr. GROSS: You have used, or the Odendaal Commission report has used, the description. I cannot interpret it, I am really asking you to. In any event, let me ask you whether, in your view and in the respects which qualify you to answer the question, is it a "universal characteristic of man" to desire individual self-improvement and self-development according to his innate ability and capacity?

Mr. BRUWER: I think that is so, Mr. President.

Mr. GROSS: When the Odendaal Commission considered the question of rights and duties of individuals in the White sector, of non-Whites in the

White sector, was weight given to these universal characteristics of man which I have mentioned?

Mr. BRUWER: Yes, Mr. President, weight was given. I have already tried to indicate that the Commission considered every possible angle of the problem and the Commission naturally also considered the problem of individuals staying in the areas of other individuals, not only in the White area but also in other areas. But the Commission's conviction was, Mr. President, and this is also my conviction, I have been asked to give my opinion as a member of the Commission, Mr. President, as a social anthropologist and also as Commissioner-General, it is therefore also my opinion, Mr. President, that within the framework of the problem that the Commission had to face, although the Commission understood that a specific individual, whether he be White or whether he be non-White, will perhaps suffer and will perhaps feel unhappy, the Commission felt and was also convinced, Mr. President, that the major interests of the people, considering also the interests of the individual members of the people, could best be served, under the present circumstances, by the approach (if I may again use that word) of giving people the opportunity to have rights and freedoms without the fear that they may be dominated. That was the broad principle—also keeping in mind, Mr. President, the interests of individuals.

Mr. GROSS: You mean, I take it, what you testified before: the privilege to attain freedoms or avoid limitations of freedoms by leaving the White sector. Is that what you mean?

Mr. BRUWER: I think that is correct, Mr. President. By taking the freedom to leave the one area . . .

Mr. GROSS: "By taking the freedom to leave"—would you characterize that, or be willing to characterize that, as a solution by permitting escape from the local situation?

Mr. BRUWER: That appears to me, Mr. President, as being the situation, if it is a question of the individual now saying well, I am prepared to stay here on the basis of these limitations, or these limitations notwithstanding. But on the other hand again the individual may say, but I would rather like to move to my group and to my people where I have all the basic rights.

Mr. GROSS: So that an individual and his family, who were born, perhaps, in the White sector, have the option of remaining there so long as he pays the price of the limitation upon his freedom, or else taking himself and his family and removing outside the area. Is that the alternative posed by the Odendaal Commission?

Mr. BRUWER: Mr. President, that is the alternative within this framework.

Mr. GROSS: Now, in determining the extent and nature of the limitations upon the freedom of the individual, are there any objective—speaking as a scientist—are there any objective criteria or standards on the basis of which the dominant group (in Prime Minister Verwoerd's terminology)—the Whites in this case—may judge the extent to which, and the nature in which, these limitations should be imposed?

Mr. BRUWER: Mr. President, I think yes. If one keeps in mind the interests of peoples, there are many factors, in my opinion as a social anthropologist, that have a bearing on the basic interests of people. Now, if I remember well, I told the honourable Court that there is the possibility that when you waive, for instance, measures of influx control, that so

many people of the other areas will migrate to an economy which, after all, is only also limited, that you will have to deal with what I would call a social illness, and not be able to cope with this; and, Mr. President, if I may be permitted to give my opinion as a social anthropologist in this respect, I would rather see the African people, with the respect that I have for them, in their own areas amongst their own people other than in circumstances in which one sometimes finds them in the urban areas.

Mr. GROSS: Would you, as a social anthropologist, in the terms in which you have just commented to the honourable Court, say that there were any improvements or modifications which could be made to relieve limitations of freedoms which are now imposed by the Whites?

Mr. BRUWER: Mr. President, unless of course you change your whole basic concept, and then it must be remembered that it would have to be changed altogether, unless one changes the whole concept of recognizing the unity of certain people, recognizing their rights, recognizing the rights that they have assumed to be their rights for many, many years, unless one removes this concept with the protection that also, in my opinion, goes with it, I cannot see actually how one can take away these limitations for the protection of that one group, but also, Mr. President, in my very sincere opinion, for the protection and interest of the other people. On this basis that I have just tried to explain to the honourable Court, I would rather see people living within their group where they have that dignity and that individual freedom and also that possibility of economic improvement, rather than creating a situation, Mr. President, where one has sociological situations which I would define as not being in the interests of people or of an individual.

Mr. GROSS: Will you apply this general criterion or approach, of physical separation of the non-White by removal, voluntary or otherwise, from the White sector, irrespective of the effect of that upon the economy of the area?

Mr. BRUWER: Mr. President, I did not get the last two words.

Mr. GROSS: The effect on the economy of the area. I say, would you apply the concept or scope or approach which you have just expressed, of separation physically of the non-White from the White sector—would you apply that approach as a desirable objective, as you put it I think, irrespective of the economic consequences in the White sector?

Mr. BRUWER: Mr. President, certainly I will, irrespective of what effect it may have on the White economy, if it is in the interests of the various African groups.

Mr. GROSS: Are you well aware that the Court is aware that you are not an economist, and I address this to you as a member of the Odendaal Commission? Can you conceive of the possibility that the modern economy, the co-called White economy, could cease functioning in South West Africa without detriment and suffering to the entire population? Can you conceive that possibility?

Mr. BRUWER: Mr. President, I can conceive that possibility and that is also the reason why I have already told the honourable Court previously that neither the Odendaal Commission nor myself could conceive a situation where there is a momentarily physical separation, Mr. President, of the people.

Mr. GROSS: I am talking, sir, not about "momentarily" (if by that you mean short visits abroad), I am talking about physical separation by removal, voluntary or otherwise, of the non-Whites from the White

sector; your approach, if I understood it correctly, is that it is a desirable social objective and a human objective that these individuals obtain their freedoms and their rights by living elsewhere, and I ask whether you uphold that view despite the malfunctioning or cessation of functioning of the modern economy of the Territory?

Mr. BRUWER: Yes, Mr. President, I will still be of that view if it is in the interests of the African people.

Mr. GROSS: And then I ask you, and I will repeat my question: can you, as a member of the Odendaal Commission, conceive of the termination, cessation of functioning, of the modern economic sector as of benefit to the population of South West Africa, regardless of colour or race?

Mr. BRUWER: Mr. President, naturally on the basis of the answer, I can only say no.

Mr. GROSS: On any reasonable basis, can you give any other answer?

Mr. BRUWER: Mr. President, I would say again that I am not an economist, and I cannot conceive how the economy of South West Africa in the White sector can function at this moment without the considerable contribution that is made by the African people, but I cannot say that it is not possible, or that one cannot conceive such a possibility in the future, when for instance a great percentage of that African force will be busy in their own areas, with their own development. I can also foresee, Mr. President, that one can qualify your answer by saying that: although I say yes I can conceive it in a purely theoretical or academic way, in practice there would always be, Mr. President, in my opinion, a possibility for the one man to go and work in the area, or economy then, of the other, since I personally, Mr. President, cannot foresee, and that was also not the consideration or the conception of the Odendaal Commission, that there would be no inter-relations in regard to the economy of the entire Territory. In other words, if I may put it in that way, Mr. President, as I understood it, purely as a layman in regard to economic things but having subscribed to the report, as I understood it, there would always have to be an inter-relation in regard to the economy of the Territory, the economy of the various groups or the homelands then, as was recommended by the Odendaal Commission. Giving my opinion, Mr. President, as a scientist or a social anthropologist, I accept that it is impossible to say that one can conceive the one economy functioning as a totally independent economy in the White sector as against the economies in the other sectors. I cannot foresee such a situation.

Mr. GROSS: When you use the phrase, as I think you did, that in your opinion there will always be an "inter-relation", did you mean to include in that phrase the thought that there will always be a need for non-White labour in the White sector?

Mr. BRUWER: Yes, Mr. President, I included that in my phrase, but I also meant that there may also be the necessity for White labour in the African areas.

Mr. GROSS: How many White settlers are there in the African areas —did you testify to this yesterday?

Mr. BRUWER: Mr. President, I think I said somewhere between three and four hundred; that was according to the 1960 figures, I do not know the exact figures.

Mr. GROSS: Now, one final question with respect to this very basic question of the functioning of the White economy: I refer to the Odendaal Commission report at page 315, paragraph 1285, in which it is

stated that the White sector or the White economy, as it is variously called (I describe it that way, and now quote):

> ". . . links up with the traditional sector by attracting unskilled non-White employees, virtually to the maximum of their availability, as wage earners on farms and mines, and in domestic service and industries".

In your opinion, as a member of the Odendaal Commission, will there always be human foreseeability, will there always be a need for non-White persons to serve as "wage earners on farms and mines, and in domestic service and industries", in the White sector of South West Africa?

Mr. BRUWER: Mr. President, it may well be; that is if you have not got enough employees in that sector, it may well be.

Mr. GROSS: If you have not got enough White employees?

Mr. BRUWER: Yes, Mr. President.

Mr. GROSS: Did the Odendaal Commission consider how many were necessary to operate the economy in that sector?

Mr. BRUWER: Mr. President, no, the Odendaal Commission did not consider the number.

Mr. GROSS: There are, however, 125,000 persons classified as non-Whites in the southern sector outside of the Reserves, is that not correct?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: Now there are in addition some 22,000 Ovambo who are recruited for service in the White sector. Is that correct?

Mr. BRUWER: Mr. President, I think the figure is higher than 22,000; if I remember well, I think it is a little bit higher.

Mr. GROSS: So that that is a total of something like 151,000 persons classified as non-White, of whom 26,000 are brought in, recruited especially for labour, that is correct is it not?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: And did the Odendaal Commission consider the labour requirements of the White sector in any respect in its studies?

Mr. BRUWER: Yes, Mr. President, the Odendaal Commission very definitely considered the entire labour position as well as the employment position.

Mr. GROSS: How many employees, roughly, are necessary—let me take it in categories—how many non-White employees are necessary under present conditions, to maintain the economy of the White sector, the so-called "White economy"?

Mr. BRUWER: Well, Mr. President, apart from the numbers of the so-called non-Whites then staying in the southern sector, there are also necessary a further number recruited then from Ovamboland, a smaller number recruited from the Okavango, in addition therefore, to the people staying in the southern sector. Although I do not know the exact number of people necessary for that economy, I can say that above the number in the southern sector, and they need not of course, of necessity, be all employed, but above that number the general labour position appears to me to be that they have still got to get labour from outside the so-called White area.

Mr. GROSS: This would seem to follow, would it not, from the apparent necessity of bringing in 26,000 Ovambos for labour purposes? Therefore, I take it that the Odendaal Commission considered that the present non-

White population was an indispensable feature of the functioning of the White economy. That is correct, is it not?

Mr. BRUWER: Mr. President, that is correct, for the present and the foreseeable future.

Mr. GROSS: And that will be correct for the foreseeable future, and as a member of the Odendaal Commission would you give to the Court your opinion as to how long in the future the members of the Commission can foresee in this respect?

Mr. BRUWER: Mr. President, I cannot give an opinion because the Odendaal Commission did not consider a span of time.

Mr. GROSS: That was simply not taken into account?

Mr. BRUWER: That was not taken into account, Mr. President.

Mr. GROSS: Now I will conclude with a line of questions which I address to you as a member of the Odendaal Commission, and as former Commissioner-General for the Indigenous Groups of South West Africa. You are familiar with the terms of the Mandate for South West Africa, are you not?

Mr. BRUWER: Mr. President, I certainly am not an authority on that.

Mr. GROSS: Did the Odendaal Commission take the Mandate into account in its studies and deliberations and conclusions?

Mr. BRUWER: Mr. President, the Odendaal Commission did refer to the Mandate, but naturally it based its recommendations on the framing of their Commission, that is the task that was assigned to them.

Mr. GROSS: Are you aware of the provision of the Mandate which requires the Government of the Republic of South Africa as Mandatory to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory"?

Mr. BRUWER: I am aware of that, Mr. President.

Mr. GROSS: I will therefore now ask you, was it an objective of the Odendaal Commission to give effect to that provision of the Mandate?

Mr. BRUWER: Mr. President, it was very definitely the objective of the Odendaal Commission to give effect to that.

Mr. GROSS: Now, in its attempts to achieve that objective, which is described in the terms of reference of the Commission as an enquiry concerning the promotion of well-being and social progress (I am not quoting it exactly) in the pursuit of that objective in the Mandate and the terms of reference of the Commission, did the members of the Commission perceive or apply any objective standards or criteria of judgment with respect to what constitutes the promotion of moral or material well-being?

Mr. BRUWER: They did, Mr. President.

Mr. GROSS: Such objective standards and criteria in your view were sought, and discussed, and applied, by the Commission?

Mr. BRUWER: Mr. President, the Commission discussed the various avenues of approach in regard to a problem, having to do with peoples, and on that basis the Commission considered what would be in the best interests of all the people of South West Africa.

Mr. GROSS: Could you explain to the Court, by way of illustration, any standard or principle, whether of human behaviour or otherwise, which you regard as an objective criterion, or standard, to measure your judgment against, in regard to a specific policy or measure?

Mr. BRUWER: Well, Mr. President, I would say that the question of one's rights, one's privileges, one's values and one's attachments to cer-

tain sentiments, these are all things that have to be considered in trying to get to the basis of the interests of people, their moral and their social well-being.

Mr. GROSS: Do you, in your answer, seek to draw a distinction between subjective personal appreciation of a given social or political context, and an official responsibility, such as you carried out? Do you perceive a distinction between your subjective personal view-point, about what is good for the non-White, let us say, without reference to some objective standard, to which you look to measure your personal judgment?

Mr. BRUWER: Mr. President, if I understand the question well, I would say basically no, depending on the application of the concept. I have my own ways and means of evaluating the interests of somebody else. I may be, for instance, as a person, basing that on certain Christian considerations, that is, religious considerations. The other man may perhaps again, base it on political considerations, a third man again may base it on economic considerations. Now when such a body as the Commission considers the question of the interests of people, it tries to be as objective as it possibly can, in regard to a factual situation, with all the implications of it, and on the basis of that, Mr. President, it then defines its approach in regard to the interests of the people.

Mr. GROSS: Do you consider that the objective stated by the Prime Minister, in the quotation I have referred to more than once—the domination of the White man in his own area—was an objective which the Commission pursued according to the best of its Christian and other judgments?

Mr. BRUWER: Yes, Mr. President, the Commission very definitely came to the conclusion that the one people cannot be dominated by another people in an area, and it was on that basis that the Commission said, well, under these circumstances, having now a White group—and let us then, for the moment, Mr. President, say that they dominate the non-Whites in regard to the fact that there are measures that they have applied—the Commission could not subscribe to such a position and, on the other hand again, the Commission had to subscribe to existing rights in that White area and on that basis, Mr. President, it was the conviction of the Commission that if you agree, or if you accept the rights and privileges of people, and there are other people in that society not having those rights and privileges, then it is your duty, if you cannot change—and the Commission could not change a factual position—then you have at least got to provide for the other man, so that he also can make use of the same liberties, the same rights and the same privileges, Mr. President.

Mr. GROSS: So that he can—if the phrase we used before is used, and with which you agreed—"escape" from the condition in which he finds himself?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: And if he cannot escape from a condition, by reason of economic or other circumstance, he is then irrevocably subject to the limitation upon his freedoms in the White area—is that correct?

Mr. BRUWER: That is correct, Mr. President, so long as those limitations exist, he will be . . .

Mr. GROSS: As long as he is there, present physically, and alive: is that correct?

Mr. BRUWER: That is correct, Mr. President.

Mr. GROSS: Now I would like to ask you the significance of the expression you used, if I understood you correctly, that the Commission "could not subscribe" to the principle or doctrine of White domination? Did I understand you correctly?

Mr. BRUWER: Mr. President, I think I was correctly understood.

Mr. GROSS: In this respect, then, is your view, or the Commission's view, to be distinguished from the expression by the Prime Minister to which I have referred, the policy of the domination or *baasskap*, as he called it, of the White man in his own area?

Mr. BRUWER: Mr. President, I am sorry, I cannot follow . . .

Mr. GROSS: Are you saying to the Court that the answer you gave to my previous question indicates a difference of point of view from the policy announced by the Prime Minister in his statement, which I have quoted, regarding "the domination", or *baasskap*, as he called it, "of the White man in his own area"?

Mr. BRUWER: Mr. President, I would not say there is a difference, but I will have to make it clear. If we take it that my approach, the approach that I explained to the honourable Court, is based on the same rights for people, but in different territories, and if the honourable Prime Minister's reference to domination of the White group in his area refers to the domination of individuals of other groups staying in the White area, then I would say that substantially and materially, the two concepts are the same. I have already indicated to the honourable Court that according to logic and according to my logic also, if you have to subscribe to or if you have to accept the rights that exist and that existed, of a certain group in a certain area, it appears logical to me, Mr. President, that you have then to protect them, and in the process of protection, you have these limiting measures. But, Mr. President, and I would like to stress that, the term "domination" may be interpreted in so many terms. I do not always know the nuances of these various terms, but to me it is a question of safeguarding the rights of the one individual and therefore also of the one group, on this side, and on the other side, doing exactly the same for the other group. So it will be domination here, but it will not be domination on the other side, because there again, it may well be domination by the non-White of the White again, Mr. President, if I have made myself clear now.

Mr. GROSS: Would it be perhaps a little help to you, to get the nuances of the word "domination", if I should refer to a quotation from a statement by the Prime Minister in the *House of Assembly Debates* in the Third Session of the Second Parliament, in May of 1964, on the subject of the Odendaal Commission report, at column 5461, in which he referred to "White rule in its part of South West Africa"? Does the phrase "White rule", in your judgment, mean the same as the word "domination"?

Mr. BRUWER: Mr. President, I think that one could say that it has the same meaning.

Mr. GROSS: And you accept that, as in conformity with standards . . .

The PRESIDENT: The witness had not finished his answer. Will you continue?

Mr. BRUWER: Mr. President, I said that I think White rule could possibly be the same as White domination, keeping in mind the degrees of differences of the two words, which I cannot of course distinguish myself, in regard to the specific term "domination". But I think White

rule means that the White group will have political rights, the rights of land and all the rights generally ascribed to a group that rules a country.

Mr. GROSS: Were you through, Mr. Bruwer?

Mr. BRUWER: Thank you, Mr. President.

Mr. GROSS: Mr. President, I will be able to conclude in five minutes.

The PRESIDENT: In those circumstances, Mr. Gross, continue please.

Mr. GROSS: Thank you. I would like to ask you, Dr. Bruwer, whether, in its deliberations, the Commission took note of, or discussed, any international standards of any character, regarding discrimination or differentiation?

Mr. BRUWER: Yes, Mr. President, the Commission naturally discussed, certainly not in detail, but the Commission did, in the course of sessions, discuss situations. We discussed many situations, Mr. President, in various countries of Africa and also in various other places of the world, in regard to the question of discrimination.

Mr. GROSS: In the Prime Minister's statement in the same debate upon the Odendaal Commission report to which I have referred (this is at column 5642), the Prime Minister said "in respect of human rights, we comply with international demands as well", and then (skipping an unnecessary sentence), "there is the possibility of convincing everybody who wants to think reasonably, except the communists or those who want to make the whole of Africa Black dominated, that we are following a course which provides justice for everybody in the international sense".

Now taking note of the phrase "justice for everybody in the international sense", did the Odendaal Commission consider what is meant by justice in the international sense, or any similar concept or standard?

Mr. BRUWER: Mr. President, they did not consider it in the sense that they made a long and deep study of that concept, but naturally, in evaluating a situation, the Odendaal Commission also kept in mind the standards that are applied in the international sphere, in regard to the whole question of—which is usually described as human rights.

Mr. GROSS: Did consultations of any kind take place between the Odendaal Commission, or any of its representatives, and any international bodies or agencies?

Mr. BRUWER: No, Mr. President, such consultations on a physical basis, did not take place.

Mr. GROSS: Did they take place on any basis whatever?

Mr. BRUWER: Well, Mr. President, I think they took place in the sense that the Odendaal Commission certainly read the sources of international bodies.

Mr. GROSS: And did the Commission take into account the judgments of any international bodies, with respect to the policies pursued?

Mr. BRUWER: Mr. President, the Commission certainly considered all possible angles in regard to the problem of South West Africa.

Mr. GROSS: But there was no consultation of a physical or direct nature?

Mr. BRUWER: No, Mr. President, not at the sessions I was present at.

Mr. GROSS: Do you know of any sessions or otherwise, in which such consultations might have taken place?

Mr. BRUWER: No, Mr. President, I do not know of such sessions.

Mr. GROSS: Now, finally, one last question for clarification. In your testimony, you concluded—this was on Friday, 2 July, and I refer to

page 264, *supra*,—you said, I think, that one must apply also certain rules of logic and principles on the basis of ensuring the rights of a specific group against possible encroachment by others. And then you said:

> "For instance, it may be, Mr. President, that I would personally like to, say, go and reside in Ovamboland, perhaps one day when I am finished with my work, because I like the people, I am interested in them, but then I will be encroaching on the rights of the Ovambo people."

Would you explain to the Court on what basis and on what considerations your presence in Ovamboland would be regarded as an "encroachment" "on the rights of the Ovambo people"?

Mr. BRUWER: Mr. President with due respect to the honourable Court, that was a very personal note, but my encroachment is, if I now then have to take this as an example: I have now a certain desire as a person, based on my intimate experience with these people, whom I like, to go and stay in Ovamboland, but if I go and stay in Ovamboland I will have to make a living, unless I am a capitalist and have so much money that I need not work. But the very first thing that will be necessary, at least for me, will be to build myself a house, and to be able to build that house I would have to have a piece of land and I would have to buy that land, and that means now, as a White man, as belonging to another group, where I have my rights to buy land, I, in my opinion, Mr. President, would then be encroaching on the rights of the Ovambo people, because if it is true of myself as a person, it may also be true of other people, and that is what I had in mind in regard to the encroachment of the rights and privileges of another group.

Mr. GROSS: How many months have you spent in Ovamboland?

Mr. BRUWER: Mr. President, I would have to count now but . . .

Mr. GROSS: Well, very roughly, was it more than a year?

Mr. BRUWER: Yes, Mr. President, I think altogether I would say nearly three years in Ovamboland.

Mr. GROSS: And did you buy a house?

Mr. BRUWER: No, Mr. President, I did not buy a house.

Mr. GROSS: Were you encroaching upon the rights of the Ovambos by being there?

Mr. BRUWER: I hope, Mr. President, that I was not encroaching at the time.

Mr. GROSS: I am sure you were not, sir. No more questions.

[Public hearing of 7 July 1965]

The PRESIDENT: Dr. Bruwer, will you go to the podium? I understand, Mr. Gross, that you have completed your cross-examination.

Mr. GROSS: Yes, Mr. President.

The PRESIDENT: Certain Members of the Court desire to put some questions to the witness. I call upon Judge Jessup.

Judge JESSUP: Thank you, Mr. President. Professor Bruwer, I am going to ask you if you will please expand on one aspect of the testimony which you gave in the record on 2 July.

I was very much interested in your analysis of the individuality of the various groups in South West Africa and their differences one from the other. I understood you to indicate the desire of these groups to

maintain their individual societies and cultures. Am I correct in that, sir?

Mr. BRUWER: That is correct.

Judge JESSUP: Thank you. Now, the point which I would ask you to develop is this. What contact has there been, or is there now, between the various groups and their members? I think you indicated that historically there had been some rather warlike contacts in the form of massacres, I think, and I am asking you whether, in the last three or four decades, there have been peaceful contacts. You did point out in your testimony the barrier of distance, that certain events in the southern part would not have affected the northern part, and at page 249, *supra*, of the record which I have cited you mentioned that one group "superimposed themselves" on another group and you said this made an impact on the language of the group, as I understood it. In the same record, on page 250, *supra*, you spoke of what I understand was another instance in which one people "ultimately superimposed themselves and became part and parcel of the Nama", and at page 264 you speak of Bushmen and even Dama and Nama people in Rehoboth, and you pointed out that they were not "absorbed in the society", that they were not accepted into citizenship.

Now, can you give the Court a little more detailed picture of this whole situation? Do these various peoples or people mix socially or culturally with each other or with the Basters? How do all these people communicate with each other in the light of the language differences which you have stressed? Now, I am mindful of some testimony you gave yesterday about the offspring of mixed matings and I am not asking particularly about that. But in short I would ask if you would tell the Court to what extent, if any, there has been or is now physical, social or cultural contact between the various groups themselves, or among members of the groups. For instance, has any *lingua franca* developed which is used between members of the various groups and, if convenient, Professor Bruwer, I would be grateful if you, in answering this question, would speak first in respect of groups and members of groups living in their own Reserves or communities, and secondly in respect of situations when persons of different groups find themselves close together, for instance in the southern part of the Territory outside the Reserves. Is my point clear to you, sir?

Mr. BRUWER: Thank you, Mr. President.

Judge JESSUP: Thank you very much.

Mr. BRUWER: Mr. President, I shall start with the contact and the medium of communication in regard to the groups still living in their own areas or, if we then call those areas, in the Reserves.

To clarify the two points, Mr. President, that were made in the honoured question in regard to the superimposition, I had in mind the superimposition of the Kololo on a population which, naturally, Mr. President, I did not study at that time because that was during the previous century, in the Eastern Caprivi. The other example that I had in mind, Mr. President, was the example of the Orlam people who spoke Afrikaans, or a form of Afrikaans, and entered South West Africa since the beginning of the nineteenth century. If I remember the dates correctly, Mr. President, the first groups crossed the Orange River by 1810. They superimposed themselves on the Nama. Now, in regard to communication in connection with those two groups, first of all, Mr. President, the Eastern Caprivi, as the honourable Court will know, is a very great

distance from the rest of South West Africa and in that narrow strip of country, which is usually referred to as the Western Caprivi, coming up to the Okavango River then, that piece of country is not populated to a very great extent. One does find, and I have found in those areas, a small group of !Kgu or Mbarakwengo Bushmen.

Now, in the Eastern Caprivi, Mr. President, the language of communication there, among the people living in the Eastern Caprivi, is Sikololo. They do, of course, learn English and Afrikaans in the schools. As far as the language of the other group is concerned, where we had the Orlam superimposing themselves on the Nama, in their Reserves the medium of communication that one finds there is Nama. In other words, in the one case the language of the superimposing group, according to my knowledge and deduction, had remained in the Eastern Caprivi where one has the Sikololo or, I think for all practical purposes, one could call it the Lozi-language. The language of the conquerors is today among the people the medium of communication.

Now, in regard to the situation of the Orlams and the Nama one does find that Nama speak Afrikaans, but some of the Orlams, or rather the Orlams that have been absorbed in the Nama, also make use of the language of the Nama.

In so far as the Reserves in the southern sector are concerned, Mr. President—and I am now using the word Reserve to indicate the areas assigned to certain groups, in the southern part, for example in Warmbad and in the Reserve of Bondels or Bondelswarts—I have come across two media of communication between the people. Some people use Afrikaans and others again use the Nama language. In the Reserves of the Herero, that is Reserves like Epukiro, Aminius, the Eastern Reserve and so forth, there the basic medium used by the people is Oshiherero, that is the language of the Herero people. Barring a small group of people, Mr. President, staying in the Aminius or, as it is sometimes also spelt, Aminuis Reserve, a small group of people of Tswana stock amongst themselves use Tswana, but most of them also speak Herero. The medium of communication in Rehoboth is what I would call basically Afrikaans. Also the Nama and the Dama living there make use of Afrikaans when speaking to the people called Basters. When they communicate among themselves they usually use their own language.

In the northern part of the Territory, Mr. President, the situation is roughly as follows. In the Kaokoveld one has what I may perhaps also indicate as three factions, a Herero faction that went into the Kaokoveld Reserve after the wars between the Herero and the Germans, and then one has the original groups that apparently stayed behind when the Herero passed through the Kaokoveld and they are today known as the Ovahimba and the Ovatjimba. Now, Mr. President, one can say in regard to the medium of communication in the Kaokoveld, if my analysis of the position is correct, that it is basically Oshiherero, the language of the Herero, but there are also dialectical differences. For instance, the dialect of the Tjimba is apparently not easily understandable by the Herero people. I base that, Mr. President, on practical experience that I had when I had a Herero interpreter with me, since I do not speak the language of the Herero people or of the people of the Kaokoveld, and when an older man of the Ovatjimba group stood up the Herero interpreter had difficulty to translate.

As far as Ovamboland is concerned, Mr. President, the two languages

of communication in Ovamboland are basically Osikuanyama and Osindonga, two languages very much related to one another and, as a matter of fact, mutually understandable. In the Okavango, Mr. President, there are two what I would call distinctive languages in the sense that the one is not easily understandable by the group using the other—that is, on the one hand the Kuangali language spoken by the Kuangari themselves, the one faction; spoken by the Bunja, another faction; spoken by the Sambiu, another faction; and spoken by the Djiriku, another faction of the Okavango people; but the fifth faction, Mr. President, the Mbukushu, speak what one must then call the Mbukushu language, which is not easily understandable by the other group. But then, Mr. President, in the Okavango, Kuangali has become what one could then call a *lingua franca*, because Kuangali is understandable by everybody, also by the Mbukushu.

Now, Mr. President, that is the language position, basically, apart, of course, from the fact that in the schools, and in practical use, the people also make use of either English or Afrikaans. As to the development of a *lingua franca*, I cannot say that a *lingua franca*, apart from Afrikaans and English, has developed in South West Africa, a language which one could say is, as such, something that was developed in South West Africa and that is understandable by all the people. I have tried, Mr. President, to indicate to the honourable Court the great differences between the two language families that we have.

As to the use of English and Afrikaans as media of communication, Mr. President, I have always been astonished that it is possible in South West Africa, practically everywhere, to make oneself understood in either English or Afrikaans. As a matter of fact, in Ovamboland—I have more knowledge of the Ovambo people, I think, than any other—it has always astonished me that they speak an Afrikaans which is not influenced by their own language in the sense that, generally, when a Bantu-speaking person uses Afrikaans, and to a certain extent also English, unless he is very, very, proficient in the language, he tends to make use of certain things inherent in his language, and that influences his rendering of this alien medium; but that is one of the things that has interested me very much, Mr. President—the fact of the use of a language in such a form that one could say that it has developed into a *lingua franca*, and that applies actually to both the two official languages, Afrikaans and English, depending to a great extent on the language that was used by the missionaries working in certain areas. In certain areas one finds that, for instance, the Anglican Church has been doing mission work, and they make use of English more than another language; in other areas, again, one finds that the Finnish mission has been working, and they tend to make use of Afrikaans —they do not use Finnish; and in the previous century, and even today, in certain areas one again finds the Rhenish missionaries, and they sometimes make use of German—hence one also finds some people being proficient in German. But, Mr. President, a definite *lingua franca* for the whole of South West Africa has not as yet developed, according to my analysis of the situation.

Then, Mr. President, if I remember the second part of the question well, the contact of people in so far as it then, if my interpretation is correct, has an influence on the change of a cultural configuration. Now, if my analysis of the situation is correct, and I am basing that on my experience in South West Africa, one finds that in the southern sector—using that phrase in its broad sense that is, the sector that is also sometimes called

the Police sector on account of the fact that they have no police north of that sector—if we take that sector into account, it would appear to me that there has been much more of a contact between the various groups in the southern sector than in the northern sector. In the northern sector, if one compares for instance contact between the Kaokoveld people and Ovambo, one does not really find that there is a great deal of contact. I do not want to go into detail, but to me it appears as if in the general configuration, if I may use that word, Mr. President, of the one group, the pastoralist group—in this case, then, the people of the Kaokoveld and more so the Ovahimba and Ovatjimba—is not acceptable for the Ovambo people. Now the Ovahimba and Ovatjimba, being a cattle people, are a very conservative group of people, and I think that that is probably the reason why you do not find interrelation there.

As far as the contact between the Ovambo people and the Okavango people is concerned, there is contact, but not contact that I would call on a great scale—again, I think, most probably on account of the physical nature of the territory. If I may perhaps just explain, Mr. President, Ovamboland is a very interesting part of South West Africa in the sense that one has in the central part of Ovamboland practically the basic settlement of the Ovambo people, on account of the fact that that is where one has what is called in the indigenous language the Oshana—a term which is very difficult to translate, but which means very shallow water courses, but there is not water in the courses very often, but sometimes during the rains one finds that this is the drainage system. The people have settled there, and one finds that the eastern part—that is, the part between Ovamboland proper and the Okavango area—has remained unpopulated for a very long time, and naturally there is not a great amount of contact.

As far as the Eastern Caprivi is concerned, I do not think that one can speak here of contact with the rest of South West Africa in any sense of the word. They very, very seldom come into contact with people on the other side of the Kuando River and the Okavango River. Mr. President, I know from experience that the distance between the Kuando and the Okavango Rivers would be approximately 125 miles, which is 125 miles without water during most of the year, so one can quite see why there is not that contact.

So, Mr. President, to summarize I would say, in answer to the honoured question, that there is no real *lingua franca* in South West Africa as at this time. The contact between the people one could perhaps summarize by saying there certainly is more contact between groups in the southern sector than between either groups amongst themselves in the northern sector or the people of the northern sector in regard to the southern sector.

Judge JESSUP: Mr. President, if I may ask for just one point of explanation: when you have, for instance, members of two or three groups in the southern sector who find themselves in Rehoboth, or perhaps some other urban area, or some place where a number of different persons are together, what is the nature of their interrelationship—do they stay by themselves or do they mix in various social ways, and so on?

Mr. BRUWER: Mr. President, from my knowledge and my experience in Rehoboth—when I pass through Rehoboth I sometimes also stay over there, and I have spoken with people there—it is interesting what one finds in the Rehoboth area, or the Rehoboth Gebiet. One has the township

Rehoboth, and then one has the farms belonging to the Rehoboth people. Many of the Rehoboth people, or Basters, as they are called, stay in the Rehoboth township, but when one travels through Rehoboth, or when one stops there and looks around, it is immediately apparent, Mr. President, that groups are staying away from one another, the Basters staying in the Rehoboth township and the Damaras and Namas, who are actually employed by the Baster people in Rehoboth, staying in what I would call a little shanty town just north of the main road up to Windhoek. That is the general situation, Mr. President.

Judge JESSUP: Thank you, Professor Bruwer. That is all, Mr. President.

The PRESIDENT: Sir Louis Mbanefo.

Judge Sir Louis MBANEFO: Professor Bruwer, first, on the question of language. It is said that there are two family groups of languages and you later on said that there were 300 languages. When you speak of 300 languages, do you mean dialects or do you mean separate and distinct languages?

Mr. BRUWER: Mr. President, no, I meant languages, and in this case what I described as Bantu languages. It is generally accepted, Mr. President, by linguists—and I have had linguistic training, Mr. President, and I also have that opinion—that there are distinctions between what one would call a language and what one would call a dialect.

Mr. President, to use an example which I think would be understandable to all of us, if we take the Aryan family of languages one has, for instance, a language like English, one has, say, German, one has Dutch, and also a number of others. Now in those languages, Mr. President, certain words are practically the same. If I take, for instance, the term "water", now in English it is "water", in Afrikaans or Dutch it is "water", and in German I think it is "wasser". Now it is practically the same word, Mr. President, but yet we look upon those three languages as being three different languages.

We find exactly the same position in regard to the 300 Bantu languages and—pardon me, Mr. President, not in South West Africa but in the southern part of Africa, that is all the Bantu-speaking peoples from Uganda southwards to South Africa—the linguists distinguish 300 languages and probably a few thousand dialects. But a language and a dialect are very definitely distinct from one another.

Judge Sir Louis MBANEFO: You said that among the Ovambo, for instance—they are the largest unit in South West Africa—how many languages do they speak?

Mr. BRUWER: Mr. President, there are only two languages amongst the Ovambo people and the honourable Court will remember that the Ovambo people originally was one group. But apart from the two languages one also finds dialectical differences.

Now, to give an indication, Mr. President, of the type of difference that one sometimes finds I will take the word—with your permission, Mr. President—"olupale". That word means, in the Kuanyama language, the sitting place or the meeting place within the family abode (sometimes they have a very big meeting place within the family abode, that is called "olupale"); but the word "olupale" in the Ndonga language today, or Oshindonga, would mean a threshing floor where they thresh out the grain.

So one does find, sometimes, that you have dialectical differences also in Ovamboland, but I would call the two languages of Ovamboland, Mr.

President, mutually understandable. Although they are used as two languages today, one could say they are very, very, near to one another.

Judge Sir Louis MBANEFO: If I am wrong you will correct me. The Dama, do they have a separate language of their own?

Mr. BRUWER: Mr. President, so far it has not been possible for linguists to establish whether the Dama, long, long, ago, perhaps had a language of their own, since from time immemorial they have been using the Nama language.

I may perhaps add, Mr. President, that one of the renowned research workers in South West Africa, Dr. Vedder, in regard to the Dama people has, in one of his works on the Dama, given an indication that there are remnants of words which appear to be something of an original language, but I think, for all practical purposes, that my answer to that question would be "no", the Dama apparently, not during their stay in South West Africa, from what we can find out, do not have a language of their own.

Judge Sir Louis MBANEFO: The Herero have their own language?

Mr. BRUWER: They have their own language.

Judge Sir Louis MBANEFO: The Okavango?

Mr. BRUWER: In the Okavango, Mr. President, I have explained that we have two basic languages—the Kuangali language and also the Mbukushu language, although Kuangali is used as a *lingua franca* in the Okavango.

Judge Sir Louis MBANEFO: And the Caprivi?

Mr. BRUWER: In the Caprivi the Sikololo language.

Judge Sir Louis MBANEFO: So that you have, altogether, about eight different languages in South West Africa?

Mr. BRUWER: That is correct, Mr. President.

Judge Sir Louis MBANEFO: Now you mentioned certain distinguishing ethnic characteristics, or bases for distinguishing ethnic groups. You mentioned name, ethnic background, language, kinship (with what you called dogma of descent—matrilineal and patrilineal systems of succession—and in the economic systems you mentioned planters and food gatherers of the Bushmen, the pastoralism and agriculturist and animal husbandry as three different types of economic system). You also mentioned land tenure, with communal ownership and, in some places, individual rights of users. And you also mentioned the culture of the people and the political system.

Now, I do not know how far you have studied conditions in other African countries, but would you accept that this is not peculiar to South West Africa?

Mr. BRUWER: Mr. President, I accept that it is not peculiar to South West Africa only.

With your permission, Mr. President, may I perhaps just say that there was a mistake in the characterization; it is not planters and food gatherers, but hunters—I also noticed the mistake in the transcript, Mr. President.

Judge Sir Louis MBANEFO: In your system of separate development, you base it on the fact of these differences?

Mr. BRUWER: That is correct, Mr. President.

Judge Sir Louis MBANEFO: Would it surprise you that—take a country like Nigeria—every single thing you mention here exists in Nigeria, possibly in a greater degree because the population is about 40 times that of South West Africa?

Mr. BRUWER: Mr. President, must I—is it a question?

The PRESIDENT: Do you know anything about Nigeria? If you do not you cannot answer.

Mr. BRUWER: I have no practical experience of Nigeria apart from what I have read about the country, Mr. President, and I accept the information that these systems of kinship and also other cultural factors exist there, but it would, of course, not be possible for me to compare the two countries on an equal basis in the sense that I can say that I have equal information about both the countries.

But, if I may point out one thing, Mr. President, which I think is perhaps different in regard to the two territories, from the knowledge I have gathered in books about Nigeria, and especially the history of Nigeria. I have gathered, Mr. President, from the publications I have read in regard to West Africa (for instance, publications by Dr. Edwin Smith, the missionary who was working there, also Rattray and even publications by Lord Lugard) that the background of Nigeria and, in fact, of other West African peoples, countries and territories, is different from South West Africa to this extent, that—if the information I have is correct—for instance, in the mid-centuries one had in West Africa what one could perhaps call empires, in other words, you had, in my opinion, Mr. President, at a certain stage a people further advanced in regard to an organization of society than we had in South West Africa.

There is, of course, Mr. President, also the question of the physical nature of the country. I know that Nigeria is a country with a very big population. I think it is, together with Ruanda Burundi and the Nile Delta, the most densely populated area of Africa.

On the basis, Mr. President, of the organization of society—because that was actually the question—I think that where one has a sedentary type of culture, as, for instance, in Nigeria (at least not the northern part perhaps, where there are other people like the Yoruba but who, according to the information, are also pastoralists but basically, I think, sedentary) one finds that the organization of society is—I would like to call it more complicated, not more advanced, because I do not want to make that sort of comparison, Mr. President, but the people learned in regard to the organization of a big group, they have more experience in a big society like that of Nigeria, and I am talking now of Nigeria before the so-called colonial period, I am talking about the old Nigeria and those peoples there with the empires they had.

They had, in themselves, and I am convinced of that, Mr. President, something which, again, gave them a foundation when they were confronted now with a modern society, or rather with modern circumstances, whereas in South West Africa it is practically only the Ovambo and the Okavango peoples, together with the Eastern Caprivi peoples, that are sedentary and that have a form of organization inherent in themselves which is easily adaptable to the complicated problems of modern society.

Then I just want to add another point, Mr. President, and that is, that I do not think, although I have not got all the information, that one can compare, in this sense of differentiation, Nigeria and South West Africa, because the range of differences, in my opinion, in South West Africa, is probably far greater than it ever was in Nigeria, that is, according to the sources that I have read.

Judge Sir Louis MBANEFO: Now what is the medium of exchange in these Native Reserves?

Mr. BRUWER: Mr. President, two media of exchange are used. Money

has come into the picture, but also bartering. Now the bartering system one finds mainly between the man who has an ox and a man who has, for instance, a basket of grain. You still find that bartering system. There are other forms of bartering also. For instance, in Ovamboland one still finds —I would not say that it is a very marked thing but you still find it—a certain type of bead, which derives from the previous century and is looked upon as something very valuable today amongst the people and this is also sometimes used for bartering. But naturally today, Mr. President, the money form of trade is certainly by far the more stressed form.

Judge Sir Louis MBANEFO: Have you, a social anthropologist, ever investigated the effect of money economy on Native societies and culture?

Mr. BRUWER: Mr. President, I have, in South Africa, tried to analyse societies where a money economy has now superimposed the old basic subsistence economy.

Judge Sir Louis MBANEFO: And do you agree that the effect on what you are trying to preserve, in your separate development, of the use of money as a medium of exchange, the introduction of taxation, contact, and improvement in roads, which makes it possible for people to move from one place to another, development of townships and so on, have a more devastating effect, if I may use the expression, on this culture, than any law you could pass? Do you accept that?

Mr. BRUWER: Mr. President, I accept that. I subscribe to the basic principle of all cultures, there is continuation and there is change.

Judge Sir Louis MBANEFO: And do you accept that progress comes quicker by contact between different cultures?

Mr. BRUWER: Mr. President, I accept that. One culture certainly always has elements in it which may serve, and usually do serve, as an element of fertilization of another culture.

Judge Sir Louis MBANEFO: How does that come into your policy of separate development?

Mr. BRUWER: Mr. President, it comes in in this way, that it is not a question of preservation of a culture in its form at a specific period of history. But it is using a cultural configuration of a people at a certain stage of their history and of their development, as, if I may use the phrase, as the place where you start now either to walk or to run, and in modern development, it is more often running than walking.

Judge Sir Louis MBANEFO: You mean as a basis for local government, or as a basis for government at a higher level?

Mr. BRUWER: Mr. President, I also had in mind, of course, the question of political institutions, but I actually meant the entire process of development of the people.

Judge Sir Louis MBANEFO: Now you have these different groups that were mentioned in the evidence and in the written pleadings, the Bushmen, the Dama, the Nama, the Hereros, the Ovambos, the Okavangos, the Caprivi and the Basters. Under your separate development, is each of these meant to develop on its own, as distinct from the others on its own level of government?

Mr. BRUWER: Mr. President, if I have now to give my own opinion, I would . . .

Judge Sir Louis MBANEFO: No, I just want to know what is being done.

Mr. BRUWER: In regard to the Odendaal Commission, Mr. President? The idea is that one is busy with a process, trying to bring people together. In trying to bring people together, one has to keep in mind certain factors

which still have a continuing influence on the lives of those people. Mr. President, permit me to explain by means of an example. Now the two groups we have mentioned here, the Ovambo and the Okavango people, they are ethnically related . . .

Judge Sir Louis MBANEFO: I am sorry to interrupt you. All I am asking is, does the policy that is being practised mean that these groups I have mentioned should each separately develop at its own level of government?

Mr. BRUWER: Mr. President, I would say yes, up to a certain stage, when these people have become acquainted with the modern form of governing themselves and at that stage, they will, in my opinion, Mr. President, have to decide for themselves whether they now want to come together or whether they still want to carry on as separate groups. I think that is the point which is usually called self-determination or auto-determination, in other words, it is a stage in a process where the people will have to decide whether they want to have their institutions developed separately or whether they want to have their institutions developed on a unitary basis.

Judge Sir Louis MBANEFO: Mr. Bruwer, what I find confusing in your answer is if people develop separately their institutions and culture, can they then develop separately as an economic unit? Are you justified in saying that they can mix with others and have a common economic unit, but separately they can develop their own institutions locally. That ties up with the question of government at a higher level.

The PRESIDENT: What is the question, Sir Louis? What is the question you are putting to the witness?

Judge Sir Louis MBANEFO: The point I want him to explain is when he speaks of people developing separately their culture as a unit, does he consider that also to include developing separately as an economic unit, within their society?

Mr. BRUWER: Mr. President, my answer is no, as I have already testified on a previous occasion to this honourable Court.

Judge Sir Louis MBANEFO: So that for their common economic life, they have to come together?

Mr. BRUWER: I think that is correct, Mr. President. There would have to be economic inter-relations.

Judge Sir Louis MBANEFO: Economic inter-relations. How far does the policy now being practised tend to foster that?

Mr. BRUWER: Mr. President, the policy at present practised I think is, in my opinion, already fostering it in the sense that in the one sector you employ people of the other sector. That is one form of inter-relation of economic systems. But the next phase, and that is a phase that has been foreseen by the Odendaal Commission and it is also very clear from the recommendations, is that there would now be a development of certain areas on the basis of their physical possibilities. For instance—I expand, with your permission, Mr. President, to explain—cattle, in Ovamboland; the only possibility of an economic development would be on the basis of cattle, whereas again, in the Okavango there are very good possibilities on the agricultural basis, being adjacent to a very big river. Now naturally, when once you have this whole process starting, there would always be that inter-relation between the economy of South West Africa and between the various sections of South West Africa.

Judge Sir Louis MBANEFO: Is it contemplated that the same would apply to the White areas and the Native areas?

Mr. BRUWER: Mr. President, I would say the principle would be applicable to every single part of South West and therefore to the whole of South West.

Judge Sir Louis MBANEFO: And as common citizens you accept the right of free movement of individuals and intercourse between the Territories?

Mr. BRUWER: That is correct, Mr. President. That is a process that one can foresee.

Judge Sir Louis MBANEFO: Would you accept that any attempt to restrict movement, unless it can be justified, would not be right—that is, within the State, within the Territory?

Mr. BRUWER: Mr. President, may I get the question clear that any attempt to . . .

Judge Sir Louis MBANEFO: Restrict movement of individuals, it does not matter from what part of the Territory, from one part of the Territory to another, within the same Territory.

Mr. BRUWER: Mr. President, I can quite foresee that, with the development as I foresee it, and where you have that state where people now decide for themselves what they want to do, that is a possibility, and I think it is a very great possibility.

The PRESIDENT: Are there any further questions, Sir Louis?

Judge Sir Louis MBANEFO: I think I will leave that.

The PRESIDENT: Mr. Muller? Do you desire to ask anything in reply?

Mr. MULLER: No. No further questions, Mr. President. May I ask that the witness be excused if there are no further questions to be put?

The PRESIDENT: That will be indicated to you later in the day.

Mr. MULLER: As the Court pleases.

The PRESIDENT: You may call your next witness.

Mr. MULLER: Mr. President. The next witness will be Professor Logan. His testimony will relate also to the issues arising under the Applicants' Submissions numbers 3 and 4. The points to which his evidence will be directed will be the following: the different geographic regions of South West Africa; the population groups occupying such regions and their role in the life of the Territory; the differences between the various population groups with regard to language, cultures, traditions, ways of life and stages of development, and, finally, the effect which, in the opinion of the witness, the application of a norm and/or standards of non-separation, such as contended for by the Applicants, would have on the people of South West Africa, especially the Native people. May I present the witness, Mr. President, and ask that he make both the declarations provided for in the Rules?

The PRESIDENT: Please do. I recognize the Agent for the Applicant.

Mr. GROSS: Prior to the qualification of the witness as an expert, the Applicants would seek to establish his qualification to testify as an expert with respect to the question as formulated, specifically question *(c)* in the letter of 1 July addressed by the Agent for the Respondent to the Applicants.

The PRESIDENT: The proper course, Mr. Gross, is for the Respondent to call the witness to establish first his competence to speak upon the three subject-matters which have been indicated. If then a question is put in respect of the third matter and it is your view that his competence has not then been established, at that time you could make your objection.

Mr. GROSS: Mr. President, in deference to that ruling, I would state, on behalf of the Applicants, that the Applicants will find it exceedingly difficult to understand the questions addressed or the statements made with regard to qualification of this expert, on the basis of the foundation laid with respect thereto, and the general line of objections to any evidence proffered on the basis of this formulation, as set forth in the record of 22 June, is reaffirmed—the basis being that the formulation of the point to which the testimony is being proffered is incomprehensible to the Applicants. With that reaffirmation of the general objection, the Applicants will reserve the right to raise the question of qualification as expert and to the proffer of evidence as a witness in accordance with the Court's direction . . .

The PRESIDENT: Mr. Gross, when previously the same subject-matter was raised by way of objection by yourself, it was indicated, and it is the view of the Court now, that the proper course is not to take objection before you know the question to be put to the witness, or before you know what his qualifications are but to take the objection to the specific question and it is then that the Court can best see the basis of the objection.

Mr. GROSS: With respect, Sir, and without prolonging the colloquy, I should like to make it clear (which I feel it my duty to do on behalf of the Applicants) that I am, in addition to the statements previously made, referring specifically to the Rules of Procedure, Article 49, requiring that an indication be given of the point or points to which the evidence will be directed; in the Applicants' respectful view, that Rule requires the clear formulation of the point to which the evidence is to be directed.

The PRESIDENT: Rule 49 has I think been sufficiently complied with.

Mr. MULLER: Professor Logan, your full names are Richard Fink Logan, is that correct?

Prof. LOGAN: Yes, sir, that is correct.

Mr. MULLER: I am sorry, Mr. President, the declaration has not been made.

Prof. LOGAN: In my capacity as a witness I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth. In my capacity as an expert I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.

Mr. MULLER: Prof. Logan, your full names are Richard Fink Logan, is that correct?

Prof. LOGAN: That is correct.

Mr. MULLER: You are a citizen of the United States of America, is that so?

Prof. LOGAN: That is correct.

Mr. MULLER: You were born in the United States of America?

Prof. LOGAN: That is correct.

Mr. MULLER: Did you grow up there?

Prof. LOGAN: Yes, I did.

Mr. MULLER: In what part of the United States of America?

Prof. LOGAN: I grew up in the north-eastern part of the United States, in Massachusetts and Connecticut.

Mr. MULLER: Were you educated in the United States of America?

Prof. LOGAN: Yes, I was educated entirely in the United States, again in the north-eastern parts.

Mr. MULLER: I will state to you your academic qualifications and I

want you to indicate whether my statement is correct. You hold a Bachelor of Arts degree of Clark University of the United States of America?

Prof. LOGAN: That is correct.

Mr. MULLER: And a Master of Arts degree of the same University?

Prof. LOGAN: That is also correct.

Mr. MULLER: Another Master of Arts degree of Harvard University. Is that so?

Prof. LOGAN: That is right.

Mr. MULLER: And a Doctor of Philosophy degree also of Harvard University?

Prof. LOGAN: That is correct.

Mr. MULLER: Did you teach at several Universities in America?

Prof. LOGAN: Yes, I have taught at Clark University, at Connecticut College for Women, at Yale University, at Harvard University and, since 1948, at the University of California, the Los Angeles campus.

Mr. MULLER: What position do you hold at present, Professor Logan?

Prof. LOGAN: I am Professor of Geography at the University of California, Los Angeles.

Mr. MULLER: What is your major field of study?

Prof. LOGAN: Geography.

Mr. MULLER: Will you explain to the Court what you mean by geography?

Prof. LOGAN: Yes. Perhaps I had better explain first the contrast between geography and geology with which it is quite frequently confused. Geology is the study of the crust of the earth and its land forms. In geography we start with this base and we go on into a study of the relationship between man and the land. Now in order to understand the land we need to understand all elements of the physical environment and so we are interested in the landforms, the climate and the vegetation, the soils, the water resources and other things of this sort which constitute the natural resource base. We are interested beyond that in how man utilizes this base. So it is necessary for us to know about man, that is, the different groups of men, both racially and ethnically, that occupy a given area. We also need to know about the stage of technology, the stage of material development of these people, because different societies use land in different ways and so we are interested in this aspect. We are also interested in the economic phases because the whole basis of economy is an integral part of the study of the geography of an area. Consequently we are interested in man and in the land on which he lives, not simply in the land.

Mr.MULLER: How does the study of geography, as you have just explained to the Court, compare with the study usually made by an anthropologist?

Prof. LOGAN: An anthropologist deals basically with man and focuses upon man as the central theme of his study. The geographer focuses upon the land or the region or the area as the focus of his study and so we are basically interested in the land, the anthropologist in man. In each case we are an integrative discipline, in that we draw upon all of the surrounding fields for a great part of our knowledge and basic information, but we interpret this differently: in the one case the inter-action between groups of men, in the other case the inter-action between those men and their land, the first being anthropology, the second geography.

Mr. MULLER: In what areas of the world have you conducted research with regard to the study which you have just indicated to the Court?

Prof. LOGAN: My work has been essentially centred around arid regions, desert lands. Consequently I have worked in a number of desert areas in order to see not only the physical aspects but the different situations under different types of culture in different parts of the world. I started my work in the deserts of California and in the adjacent states of Arizona, New Mexico and Utah. I worked also considerably in the north-western part of Mexico, in Baja (California) and the state of Senora. I have done considerable work in the drier portions of the Mediterranean, in Crete and southern Greece, which, while not a desert area, has quite a smack of aridity connected with it. I have spent time in the Republic of the Sudan, having been at the University of Khartoum; and I have studied South West Africa.

Mr. MULLER: Have you published any works on the subject of geography, the field of study which you have explained to the Court?

Prof. LOGAN: Yes, I have somewhere around 70 publications including articles and the things of this sort, about 40 of them on arid regions. Of the more important ones perhaps is the one entitled the "Central Namib Desert", *Monograph 758 in the Monograph Series of the National Academy* of Sciences and National Research Council published in Washington in 1960: this is on the Namib Desert of South West Africa. I have an article in German "Die Landschaften Südwestafrika" in the Geographische Rundschau, 1958. I have an article on the "Climate of the Namib" published by the Quartermaster Corps of the United States Army in 1958. I have a chapter on "The Utilization of the Arid Lands of the World" in *Natural Resources* by Huberty and Flock, published by McGraw Hill in New York. The entire issue of *Focus*, the organ of the American Geographical Society of New York, in 1962 was devoted to an article by myself on "South West Africa" *in toto*. I have done two chapters, one on the United States and one on South West Africa, in a publication by Unesco —United Nations Educational Scientific and Cultural Organization—entitled *The History of Land Utilization in Arid Regions*, and I did the chapter on "Regional Setting" in the book by the American Association for the Advancement of Science entitled *Aridity and Man*. I bring these out specifically to indicate my interest in arid regions and the fact that it is not limited solely to South West Africa.

Mr. MULLER: Have you participated in international conferences regarding the field of study which you are interested in?

Prof. LOGAN: Yes, I was the delegate of the American Geographical Society to the meeting conducted by the American Association for the Advancement of Science and Unesco on Arid Lands held at Albuquerque in New Mexico in 1954. I was the delegate representing the National Science Foundation at the Unesco and International Geographical Union meeting of the Arid Zone Commission at Stockholm in 1960, and to a similar meeting of the Arid Zone Commission at London in 1964, again representing the National Science Foundation. I was the American delegate to the Unesco International Geographical Union Colloquium on the Development of the Arid Lands held at Heraklion, Crete, in 1962.

Mr. MULLER: You have told the Court that you have done research work in South West Africa. Will you explain to the Court the nature of the work done and the period in which it was done?

Prof. LOGAN: I first went to South West Africa in 1956, after having done a couple of years of library research in my research time as a university professor. I was there for a year in 1956-1957; I went out to study

the physical aspects of a utilization of the Namib Desert area. I was financed by the National Research Council of the United States. I was there for a period of just about a year; my wife and family accompanied me and we made a home in Windhoek and operated from there to the coast by private vehicle, carrying on lengthy field periods of study. In 1961 I returned to South West Africa to carry on not that work, but other work which I had begun during that first period. During the latter part of the first period I began to undertake a study of the geographical regions of South West Africa, this never having been consistently or systematically studied before by a geographer. I began to be interested in the contrast between the ways in which the land was used by the various groups within the area—that is the utilization of the land by the European population, and by the various groups of Native peoples. I went back in 1961 to study the contrasting utilization of similar areas by different economies, and by different population groups. I knew that I could not do this in the period at my disposal then, which was about eight months. I worked on the southern half of the territory at that time, the area inhabited primarily by the Whites of the Police Zone and by the Damara and Nama peoples of the south; I only did a bit of work in the north. This study was sponsored by the Social Science Research Council. I returned in March of this year to carry on work in the northern part of the Territory, the same kind of work, extending it into the area of Herero domination, and beyond that into the areas of completely non-European inhabitation, north of the Red Line, outside of the Police Zone.

Mr. MULLER: Have you travelled extensively throughout the whole area of South West Africa?

Prof. LOGAN: Yes, I have been in every portion of South West Africa and seen it quite in detail, with the exception of the Eastern Caprivi. I have been to Katima Mulilo by air, but I do not know the Eastern Caprivi. The Western Caprivi, the Okavango, Ovamboland, the Kaokoveld and all of the areas of the Police Zone and virtually all of the Reserves, I have been on and know quite well. There are several small Reserves that I have not visited, but I have been on all the larger ones.

Mr. MULLER: In visiting these areas, have you made a thorough study of the different regions of South West Africa, as well as the people occupying such regions?

Prof. LOGAN: Yes, I have endeavoured to. I have studied the physical aspects as far as I am capable, I have studied the human aspects, as far as I am capable. I feel, of course, as anyone does who attempts to study so extremely complex a set of cultures as those of South West Africa, a bit humble in attempting to do the work, because to know my own culture is a difficult enough thing, but when one is faced with the extraordinary complexities and diversities of the cultures of South West Africa, I have, as anyone would do, only scratched the surface. But I have been in all of the areas, I have studied as far as possible, as a geographer, both the physical and human resources and characteristics of the area. I have talked with most all of the Native peoples (the exception being the Native people of the Eastern Caprivi with whom I have never had any direct contact); and I have worked considerably on each of the reserve areas, as well as having stayed on and lived upon European farms in each of the basic areas of the country.

Mr. MULLER: Have you divided South West, for the purpose of your study, into different regions?

Prof. LOGAN: Yes.

Mr. MULLER: Would you name the regions to the Court?

Prof. LOGAN: Yes.

Mr. MULLER: Professor, before the adjournment you were going to indicate to the Court that you had made a study of the different regions of South West Africa and you were going to name those regions. Would you kindly do so?

Prof. LOGAN: Yes, the names of the regions which are indicated on the map, which I believe has been passed to the group . . .

Mr. MULLER: I shall come to that question in a moment. Kindly just give the regions, will you?

Prof. LOGAN: Yes, the regions as I see them, of South West Africa are the Namib, the south, the central plateau, the northern plateau, the Kalahari, the Kaokoveld and the far north.

Mr. MULLER: Have you indicated those regions by drawing boundary lines on the map?

Prof. LOGAN: Yes, I have drawn approximate boundaries on a map; as is the case in all such things, boundaries are arbitrary, and these represent the approximate positions. Sometimes the boundary is clearly indicated in the land forms, other times the boundary is one of economic development or of the population groups present and consequently it is a bit variable or arbitrary. So to the best of my ability these are the boundaries as I see them for the geographical regions of the Territory.

Mr. MULLER: Mr. President, may I explain that the witness has superimposed on the map, which is contained in Book I of the Counter-Memorial, **II**, the boundary lines of the areas with which he will deal. May I ask leave to hand in to the Court copies of the map with the boundary lines so superimposed?

The PRESIDENT: Well, you should first hand a copy of the map to the Agent for the Applicants.

Mr. MULLER: With respect, Mr. President, we had during the adjournment handed copies to the Agent for the Applicants.

Mr. GROSS: That is correct, sir.

The PRESIDENT: That may be done. There is no objection, Mr. Gross, I assume.

Mr. GROSS: No objection, sir. I should like at an appropriate moment to raise questions concerning qualification as expert.

The PRESIDENT: Do you desire, Mr. Gross, to examine the witness on the *voire dire* for the purpose of establishing that he has not the qualification as an expert.

Mr. GROSS: Yes, Mr. President, with respect to expertize in specific matters, in regard to which I should like to address my questions to the witness.

The PRESIDENT: Is it more convenient for you to do that now or to do it when the question is put?

Mr. GROSS: It would be more convenient and, in my respectful submission, more appropriate to do so now—appropriate in the sense of clarification, of understanding, on the part of the Applicants.

The PRESIDENT: Mr. Muller, the Agent for the Applicants will be permitted to examine on the *voire dire* for the purpose of testing the qualifications of the witness.

Mr. MULLER: As the Court pleases.

The PRESIDENT: I call upon the Agent for the Applicants.

Mr. GROSS: Thank you, Mr. President. Professor Logan, I should like before addressing several questions to you to state for the record that your distinction as a geographer is well known and would not be questioned in any respect, nor is any implication intended, by any of my questions, with respect to your distinctions and attainment as a geographer of renown. I should like, however, to address questions more specifically to you with respect to your qualifications as an expert in the two following respects.

1. In the proffer of your evidence, which has been made by the learned counsel for the Respondent, the Court and the Applicants have been advised that your testimony will be directed to the following points, among others, and I quote:

> "The effect which, in the opinion of the witness [that is, of course in your opinion] the application of a norm and/or standards of non-separation, such as contended for by the Applicants, would have on the people of South West Africa, especially the Native people."

Did you understand, sir?

Prof. LOGAN: Yes.

Mr. GROSS: With respect to such testimony or expert opinion—particularly in the context of this point which I have just quoted—would you be good enough to state your understanding of what is meant by the phrase "standards of non-separation, such as contended for by the Applicants"?

Prof. LOGAN: You wish me to define my impression of the term "standards of non-separation as proposed by the Applicants"?

Mr. GROSS: The exact phraseology, so that I can fix it in your mind, to which your testimony is said to be directed, is the following, in response to your question, and I break it down between norm and standards for the sake of clarity because they are two different things: "standards of non-separation, such as contended for by the Applicants." Now, I ask you to state your understanding of that phrase, to which your testimony is to be directed.

Mr. MULLER: Mr. President, I must object to this type of questioning by my learned friend. The indication given in the letter which my learned friend has been quoting from and what I indicated to the Court was for the purpose of the Court as well as for the Applicants. I shall ask the witness certain questions which will indicate what his opinion is relative to the matter now being dealt with. My objection is that my learned friend should not put to the witness questions as to what the Applicants' case in this matter is. The witness will surely not know it, save perhaps by having discussed it, but it is not for my learned friend to put those questions with regard to testing the witness's ability as an expert.

The PRESIDENT: Mr. Gross, you are putting to the witness questions which are strictly on the *voire dire* and that is for the purpose of determining whether he is competent to speak upon the matter referred to in "C" of the letter of 1 July which was directed by the Respondent to the Agent for the Applicants. It is not possible to ask what his understanding of the application of the norm or standard of non-separation is at this stage until the question has been put in the ordinary course of examination by the Agent for the Respondent. Then you may take the objection and then, if you desire to, you may test the question on the *voire dire* as to whether the witness is competent to answer.

Mr. GROSS: Mr. President, if the Applicants understand correctly, that would be then on the basis that no testimony, expert or otherwise, would be intended to be directed towards this point "C" unless so stated and identified by Respondent's counsel in asking the question.

The PRESIDENT: No, Mr. Gross. The way to take an objection is to wait upon the question and if the witness is asked a question which, in your view, he is not competent and expert to answer, at that stage counsel should take the objection and he will be given every opportunity of doing so; upon that stage being reached permission will be granted to you to examine on the *voire dire* if you desire so to do.

Mr. GROSS: Mr. President, just one more word by way of caution with respect to a possible misunderstanding on the part of the Applicants. In the light of the formulation of this question which has been stated by the Applicants to be ambiguous and incomprehensible to the Applicants, it would be difficult under certain circumstances to be certain that the question was directed to the point of the applicability of standards, or of norms, as the case may be. Therefore, in order to avoid harassing the witness and to resolve doubts in the Applicants' minds concerning the purport of a particular question in this context, I should with respect like to reserve the objection generally, since it creates a general confusion.

The PRESIDENT: Mr. Gross, it would be better to address the Court, not the Agent for the Respondent. It is a question of the ruling of the Court upon the matter and the ruling of the Court has been given, so that when the question is put it must be then for counsel for the Applicants to determine whether in his opinion it does or does not touch upon the question of paragraph "C" and if he desires to challenge the competence of the witness to say so. That is the correct procedure.

Mr. GROSS: Mr. President, I have observed the admonition to address the Court, and assure the honourable President that that has been my intention throughout, and of course will continue to be.

I would like to raise the following questions with respect to the expertise of Professor Logan.

The PRESIDENT: The ruling of the Court has already been given. Until such time as a question is put by the Respondent's counsel on the matter referred to by you there is not the opportunity nor is there the ground upon which the qualification of the witness to answer it can be tested.

Mr. GROSS: In any aspect, Mr. President?

The PRESIDENT: What other aspect are you speaking about?

Mr. GROSS: Mr. President, the point I was about to raise, now, was with respect to the qualification to testify with respect to geographical factors as defined by the witness in respect of the Territory of South West Africa.

The PRESIDENT: Well you may proceed to do that.

Mr. GROSS: This is the second line of question to which I had referred in my opening remarks. Professor Logan, you referred, I believe, if I understood you correctly, to the definition of geography as a discipline or science involving the interaction between men and land. Is that correct, sir?

Prof. LOGAN: Yes, that is correct.

Mr. GROSS: In your studies and research in South West Africa, I take it that this was the basis upon which you pursued your studies?

Prof. LOGAN: Yes, that is correct.

Mr. GROSS: In respect of the analysis you made on the basis of the

interaction between men and land, did you have extensive discussions with men?

Prof. LOGAN: Yes.

Mr. GROSS: May I ask you, Professor Logan, for general answer, what types of individual men did you have discussions with—let us say, specifically for the moment—in the southern sector of the Territory outside of the Reserves?

Prof. LOGAN: I discussed the characteristics of South West Africa and asked great varieties of questions of people ranging from the Administrator, the top man in the territorial government, downwards to the farmers of the Territory, the Natives on Reserves, the Natives on farms; government officials as well as private citizens—all sorts of persons. As I indicated, I think, earlier I lived on more than one farm—it depends on what may be considered living upon, but I have stayed, let us say, not less than three to five days upon upwards of 20 farms within the Police Zone; and I have been on all of the Reserves—not merely driving through them, but remaining upon them for periods ranging from a day on the smaller ones to at least a couple of weeks on the larger ones, still in the southern portion of the Territory.

Mr. GROSS: Did you have discussions, extensive or otherwise, with respect to the political or economic relationships of individuals to society, or were your discussions primarily centred on the relationship between man and land?

Prof. LOGAN: I have not held any political discussions to any extent with anyone; I am not interested particularly in politics *per se*, and consequently I am not an authority on the politics of the Territory, and have not really been seriously interested therein. As far as the economic aspect is concerned, yes. As far as the cultural aspect—by this I do not mean to exclude politics from culture, but at any rate the study of the culture of the peoples, whether they be the Europeans or the Natives, is very much a part of my field of study. Consequently I have talked with and observed the various culture groups within the area quite intimately. This means having talked with at close range, over considerable periods of time, Natives as well as Europeans.

Mr. GROSS: Thank you. And did you, Professor Logan, regard that it was a part of your study and analysis, from any technical or scientific point of view, to consider the questions involved in limitation of rights or freedoms of individuals, or any aspect of the relationship between man and society on a political or individual basis?

Prof. LOGAN: Well, as I just said, I am not interested in the political aspects, and I have not gone into that. As far as the laws or regulations are concerned, I am afraid I am not able to recite—I do not even know thoroughly—all of the regulations and laws involved in the relations between Natives and Whites, or other types of laws within the area. I cannot be held as an expert in any way on the legal aspects—no. I am quite aware, however, of the rights and privileges and the limitations thereon, as anyone living in and observing critically and carefully a society ordinarily is, and consequently I think I can talk with a fair degree of certainty in regard to how much freedom or lack thereof there is on the part of the Native group in South West Africa.

Mr. GROSS: And would your observations and opinions on that subject reflect scientific or technical observations or analysis?

Prof. LOGAN: No, they would not reflect scientific or technical analysis.

They would be that of a person who has lived in the area, who has observed it carefully and keenly as a part of obtaining the total background of the area, but in order to report scientifically or technically upon it, I am afraid I would have to have a legal background or a political science background, and I do not have this; I would not set myself up as an expert in those fields.

Mr. GROSS: Those fields being the political, economic and sociological fields? I just ask you for clarification, sir.

Prof. LOGAN: No, I said political fields and legal fields; when it comes to economic and sociological fields, this begins to get more into my realm, and there on at least a number of facets I think I can testify with a fair degree of certainty and with a fair degree of technical knowledge.

Mr. GROSS: With respect to the sociological aspect of your testimony, have you specialized in any sense, in studies or writing or scholarship, in the field of sociology?

Prof. LOGAN: Not in the field of sociology, but I have had courses in sociology when I was back at the university, long ago; my Ph.D degree is in human geography from Harvard, and a Harvard degree in human geography in the year in which I took it meant that we had a great exposure to sociology, ranging all the way from urban sociology through comparative societies, and things of this sort. I did a Ph.D dissertation—this was in New England, before I became interested in arid regions—which was on the causes of land abandonment in the uplands of New England, and half of that Ph.D dissertation is sociological. I had a sociologist working closely on the committee with me—over me, not with me—and I have quite a bit of background in that sort of thing.

Mr. GROSS: Yes.

Prof. LOGAN: That is why I stated to the Court at the beginning that geology and geography should not be confused, and that as geographers we have to know about men, and knowing about men we have to know about sociology and societies, and consequently, yes, I would come into that.

Mr. GROSS: And in your discussions with individuals in, let us say for the sake of this question, the Police Zone areas outside of the Reserves, for example, did you discuss and consider and analyse the social implications, sociological implications, or aspects or effects, of the legal and other policies and practices with regard to the freedoms of individual persons?

Prof. LOGAN: Yes, I did.

Mr. GROSS: And in ascertaining, or developing and ascertaining the facts, or developing your views with respect to the social or sociological implications of the policies and practices pursued there, did you discuss with individuals, let us say those classified as non-Whites, their attitudes, reactions, or perceptions of the situation?

Prof. LOGAN: Many times, yes, with many different groups.

Mr. GROSS: And with many different individuals in that area?

Prof. LOGAN: Yes, and different tribal groupings.

Mr. GROSS: Well, sir—just to avoid confusion on my part, I was not referring to groupings, but to individuals.

Prof. LOGAN: But I mean individuals from different tribal groupings.

Mr. GROSS: Within this particular area?

Prof. LOGAN: Yes, within the Police Zone.

Mr. GROSS: In connection with the political, as distinct from the socio-

logical, did you discuss with them their reactions or opinions or attitudes with respect to the political limitations imposed upon them?

Prof. LOGAN: Yes, to slight extents. I feel rather foolish, Mr. President, about giving my testimony before I have started to give my testimony, but if I should continue here I would say that generally most of the population of the Native groups basically, a tremendous proportion of it, is completely politically unaware, and consequently to hold a political discussion with a Nama shepherd is a rather fruitless undertaking, because most of the Nama shepherds do not have any political concepts; and therefore I have difficulty answering the question "yes" or "no" because one does not discuss something with a person who does not know anything about it.

Mr. GROSS: Mr. President, I feel that the response and the address to the President reflects a misunderstanding of the coverage and the scope of my question; are there Nama shepherds in the Police Zone outside the Reserves, so far as you are aware?

Prof. LOGAN: Yes, thousands of them.

Mr. GROSS: Yes, there are. Now, are there persons in this area, who are not Nama shepherds, who have political views, sir?

Prof. LOGAN: Yes, there are a few.

Mr. GROSS: There are a few, and I would like to know about those few.

The PRESIDENT: Mr. Gross, on examination of *voire dire* the questions must be of a general character, they cannot be of a specific character; the questions must be directed to ascertaining whether the witness is qualified as an expert, and it does not seem to me to be of assistance in determining that to go into detail as to whether there are Nama shepherds here or Nama shepherds there.

Mr. GROSS: I did not introduce this question.

The PRESIDENT: Maybe, but you are pursuing it.

Mr. GROSS: I referred to Nama shepherds to dispel the notion that I was referring to Nama shepherds; I was trying to establish, and am trying to establish, the limits or extent of the witness's expertise.

Prof. LOGAN: Mr. President, could I make a short statement, perhaps?

The PRESIDENT: No, answer the questions, witness—it is much better to answer the questions.

Prof. LOGAN: Excuse me, sir.

Mr. GROSS: Professor Logan, I would very much like to give you—we are addressing each other only in the presence of the Court, and through the Court—full opportunity to respond to my questions in any way you deem appropriate, subject to the views and rulings of the honourable Court. I do wish to pursue this matter so that you may understand the purpose of the question, and why I am excluding Nama shepherds or others who have no political sophistication or knowledge; I am discussing with you, or asking you specifically to advise the Court for the purpose of indicating the extent of your expertise and the particular areas or points or subjects to which it is directed, whether or not you have engaged in discussions with non-Whites, so classified, who have what you regard as political sophistication or knowledge?

Prof. LOGAN: Mr. President, I have not. I have not engaged in political discussions with the leaders of the Herero or Ovambo political groups who have been represented at the United Nations, for example; I have not held discussions with them. My discussions have been almost totally of a non-political nature, and consequently I could not qualify to discuss

political situations in really any way as an expert, or even as a strong witness.

Mr. GROSS: So that in addressing yourself to any such area of fact or opinion, you would not regard yourself as addressing your responses to questions on these matters as an expert—is that correct?

Prof. LOGAN: That is correct.

Mr. GROSS: I think that is all, Mr. President—thank you very much for your patience.

The PRESIDENT: Do you challenge the competency of the witness, as an expert?

Mr. GROSS: Not as an expert with respect to his discipline as a geographer—no, sir.

The PRESIDENT: Continue, Mr. Muller.

Mr. MULLER: Professor Logan, will you describe to the Court the area or region on the map which has been handed in, which you have referred to as the Namib region—would you very briefly indicate the boundaries, and tell the Court something about that region and its economic potentialities?

Prof. LOGAN: The Namib is a complete desert, one of the most utter deserts in the world. It extends along the entire coast of South West Africa, from the Angola border to the border of the Republic of South Africa. It extends inland a distance of 80-120 miles to the foot of the escarpment or mountainous edge of the plateau of Africa.

It is an area that is almost totally devoid of rainfall or any form of precipitation. It receives an annual average of something between one half inch and two inches of rain per annum, but this does not really indicate the true situation, for it may be rainless for as long as three or four years and then receive, in a period of several weeks, a large amount of precipitation in the form of cloudbursts which gives a certain annual average, but which really is of no utilization to anyone attempting to utilize the area for farming or anything of that sort.

Its water supply, consequently, is almost non-existent. The four settlements within the area all have great problems in obtaining their water supply. Swakopmund and Walvis Bay receive their water from the underflow of the Kuiseb River, some 30 miles inland and pipe this 30 and 50 miles respectively, to those two communities. Lüderitz, farther down the coast, obtains its fresh water entirely by the distillation of sea water, with coal brought from great distances providing the energy. Oranjemund, at the extreme south tip of South West Africa on the coast, is fortunate in that it has the surface-flowing Orange River as a source for water.

The only flowing streams in the Territory are the absolute south edge and the absolute north edge of the area: the Orange and the Kunene. Vegetation is almost non-existent within the area. The land forms consist of a flat bench cut in bedrock over a great portion of the area, about one-half of it, with bedrock right at the surface; sand dunes cover another third and the remainder is made up either of small isolated mountains or gravel flats, the gravel of which is cemented with gypsum, and gypsum is poisonous to almost all vegetation and consequently completely unusable. The soils of the area are virtually non-existent except in the case of the sand of the sand dunes which, itself, is scarcely a soil, and in the case of the gypsum cemented sands as I just mentioned. The area is virtually without anything, then, that serves as an economic base

or a base for utilization. Now the exception here lies in the mineral development. There are a couple of small copper operations and there are the world famous diamond-bearing gravels along the coast in the southern portion of the area, the area that is prohibited to entry because of the presence of the diamonds. These, of course, serve as a very important economic base for the area but only in a very limited way in a limited region.

Off-shore the cold waters of the Humboldt current which wash this coast provide a lot of plankton which develops a big fish population and, consequently, the taking of crayfish, which are exported all over the world as frozen, and tinned lobster tails or crayfish tails, is an important industry and the basis for the port of Lüderitz. Farther north, the taking of snoek, a type of tuna, and pilchards or sardines, is the basis for an important canning industry at Walvis Bay. These are two of the main economic bases of the area: the presence of the diamonds and the presence of the fisheries.

The third economic base is that of the fact that a port is needed for exporting the products of the interior and for receiving the imports for the interior, and on this basis, both Lüderitz, a minor port and Walvis Bay, the major port, have developed. Both of them are tied quite strongly to the sea and to overseas and to world trade and they have grown up here as completely exotic ports, exotic cities. Along with them, Swakopmund and Oranjemund are also exotic, that is, things completely out of place in the area. The area was originally almost uninhabited. Along the coast there were a few of a group termed Strandloper Bushmen, Strandloper means "beach runners" and they moved along the coast living off the sea wrack, the refuse of the sea, primarily.

Inland, there were a few scattered Bushmen groups, very likely. These had been apparently exterminated or virtually exterminated by the time of the arrival of the first Whites in the area, exterminated by the Hereros in the north and by the Namas or Hottentots in the south, and the result was that there was very little population in the area. Along the major rivers that flow once in several years, but which have an underflow and hence support trees and some vegetation, there were at the time of White contact, a few Topnaar Hottentots or Topnaar Namas living, dependent largely on their herds of goats. These are still living in the same way in the interior behind Walvis Bay. In other words, this was originally an almost uninhabited area and there are today in it a few peoples still representing the old group of Topnaar Hottentots and, in contrast, the large modern type cities, supported as far as their food is concerned, supported as far as their water is concerned and as far as their economic base is concerned, almost entirely by outside contacts.

Mr. MULLER: What influence have the European and Native peoples, respectively, had on development in this particular area?

Prof. LOGAN: The area is almost entirely the result of the European group. The European group developed it in order to support the trade of the interior or developed it in order to extract the diamonds and the copper and other scattered minerals in the other areas. They developed the water supply, they developed the food supply, they developed the housing. The population today is perhaps roughly a third European, two-thirds Native. The Natives are entirely brought in from outside or have come in of their own volition from outside. One group is the Ovambo, who come from the northern part of the Territory and work here as

contract labourers for a period of time before being returned to their homeland. The other group are permanent residents of the area, being Natives, largely Herero or Nama or Dama, who have come from the more moist interior and have moved down to the coast because of the opportunities for employment there. They have, of their own volition, moved in individually, family by family within the area.

Mr. MULLER: In your opinion, what would happen if the European influence were removed from this particular region?

Prof. LOGAN: Well, since the European group is the one that today keeps the water supply going, keeps the food supply coming in, keeps the railway operating, that it is the managerial ability, that it is the initiative and drive of this group that has kept the place in operation, the removal of this group without its direction and initiative, would, I think, result in almost immediate and almost complete collapse. The Native group is not of the calibre, whether it be in trained ability or whether it be in the desire to be there each morning at the given hour that is necessary to turn on the plant or oil the machinery, and since there is no such initiative, from the local Native group, I am afraid that things would fall apart very quickly.

Mr. GROSS: Mr. President.

The PRESIDENT: Yes, Mr. Gross?

Mr. GROSS: I would object to this testimony as not falling within the scope of the points to which the testimony is addressed, and as being a question which raises a purely hypothetical and fanciful supposition as to which the answer is completely meaningless.

The PRESIDENT: Mr. Muller, in the first place, to what particular issue is this evidence sought to be directed and secondly, under what heading in your letter of 1 July 1965, does it fall?

Mr. MULLER: I beg your pardon, Mr. President, with reference to the letter . . .

The PRESIDENT: The letter of 1 July 1965, addressed by the Agent for the Respondent to the Agent for the Applicants. The two questions I asked were to what particular issue in the case is the evidence which has just been given sought to be directed, and secondly, to what particular head, A, B, C, in your letter of 1 July 1965, is it said to fall?

Mr. MULLER: Mr. President, my reply is that it is concerned with the issue raised under the Applicants' Submissions Nos. 3 and 4, relative to the existence of a norm and/or standards and applicability of norms and/or standards to South West Africa. It is directed to the matters raised under B and C, that would be the differences between the population groups and upon that, the witness will eventually be asked to express his opinion relative to what is raised in C.

The PRESIDENT: Mr. Gross.

Mr. GROSS: To the objections already stated, I would renew and reaffirm the general line of objections, based upon the meaningless and incomprehensible formulation just cited as a reason for the question and answer, in response to the honourable President's question addressed to counsel. I do not know what relevance the answer or the question has to any contentions made by the Applicants in respect of Submissions 3 and 4; the favourite formula, now repeated time and time again (which does not add to its clarity)—"norm and/or standards such as contended for by the Applicants"—has taken on a ritualistic rather than a comprehensible aspect. I therefore add this general objection to those raised

specifically, with regard to the relevance or intelligibility of the question and the answer in respect of any issue raised in these proceedings.

The PRESIDENT: Sometimes the relevance becomes more apparent as questions are put and sometimes they become more comprehensible. I think, Mr. Gross, it is better that we note the objection which has been taken by the Applicants. You may rest assured that the Court itself is capable of evaluating the evidence in its relevance but I think the better course is to proceed with the evidence.

Mr. GROSS: I accept it, sir, on that very basis, with assurance.

The PRESIDENT: Continue, Mr. Muller.

Mr. MULLER: Professor Logan, will you next deal with the second region on your map which you have styled the south, giving the Court first the boundary outline of the area, and a brief description of the geographic conditions and the economic potential of the area.

Prof. LOGAN: The south is, again, an area of barrenness, of extraordinary lack of precipitation, of a general lack of resources. As I see it, I bound it southwards by the territorial boundary and eastwards by the territorial boundary and then northwards by a line running diagonally northwest, southeast, passing about through the town of Mariental, on the railway line 100 miles or so south of Windhoek. This area is a high plateau, lying three to four thousand feet above sea level, having only a couple of inches of rain on the annual average in the southern part and getting up to no more than eight inches in the northern.

It is an area of flat sky-lines reaching monotonously, endlessly, to the distant horizon, barren, almost no vegetation in the south, getting up to having open bush country of low bushes over the northern portion. A small portion in the southwest is a little more succulent because it gets some winter rains in some years. The area along the Namib border has some short grasses. The rest of it is open bush country and quite sparse in its vegetation.

The water supply is almost non-existent over large areas. There is the water in the Orange River on the southern border, but this is virtually inaccessible for any realistic uses because it is in the bottom of a deep canyon, from which the water cannot be raised up, without great expense, to the plateau-lands on top, and along the river there is almost no arable land.

The remainder of the area has water only in scattered waterholes and springs. There are some boreholes which have been put down by individual European farmers, or by the Administration, either for farmers or for the Natives on the Native Reserve areas, but it is generally a pretty poor, pretty barren, sort of area.

Mr. MULLER: What agriculture, if any, is practised in this region?

Prof. LOGAN: As far as agriculture, in the more limited sense, is concerned, virtually none. There is a bit of irrigation in little patches along the Orange River, there is a bit of irrigation being developed below the Hardap Dam near Mariental (just developed in recent years), and on the border of the area, against the Kalahari, there is an artesian basin of a few square miles known as Stamprietfontein. Other than that, there is nothing.

There can be no dry cultivation because there is not sufficient rain for dry farming.

Therefore it all boils down to the fact that basically it is an area of pastoral activity wherever there is enough bush for animals to graze

upon, and the principal type of pastoral activity is that of the raising of Karakul sheep, or Persian lamb, a luxury fur item. These are raised in considerable numbers on the European farms throughout the area. There are also, on the Reserves, the raising of sheep and goats as a subsistence type of economy. The Natives are basically sheep and goat raisers, the Europeans basically Karakul raisers. However, on most European farms there are also a few sheep and goats raised usually as a bit of food for the house and also by the Natives living upon the European farm as part of their food also.

Mr. MULLER: Can you compare the methods of developments on the European farms and those on the Reserves in the area?

Prof. LOGAN: Yes, one of the principal things that I worked on in 1961 was to study the contrast between the utilization of the land generally, which turns out to be grazing, on the Native Reserves, especially the Reserves Tses and Berseba, and the European farms immediately adjacent to this.

On the Native Reserves the sheep and goat dependence had caused almost total eating-out of the vegetation in the areas around the waterholes, that is, about the area of any one waterhole there was a more complete desert than in the surrounding territory—it was eaten down to almost nothing. When one got away from the waterhole then one would find that, at a distance of four miles or so from the watering point, the vegetation would improve and would come up to the standard which one might expect in the area were there no grazing in it.

When one crossed the fence line—the stock fence between the Reserve and the adjacent European farm—one would find that immediately the vegetation was considerably better, the stocking on the farm was therefore apparently different. At first I attributed this to the fact that the Native Reserve was over-stocked, that there were too many animals upon it; when I started getting exact census figures (not, incidentally, published census figures, but figures taken directly from the headmen, or the headmen's report to the local Reserve superintendent) and comparing this with the figures I obtained myself from the European farmer on the other side of the fence, I found that the population of sheep and goats, or of Karakul sheep on the other side, was not very much different and that the difference came about almost entirely from the methods of herding. The Native herds, with small boys taking the animals out and bringing them back each day, go with no control, for the boys merely follow the animals. On the European farms, the farms have been fenced and divided into what are called camps, or pastures, and this results in an evenness of grazing over the whole area. There were no more waterholes on the farms than there were on the Reserve, there were no differences, to any extent, in the number of sheep or goats on the opposite sides—the number of small stock head units remained the same—but there was more over-grazing of certain areas and lack of use of land in the in-between areas on the Native Reserve than there was on the European farm.

Now the Reserve Natives had been permitted to fence, had been encouraged to fence, and as a matter of fact, one could see in many places the stockpiles of wire that had been given to them to do the fencing. This had not been done even though, in some cases, in 1961, it had been there for five years.

When I came to look into the population differences of humans on

either side of the fence another interesting thing showed up. The Reserve population density and the farm population density were almost exactly the same; that is, there were the same number of people per square mile on the farms as there were on the Reserves. This, of course, meant that on the Reserves these were all Natives, in this particular case Dama and Nama; on the European farm there was the Dama and Nama population, plus the three, or four, or five members of the European family.

The standards of living were considerably in contrast. On the Reserve side of the border, the Reserve Natives were living in a quite hand-to-mouth sort of existence. They were dependent upon their flocks and herds, plus some cash obtained by working in town, or something of that sort (very frequently one member of the family is working in town and sending cash back: that is the only form of cash received). On the other side of the fence, on the European farm, the Native was receiving (the Native who was doing the actual work) regular pay—a low wage, a very low wage, in cash; in addition, he was receiving rations of food, he was receiving gifts of clothing (this is almost the same as pay because the gifts are a definite thing that are always given at Christmas, on birthdays, and so on) and, in addition, housing materials for the construction of buildings, and in many cases actually houses, cement block houses, constructed for him by the farmer. And he furthermore had a matter of stability, that is that living on the farm he was guaranteed regularly, over the months, over the years, irrespective of drought, irrespective of dry seasons, a rather continuous income—which was not the case on the Reserves, where this might be a quite fluctuating thing depending on the conditions of the climate in that particular year. In other words, there was considerably more stability and a somewhat higher standard of living on the European farm than on the adjacent Reserve.

Interestingly, several of the farms that I worked upon at that time have since been purchased by the Administration to be added to the Nama homelands, under the Odendaal Commission report—the work I did was before the study by the Odendaal Commission.

Mr. MULLER: Do you think the differences just described to the Court between what happens in the Reserve itself and on the adjoining farm is due to lack of opportunity in the case of the people of the Reserve?

Prof. LOGAN: No, I do not think so. The Administration has made continuous efforts, over a long period of time, to improve the Reserves. There has been a great deal done to improve the Reserves. This is the thing . . .

The PRESIDENT: Mr. Muller, would you ask the witness to indicate to the Court what is his knowledge of the continuous efforts by the Administration of which he speaks.

Prof. LOGAN: I beg your pardon.

The PRESIDENT: Would the witness indicate to the Court the continuous efforts made by the Administration that he is aware of.

Prof. LOGAN: You wish me to name them, you mean?

The PRESIDENT: Yes.

Prof. LOGAN: There has been the drilling of boreholes for example, to improve the water supplies. There has been the giving of fencing materials—this includes the wire itself, plus the metal posts for supporting it (this being a treeless area this has to be done, in other areas wooden posts are ordinarily cut)—and these have been made available, delivered to the Natives of both Berseba and Tses, not only to the Reserve headquarters,

but to the area in which the fencing is to be done. There have been attempts to improve stock—this is done by both breeding, by giving of rams, or sometimes ewes, to them to improve the quality of the stock; a great deal has been done in the way of innoculation and spraying and handling of animals by veterinarians in various ways to reduce stock diseases. There has been educational work in the form of attempting to improve the animal husbandry and the pasture management of the area by agricultural experts. There has also been education—I am not fully aware of what has been done in the educational lines on the Reserves, but there are schools operating on them, normal types of schools—as well as a great deal done also in health education by agricultural department people in home economics, in regard to nutrition, and in regard to various diseases.

Mr. MULLER: Do the Native inhabitants of the Reserves accept these improvements readily?

Prof. LOGAN: Some, very readily, yes. The matters of stock improvement that relate to disease control, and things of this sort, are accepted very readily. Since we are dealing with the south, with the Nama and Dama, the stock-breeding programme is usually accepted quite readily; this is not always the case with other Natives, but it is in the southern part of the Territory.

Mr. MULLER: Would you now deal with your third region, described on the map as "the central plateau"?

Prof. LOGAN: The central plateau area, which lies considerably higher than the areas I have been describing so far, at elevations of 4,000 to 6,000 feet above sea-level, is the real centre of the country economically, although not the centre from the land utilizational point of view—I will get on to that in a moment.

It is an area with considerably more rainfall than the areas we have been discussing, 8 to 15 inches of rain coming in the form of summer showers. There is a long period, ordinarily, of drought through the whole of the winter and there are also recurrent droughts, of some years' duration, in which perhaps as little as one-quarter of the annual average will be received for several years in a row—this produces a very serious problem of trying to bring herds through such a period alive and in even fair condition.

The area is one of thorn bush savannah. By this I mean it has thorn bushes—almost all of them acacias, all of them covered with spines and thorns, having green leaves on them during the summer rainy season and being quite dry and barren-looking the rest of the year. Savannah means that it is an area of fairly tall grasses which come up for a short period after the rains.

It is an area of rocky, stony, soil and of generally quite hilly country. It is a plateau, but the plateau has been cut into valleys in a great many areas and so much of the land is in slope, with the bare rock just below the surface.

Mr. MULLER: To what extent, if any, is this area being developed by man?

Prof. LOGAN: It is used quite extensively for grazing. There is no agriculture in it at all of any type worth mentioning, but there is a great deal of pastoral activity. The southern part of the area is still Karakul sheep country; the northern part of the area is devoted to cattle—usually dual-purpose cattle being raised for beef and for dairy purposes. The cattle are

shipped out of the area by rail to the Republic, for the most part, on the hoof as beef, or sold locally as beef. The area also produces a great amount of cream which is used for butter and cheese being produced in centralized factories, not on the individual farms.

The area also has the city of Windhoek within it, which is the only really sizeable urban community in the whole of the Territory. Windhoek is a very modern, sophisticated, European-type city—it could be a city right here from the Netherlands transposed into a quite different sort of environment. It has a set of ordinary residential areas much the same as one would find in a modern European community. It has a large industrial area basically producing fabricated goods, that is it brings the partially constructed material, whatever it is, in from Europe, or America, or some other part of the world—increasing amounts from the Orient, particularly Japan, today—and these are then fabricated to specifications locally.

Windhoek also has a large Native population. The population of Natives is about equal to that of Europeans. The Natives are housed today in a completely new housing area, referred to as Katutura. The older housing area was deplorable—it consisted of shacks built by the Natives with very poor sanitary facilities, very poor availability of water and so on.

During the period between 1957 and 1961 the township of Katutura was constructed at the expense of the European tax payers. It is immediately adjacent to Windhoek, to the European housing area, and consists of housing for some 15,000 Natives. The housing is four-room cement block construction houses with windows and doors (incidentally the windows and doors have to be made of steel, because if they are made of wood there is generally quite a loss by their being taken out and burned for firewood). They are equipped with flush toilets, with showers, with running water, and electricity is available if the occupant wishes to have it connected and pay the bill. The housing is at very low cost and a good part of this cost is taken up by the employer of the male member of the family, if the male member is employed, as is usually the case. The employer has to pay for each of his male Native employees each week a certain sum which amounts to a little less than three-quarters of the monthly rent. In other words, nearly all of the rent is paid for by the White employer, if the man works. The housing is, to my mind, very adequate —as a matter of fact it is as adequate as has been supplied over the past ten years, up until this last year, by my own university for its graduate students, the only difference being that the university supplies hot water and no hot water is supplied at Katutura; of course in that climate it is scarcely needed anyway.

Mr. MULLER: Do different population groups live in the township Katutura?

Prof. LOGAN: Yes, there are several different groups. There is a number of Damaras, a number of Namas, a number of Hereros, and a small number of de-tribalized Ovambos from the area of the extreme north. These people live in separate areas within Katutura; this is simply because of the fact that basically the various groups do not like to live together and they actually have some friction between them if they do live in immediate juxtaposition; so they are in separate units with buffer zones of empty ground between each of the different units.

Mr. MULLER: You have now dealt with Windhoek and Katutura at Windhoek, will you tell the Court something briefly with regard to the

population groups generally living in this region that is outside the town of Windhoek?

Prof. LOGAN: Yes. Let me start this by saying that there were originally over the whole area two groups intertwined, as it were; these were the Nama and the Dama. The Nama were pastoral graziers, largely nomadic. The Dama have always been a sort of an enigma: the Nama are of the Khoisan group, the non-Negroid group; the Dama are Negroid. They, however, have been in the area from the very earliest period apparently; they are a very quiet, a very gentle, a very timid sort of people basically, and they do not like to fight, and long ago they attached themselves apparently to the Nama and lived in a kind of symbiosis with the Nama. It is not quite true, probably, that they were slaves to the Nama; they were servants or menials of the Nama. They were not at equal level with the Nama either in the view of the Nama and in their own view. The two groups lived together, the Dama working for the Nama, in scattered units, referred to as Werfs, or Werve, over the whole of the central plateau region; and as a matter of fact all over the south as well. Now in the middle of the nineteenth century, into this area there penetrated the Herero. The Herero are a tall Negroid group of the type referred to as Bantu and they were an extremely aggressive warlike people in direct opposition to the Dama who are a very mild people. The Nama and the Herero began fighting some rather bitter battles and the Nama invariably lost in the long run. So the Dama and Nama were gradually pushed southward by the Herero, until the position was frozen by the advent of the Germans in 1890, who stopped the internecine wars. The line today is very clearly indicated on any large scale map by the place names. The farms and even the towns, in the southern part of the Territory often have Nama names with "clicks" in them. The names in the northern part have the rolling vowel-full sounds of the Herero language; such as Omururu, Okahandja. Windhoek is on the line of separation between the two different groups.

The groups on the farms throughout this portion of the territory, include some, but not very many Herero, for basically the Nama and Dama are much more conducive to farm work than the Herero. The Herero have one Reserve, in the area just north of Windhoek, Ovitoto. There are also Natives living in towns, where they are engaged in a wide variety of occupations. The Herero are quite frequently in town; the women work as laundresses and housemaids for the most part; the men work at a number of different jobs, ranging up to as high as truck driver and chauffeur; they work as deliverymen, and positions of that sort. The Namas and Damaras are very dominant in the towns—there are large numbers of them in the town areas.

And then there is one more group, and that is a group that is not in the usual class of Natives—it is a mixed blood group, the group referred to commonly as Coloured, and in this particular case by the rather distinctive name the Rehoboth Bastards—the term "Bastard" is a name that they apply to themselves; you ask a man "Is jy 'n Dama?", and he will say "Nee, ek is 'n opregte Baster"—that is, "I am a proper Bastard", and this is the term always applied by them. The name goes back to a much earlier time, when this group developed in the northern part of the Cape Province of the Cape Colony, in the area of Namaqueland. A number of White herders came into a country which was very bleak, and women from the White community were not interested in coming into it. The

men settling there eventually married the headmen's daughters of the local Nama community—now by this I mean they married them—it was not a case of mating with them, as in many other cases, in which case the child was brought up in the Native surroundings, very often brought up pagan and brought up in a relatively uncivilized condition. Rather in this case they were brought up within the home of the White European pasturalist; they were brought up Christian; and they were brought up civilized. This was in the 1810s and 1820s. This group developed to a rather considerable extent in that area. When, later on, other Whites moved into the area, it having been civilized and tamed somewhat, they began to look with some disparagement upon these others, and they referred to them by the derogatory term, and this derogatory term these people picked up and used with pride. Now, as the years went on, feeling themselves somewhat squeezed in Namaqueland, they moved across the Orange River and eventually, in a kind of truce with the Namas, were given the Rehoboth area, and settled in the Rehoboth area as a group of people completely distinct from the surrounding Namas. They were Christian, they always had a minister with them, they had a written law, they had an organized community. When the Germans arrived they recognized this and made them an independent, autonomous state and set up the territory, the *Gebiet*, for them; and so today this is, in Afrikaans, the Rehoboth *Gebiet*, the Rehoboth Territory, settled by these people. These people, incidentally, are herders and farmers. They employ large numbers of Damaras as their servants. They have a location, a separate housing area, in Rehoboth for the Damaras, since they do not allow the Damaras to live with them. They have in recent years—the last 40 years or so—been renting out their farms to Europeans, and they objected very vociferously a few years ago when the Administration announced that these farms would have to be turned back to the Rehoboth group, because the Rehoboth group did not like the loss of the cash income from the rental—they preferred to rent than actually to have to do the farms themselves and take the risks associated with it.

There are also in the area generally, in the Windhoek area and through the whole of the Central Upland, a number of Europeans of the three basic language groups and a scattering of Coloureds, largely from the Cape, in relatively small numbers.

[Public hearing of 8 July 1965]

Mr. MULLER: Mr. President, before proceeding with the examination of Professor Logan, Mr. de Villiers would like to make an application to the Court relative to a witness who wishes to sit in Court.

The PRESIDENT: Mr. de Villiers.

Mr. DE VILLIERS: Mr. President, it concerns Professor Possony, who will be called as an expert solely. He will not testify about facts in South West Africa as being within his knowledge in any way and I have spoken to Mr. Muller and our friend, Mr. Gross, about it and the latter has no objection to his attending this sitting.

The PRESIDENT: He may be present.

Mr. MULLER: Professor Logan, you were about to state your conclusions of your study of the third region, that is, the central plateau, when the Court adjourned yesterday. Will you proceed to do so now?

Prof. LOGAN: Yes. Mr. President, the central plateau region, the area

which was under discussion at the termination of yesterday's session, is an area of relatively poor physical resources in which a rather remarkable development has taken place, resulting in rather considerable prosperity within the area due to very extraordinary economic development of the region. It is also an area in which formerly warring tribes are now peacefully living. They, as well as the Europeans, are making considerable progress within the area.

Mr. MULLER: Will you next deal with your fourth region, that is, the northern plateau, and first give the Court a brief description of the geographic conditions of the region?

Prof. LOGAN: The northern plateau area has a rather arbitrary set of boundaries in a couple of places. On the west it merges into the Namib desert country. On the south it has a physical boundary with the area just described. To the northward the boundary line is drawn along the northern limit of the European settlement area, the area of the European farms, and on the east also it borders the edge of the area of European farms. So, in some areas, this is a culturally bounded region, and in the other areas, it is a physically bounded region.

It is an area of broad, rolling plains at a high altitude, 4,000 to 5,000 feet for the most part, covered largely with relatively deep layers of sand, not heavy sand, not a light sand, but usually with a good admixture of other materials which makes it fairly water-retentive. It holds water fairly well and consequently it is not an arid region as it might be were it sand like the sand dunes of the coastal area. It receives a moderate amount of precipitation, between 15 and 20 inches of rainfall in an ordinary year. This, however, falls entirely in the summer which leaves a long, dry period in the winter. As in all of these areas, this poses a rather major problem because there is invariably a shortage of water during that winter period and, at the same time, a shortage of feed for the animals. In a pastoral economy this means a great concentration of the animals about the water holes during this particular period.

It also suffers, as do the other more southerly areas, from protracted droughts of more than a winter's length. During the past decade there have been approximately seven years of extraordinary drought. Some areas have received no rain whatever for as much as two years. This causes, of course, a grave depletion in the grazing possibilities of the area, and is a very serious matter as far as domestic water supplies as well as the water supplies for animals are concerned.

The area is one that has several points of mineral development. In the northern part of the area there are reserves of copper, lead, vanadium and germanium. These minerals are mined at several different places, particularly at the town of Tsumeb. The area has consequently a modest physical resource base.

Mr. MULLER: Can you tell us something about the agricultural and pastoral activities in the area?

Prof. LOGAN: Yes, this is an area which again, like the other areas we have discussed so far, has no possibilities of irrigation agriculture. The soil would be suitable, but there is no water anywhere available. However, the northern portion of this area gets just enough summer rain so that it is possible to carry on agriculture in the open field, that is, without irrigation but still agriculture. The major crops are maize, which in southern Africa is called mealies, or in America called corn, and these are grown with moderate success. By that I mean that probably the crop failures

over a number of years would average about one year out of two, or perhaps as much as two years out of three, which means, then, that only in half of the years, or in a third of the years, is it possible to get a crop. This, of course, makes for very marginal agriculture.

The area is largely a thorn bush and thorn tree savannah and so is quite an area of importance for grazing, grazing both upon the grasses when they are available and on the bush at other times. So it is an area of the raising of cattle for the most part—the same dual purpose cattle production that we saw farther south in the central plateau region.

Mr. MULLER: What are the population groups occupying this particular region?

Prof. LOGAN: Undoubtedly originally there were Namas and Damaras and Bushmen here. This is a known matter of record from the tribal traditions of the various groups. However, at the time of first White contact in the area it was occupied by the Herero, the Herero during the preceding several decades, up to perhaps a half-century, having pushed the Nama out of the area in rather bloody wars. The area then was occupied by the Herero. Now, the Herero are, or I should say were, a nomadic cattle people. They did not raise crops. They depended entirely upon their herds. Furthermore, it is interesting that they were not meat eaters to any extent, they used their animals, their herds, instead entirely for their milk and lived almost entirely off the milk of the animals, making cheeses and curding the milk and so on.

These groups moved about over the area. There was only a modest number of Hereros (the estimates of population are very difficult to arrive at). They moved about over the area without having any fixed ownership patterns. As a matter of fact, it is often said that if you can find the track, the spoor, of a Herero animal in the area, then that area is part of the Herero land, because they considered that if their herds had ever passed over it then it belonged to them. The Herero lived usually for a year, or even several years, in one spot, building rather crude houses at that place, but then, after a year, or several years, would usually abandon this and move onward. The general movement was basically southward, they having apparently originated in central Africa. So they were the inhabitants of the area, by and large, at the time that the first Whites appeared in the area. They had with them considerable numbers of Damaras, whom they had taken over as servants from the Nama at the time the Nama had left the area; the Damara attached themselves as thoroughly and as loyally to the Herero as they had earlier to the Nama. These were the population groups that were in the area originally.

Today there still are considerable numbers of Damaras in the area; there are large numbers of Hereros within the area. There are also within the area considerable numbers of Europeans. In the area there are two large Reserves—one the Reserve Otjohorongo, which is a mixed Herero-Damara Reserve, and the Reserve Okambahe, which is the only Damara Reserve, reserved completely for these formerly subservient peoples.

Mr. MULLER: Would you next proceed to describe the fifth region, that is, the Kalahari region?

Prof. LOGAN: The Kalahari is part of a much larger region that extends far to the eastward into Bechuanaland. The Kalahari is misnamed a desert. You see, it is a desert from the point of view that there is no water at the surface within it, and so early peoples travelling through the

area by ox-cart found within the area no surface water, no drinkable water, and so they called it a desert. Furthermore, the area is covered with thick layers of sand which in some places are still slightly moving with the wind; in most places they are fixed by vegetation, but in some places there are lines of sand dunes across it. This added still more to the idea of it being a desert.

When one comes to consider its precipitation, however, it is scarcely a desert. The driest portion of it, in the extreme south against the Bechuanaland border, receives about 7 inches of annual precipitation, and this increases in the northern part of the area to well over 20 inches of precipitation; and this means that it is a sub-humid or at least semi-arid region instead of one which is subjected to real scarcity of water. When rain falls upon the area it soaks into the soil and remains as a reservoir of water at some depth below the surface. This is tapped by the roots of trees and bushes. Consequently the area comes to be covered with bushes or with trees, and so you have the paradox of a desert covered with good vegetation.

This vegetation has long been used by some of the inhabitants of the area, and is used more extensively today by other inhabitants of the area. In the early days the Bushmen were the chief inhabitants of the region. The Bushmen are a very primitive group, living by direct hunting and gathering, with no preservation or storage of food, and in this area they found considerable herds of game which they could hunt—game of all sizes, from very small rodents up to the larger antelopes, and they lived from this. They also dug what is always referred to as *veldkos* or field food, meaning various tubers and roots, which they dug and subsisted upon. There were scattered groups of Bushmen throughout the area from the earliest times, no doubt.

The lack of water rather precluded the invasion of the Herero successfully into the area, and so it was not invaded by the Herero in the same way that the other regions were; and consequently it remains today, in a good portion of the area, chiefly a Bushman country. But in some cases the Herero were able to penetrate well within it, particularly in the central portion where there is less sand and more open, hard ground, and in this area there is today one Reserve of the Herero group, the Aminuis Reserve. Also in the area farther north they have invaded into the edges of it, and there is the Epukiro Reserve, which is partly Herero; and in the portion of the area which extends far westward in the northern part are two more Herero Reserves, Otjituuo and Waterberg. These Reserves are all peripheral to the full desert area which lies farther eastward, the full Kalahari, which is largely in occupance by Bushmen.

Europeans have come into portions of this area, and have developed their farms, the same as they have in other areas. This has been predicated upon the drilling of deep bore-holes to provide a suitable water supply.

Obviously the shortage of water would also hinder the Herero in their various reserved areas, and the Administration has drilled a large number of bore-holes, invariably some successful and some unsuccessful, on all of the Herero Reserves we have just named, as well as assisting the European farmers in obtaining water on some of their farms. Water is by far the chief problem in regard to these peripheral areas in the edges of the desert. The grazing is moderately good—it is the water supply that is the principal handicap.

Mr. MULLER: Would you tell the Court something about the pastoral activities within the Reserves?

Prof. LOGAN: Yes; the Reserves Natives, the Hereros, are still carrying on their pastoral economy, but in a somewhat different method from their former one. Formerly they moved about, as I indicated, from place to place; today they are usually stabilized with a fixed community, based usually upon a good water supply. That does not mean they camp right around the water—usually the village is somewhat removed from it, but there is water readily available within a relatively short distance; and there they build their village of quite substantial houses today, and there they live permanently, on a long-term basis; there is none of the old migratory movement.

They herd the cattle on foot, using small boys ordinarily as the herders. You see, there is a division of labour in the Herero community, ordinarily. Today they do a considerable amount of farming—raising of maize or other grains—such as millet and kaffircorn. The farming is done by the women, and the women also milk the cattle and look after the curding of the milk and the souring of the milk—to do it properly is their chief occupation. The little boys look after the cattle. The men among the Herero have always been warriors—they are warriors by tradition—and today, with the peace which is imposed upon them by the European control which prevents them from warring, it means that the Herero men consist basically of a group of unoccupied or unemployed male warriors, because there is simply no war to be carried on. They obviously are not going to herd the cattle because this is traditionally children's work; they are not going to farm because this is traditionally women's work; and consequently the Herero men—whenever one visits one of the Reserves and comes into one of the villages, one will find the men sitting about, usually, under the trees, talking, in the shade of the trees, minor politics, I presume, although I have not talked with them about their discussion of politics. They sit under the trees all day long, discussing things. The children do the herding; this means that there is no organized control of the herding, and so the cattle graze where they will, and this is usually not very far from the water. The result is that once again, as we saw in the Nama Reserves, one finds that in the area about the water-holes the original vegetation is reduced to that of a desert; it is bare ground, very often beginning to blow with the wind, with very serious soil erosion, due to the over-grazing there. At a distance of several miles from the water, then one finds that the vegetation is quite normal, and a bit beyond that is very often quite lush, because it is never grazed, except perhaps by wild game.

The contrast once again between these areas and the European farms immediately adjacent is very striking. I did considerable work on the Reserves Otjituuo and Waterberg East, studying the Reserve and the bordering European farms, and found very similar situations here, in this case with cattle instead of in the south with sheep, in this case with Hereros rather than with Damara and Namas, but very similar situations as to what I described yesterday in the southern Reserves, which I will not bother going on repeating unless it is requested—that is, that there are much better grazing conditions on the European farms due to the better control there than on the Reserves where the control is very weak.

Mr. MULLER: Are there still Bushmen within that area?

Prof. LOGAN: Yes, there is, I would say, an unknown number of Bushmen within the area. The Bushmen are not particularly on the Reserves that we have mentioned, although there are a few on each of the Reserves; basically the Bushmen are in the rather unassigned area, including the Eastern Native Reserve and going on beyond that into the areas which are merely left as unassigned lands.

The Bushmen live in very primitive conditions, totally unchanged from what they were a century or ten centuries ago. They live in very small groups with only family relationships, or at the most clan relationships, not recognizing any central tribal authority or anything of that sort. They speak a number of different dialects, all replete with these "click" sounds that have been discussed before—I mentioned them yesterday—and they depend entirely upon the food that is readily available to them by hunting or by gathering; when I say "readily", I mean that is available to them, because in many times this is very difficult to come by, especially in drought periods.

There is a very definite attempt and a very interesting attempt, which has been going on for about four years, at a waterhole called Tsumkwe in the northern part of the area, in the middle of the Great Omaheke, or Sand Belt, country. There the Administration has sent in a Bushmen Commissioner and he is attempting to stabilize the Bushmen and to change completely their way of life. It is a very interesting experiment and having very profound results. Where Bushmen groups seldom today number more than 20 or 30 there are, at Tsumkwe somewhere in the vicinity of 800 Bushmen. They have come in there because there is an adequate water supply provided by several boreholes, drilled by the Administration, and so there is an adequate water supply for the area. In addition, the Commissioner there is providing the Bushmen with ploughed land of a suitable quality for farming; the land is at present ploughed by the Administration. The Bushmen are allocated fields in this and are now planting, for the first time ever, crops; the crops are millet, groundnuts (or peanuts, as we call them in America) and a number of different types of melons and things of that sort. Since the experiment has only been going on for four years, only in the last two of which has it been possible to farm on any large scale, the results of it are, of course, something that one can only guess, but at the moment there is this interesting development taking place.

Mr. MULLER: Would you next deal with the sixth region, that is the Kaokoveld?

Prof. LOGAN: The Kaokoveld is one of the most remote, and by far the most primitive, regions in the whole of South West Africa. It is a region in the extreme north western part of the Territory. It is a rugged, mountainous country; it has most of its land in slope; it has very little flat, arable land. Its rainfall, however, is not as bad as some of the areas we have discussed before—it runs between probably 6-15 inches, and perhaps even a little more in some of the mountain areas, for an annual average.

The area is covered with scattered brush; the brush ranges from rather open brush in the west, to quite heavy brush in the eastern part, and with a good amount of grass in the ordinary year.

The area suffers very greatly from lack of surface water. There are very few waterholes within the area.

It has, as far as is known, practically no mineral development, and it

has relatively poor soils over most of the hill areas and this reduces its potential as far as arability is concerned.

The peoples within the area are the most primitive, very likely, that one will find in South West Africa, short of the Bushmen communities themselves. They consist of two basic types; some Namas in the southern part—Namas who are a splinter-group from the main Nama tribe—and, secondly, a group of Hereros. Now the Hereros are a set of splinter-groups of Hereros left behind when the main Herero migrations took place over the last couple of centuries. As the Hereros came southwards out of Angola they found the Ovambo occupying a large area and, rather than attack a very large nation such as this, they skirted round its edges and came down through the Kaokoveld. Now when they came through the Kaokoveld many of them continued onwards, but some of them remained behind. These were people who did not wish to change their ways in various lines, and who wished to remain independent and separate, and so they have remained in the Kaokoveld ever since. They dress today in the ancient tribal garb of the Herero, which consists of, in the women's case, a leather head-dress made with three horns projecting from it and a leather apron—today the rest of the Herero women, throughout all of South West Africa, dress in the mid-Victorian style of clothing first seen on the German missionary wives who came into the area in the 1880s and 1890s. These people still retain their old tribal customs completely, they have not altered in any way.

Now there is more than one group here of Herero. There are the ones who consider themselves proper Hereros, and are so considered by the other Hereros. Then there are two other groups called the Ovahimba and the Ovatjimba, and these are also Herero groups, but are more or less disowned by the main body of the tribe and they themselves consider themselves not to be part of that main body of the tribe; their language still remains, however, Herero.

These people live in their old, primitive, manner, as nomadic as is possible in an area where there is very little water, but most of them have rights to a number of waterholes and migrate, nomadically, between them. There is still a great deal of Nomadism in this particular area.

Mr. MULLER: What is done for the development of the area today?

Prof. LOGAN: As I said earlier, this is the most primitive and most remote area in South West Africa—remote because of the difficulties of transport. Despite this, there has been a considerable development of the area as far as possible, considering the groups being worked with and considering the nature of the country—the terrain particularly—along a number of lines.

For example, the area has suffered, over a long period of time, from a number of cattle diseases, which are today being combated by innoculations. Many of these diseases are highly communicable (lung sickness, for example, one of the common ones with cattle in the area) and therefore it is necessary to inoculate all the cattle within the area more or less simultaneously, and this becomes a difficult thing when you realize that these are nomadic peoples—you do not know where the cattle are at any time (it is not like a Dutch farm where you know that the cattle will be brought in each night at sunset); instead, here there is a great ranging of cattle over wide areas—and this poses a very serious problem for innoculation teams

As far as the breeding of cattle is concerned, there has been a strong

effort, on the part of the Administration, to improve the cattle breeding of the area and this has met with no success whatever. You see, the cattle, to the Herero, are slightly sacred—they have a very strong feeling for their cattle—and to introduce outside animals (bulls of some other strain) into the cattle of their particular ownership means a disruption of the blood line of the cattle, and they look askance at this, desiring not to disturb the blood line of their cattle.

As far as the people are concerned, venereal disease has been rampant in the area for a long time, and in 1957 teams went into the area and inoculated the entire community against venereal disease in an effort to stamp it out completely. The people had oral polio vaccine available to them and administered, as far as possible, to everyone in the area, very early in the development of polio vaccine.

As far as education is concerned, there are a couple of schools in the area endeavouring to bring the children into a central place where they can be taught. Otherwise, you see, it becomes almost impossible, because of the migratory habits of the people, to establish a regular school travelling with herds of cattle.

Finally, a large number of boreholes have been put down, about two-thirds of them unsuccessful, incidentally, but still there has been the drilling of holes and the production of considerable numbers of new water sources within the area.

Mr. MULLER: How does the potential of this area compare with those areas in the south that you have already described?

Prof. LOGAN: Well, I think you can make a comparison between this area and the area called the Khomas Hochland, which lies immediately to the westward of Windhoek, the capital of the Territory.

The Khomas Hochland area is—it is shown on the map here as Khomas Highlands—is very similar, almost identical, as far as the terrain is concerned, as far the physical resources all the way through are concerned. The Khomas area had, originally, a very severe water shortage. However, it is, today, a moderately prosperous Karakul and cattle raising area. The difference is that this area, being one that was settled at the very beginning (in 1890) by Germans and since then has had a succession of ownership of farms, in many cases, but all in the European grouping, has had a large expenditure of effort on it to improve it. This is individual effort on the part of the individual farmers. The result is that today it is a fairly prosperous area. Its vegetation, its rainfall, its soils, its terrain, are almost identical with the Kaokoveld area. Had the same kind of effort been extended to the Kaokoveld in 1890 or 1900 I am quite sure that the Kaokoveld would today be as productive and as prosperous as the Khomas Hochland. However, being remote, it was not so developed in the early days and the expenditures of effort being put in there within the last 15 years or so, let us say in the post-war period (post-Second World War) have only begun to be successful in the area. And there is, of course, the endless problem of, for example, combating the objection to cattle improvement through cattle breeding which holds the area back considerably, the splitting of the Native groups, the cultural inertia that develops in the area where primitive groups are concerned, these very seriously handicap such development.

Mr. MULLER: Would you next deal with the seventh area, the area termed by you "the far north"?

Prof. LOGAN: The far northern, and with this the north-eastern part

of the Territory is a rather sizeable block. Appended to it is the very curious Caprivi Zipfel, or Caprivi Strip, inserted here at the bottom of the map, which extends far eastward—bounded on the north by Angola and Zambia, and on the south by Bechuanaland—a very curious panhandle, a curious accident of political geography.

The main body of the area, that lies in the western portion of this region, is a great, flat, plain—monotonously flat—in the northern portion excellent soils, in the southern portion cursed by too much salinity in the area about Etosha Pan so that it is quite useless for most purposes.

It has a good rainfall. The western part receives a modest amount, around 15 inches where it borders the Kaokoveld. This rainfall increases eastwards, so that by the time one gets to the break in the northern boundary line of the country (between the straight line running on the parallel and the curved line running along the Okavango River) the precipitation is up to something over 20 inches, and 24 inches from Runtu eastward. This is summer rainfall with, again, a winter drought, but this area does not suffer from the droughts of a prolonged nature to the same degree that the areas farther south do. There are droughts within the area, but they are not as excessive or as prolonged as the others.

The area has an open bush vegetation in the west, a thorn bush savannah vegetation in the centre and a good forest or woodland area, extending over the whole eastern part from the eastern portion of Ovamboland at about the seventeenth meridian, all the way eastwards across the whole of the Caprivi. Some of these areas within this forested region have fine tall trees with good timber available in them.

Now with this good soil that I spoke of earlier, especially in Ovamboland, and good also extending along the whole length of the Okavango River where it makes the border with Angola, one finds that with this good soil and with this fairly reliable and fairly plentiful precipitation, it is possible here to carry on a high grade type of agriculture, and this is the centre of agricultural production for the whole of South West Africa.

The prevailing economy is one of a farming-pastoral nature. This is entirely an area of Native occupants. There are no Whites in the area at all other than a few administrators, health officers, mission people, traders and so on. The area is a strictly Native area carrying on strictly Native agriculture, but this is totally different from the sort of thing that we have been describing before. It is an area in which there is some dependence upon cattle (these people are partly cattle people), but the cattle are really supplementary to the agricultural development, because this is an area of the raising of quite intensive and quite highly productive crops, of millet (mahonga) and of kaffircorn. Both of these are small grains and are nutritious and very much used from this portion of Africa all the way across the whole of Africa to the southern border of the Sahara, to Sudan and the northern part of Nigeria and so on. Consequently, this comes to be more like the rest of Africa than the portions we have been speaking about so far.

This agriculture is dependent entirely upon rainfall and the rain is usually good enough to produce a good crop. In some years it is not. In the years in which it is not, there is no reliance whatever upon irrigation anywhere in the area. Even in the Okavango area in which the Okavango River flows even in drought years, a large river on the surface flowing very frequently right alongside of the fields which are dying of drought,

there is no carrying of water at all from the one to the other. This is in marked contrast to other parts of the world in similar situations, where one finds equally primitive groups carrying on irrigation.

This is entirely a subsistence type of agriculture, these people produce for their own needs, they do not produce for the market. Nor do they buy anything on the market. It is not a cash economy basically. There are beginnings of a cash economy starting to develop within the area, but this is only beginning, and traditionally this is a purely subsistence type of agriculture or economy.

Mr. MULLER: Can you tell us very briefly about the population groups occupying the area?

Prof. LOGAN: Yes, the groups are basically Bantu; that is, the tall Negroid groups similar to the Herero. In this case the group basically, in the western part, is Ovambo. Now this is rather a collective term because the Ovambos are themselves split into several different culture groups, slightly different from one another but with a very strong basic thread running through their culture all the way. The eastern part, along the Okavango, consists of five different Okavango groups, but there again, there is a close affinity among them. They are very similar to one another and they recognize each other as being of close kinship, as it were. They live primarily, both the Okavango and the Ovambo, in small villages, actually in kraals, palisaded circular enclosures with groups of huts within them; each one represents usually not much more than an extended family. Large towns are non-existent, instead there are these scattered kraals always in the midst of their fields, scattered over the whole area. To fly over it, one looks down on a patchwork quilt of fields, punctuated all the way through with the round circles of the kraals in which the people live. The cattle are brought right into the kraal and live in a portion of the kraal, staying there during the night and being driven out in the daytime.

There are also, in the area, scattered bands of Bushmen, but there is a big difference between the Bushmen and the Bantu, in all ways, including the type of area in which they live. The easily cultivable, fertile areas are strictly Ovambo. The Bushmen live in the areas which are more like that of the Kalahari, which we were discussing a few moments ago, which border this area, in the big forest areas, and so on, where sand is more dominant than the good soil of Ovamboland or along the Okavango. That is, they are in the areas that are not so capable of high productivity.

The Bantu look down upon the Bushmen, there is no close relationship between them. Very frequently a Bushman will visit an Ovambo or an Okavango kraal temporarily, for trading purposes, or something of this sort, but there is something of an armed truce between them very frequently, the Bushmen being looked upon as very inferior beings. If Bushmen become attached to a kraal, as they do sometimes in the Okavango, they live separately from the Okavango, from the Bantu people. They are not brought in to live directly within the kraal as though they were a portion of the family. They are considered and kept separately.

The population density is quite great in the centre of Ovamboland and along the Okavango. It is by far, excluding the city of Windhoek, the most densely populated area in the whole of South West. The population density is a very curious one. It runs very dense right up to the limit of the area, and then suddenly breaks abruptly and the area changes to one of almost uninhabited countryside. This takes place because of different

things, southward because of the salinity of the soil, westward because they come into a drier area, eastward because they come against the forest region in which there is not much surface water, the forest country being developed on sand. There is a present pioneering movement into this eastern forest country, which is very clearly visible either on the ground or flying over the area, as you travel across it.

Northward, the population density drops very abruptly, at the purely artificial Angola border. This is a curious situation; when you fly over the area, the area south of the border is very clearly densely populated, the area immediately north of it and extending as far as one can see, has a much lower population density. The fields are the same size, but there are great expanses of forest between the individual fields. This appears to be due to a drift southward of Angolan Ovambos (the Ovambo tribe is split by this purely artificial boundary) for, I think, two basic reasons: firstly because they can get employment based upon their living in the northern part of south-west more easily in the labour-demanding areas of the southern part of the Territory, in the Police Zone, and secondly, because there are very great advantages accruing to them from the health services, from the water supply augmentation and so on, provided by South West Africa, in contrast to the lesser development of that kind in this extremely peripheral area of Angola. And so there seems to be a drift southwards into South West Africa, leaving this less densely populated area immediately north of the border.

The population density, as I indicated, is fairly high. It is beginning to push perhaps, against over-population, it is reaching saturation in the area. This means that subsistence agriculture, followed continuously far into the future, would lead to poverty in the area, would lead to malnutrition and so on. The population pressure is seeking escape in several directions. One of them is to extend eastward, pioneering into the forest, as I indicated earlier. The pioneering is done first by the establishment of a cattle camp, and the cattle are moved out into it and then while they are herding cattle, they begin to clear fields and develop a patch of cleared land within the forest, and eventually the family moves to this cattle camp and lives there permanently. But all of this is predicated upon the establishment of a water resource and the Ovambo themselves are not capable of doing this because the water is at some depth. Consequently the Administration is boring water-holes throughout this eastern area, to aid in this movement eastward in the new pioneering area.

A second relief from this population pressure would be through irrigated agriculture. This is a thing that remains to be developed in the future. A third avenue of escape from over-population pressure is to develop new crops and to develop more intensive agriculture. This is being done in some areas, as I will mention a bit later on.

Finally, the other means of escape is to shift from a subsistence agriculture base alone, to some sort of base in which cash is involved and, in this, the Ovambo have come to be increasingly interested in going outside Ovamboland to work.

Consequently, under the South West Africa Native Labour Association, large numbers of them move from Ovamboland to other parts of the Territory, under temporary work contracts. Now I say these are temporary, because they are limited to a year, 18 months or two years, depending on the situation. They go out and work during that period and

return home again. When I say "they" I mean only the males. The women do not go, the children do not go, the family remains at home. To move the whole family out would defeat the whole purpose, because if they moved the whole family out, then the whole family would have to be supported by cash in the new environment. As it is, the family stays at home. The women have always been the farmers and so the women do the tilling of the fields and continue to produce the basic subsistence economy. The men go outside and work as cash workers, return with cash which can then be used to purchase additional food or clothing or any other necessities that are obtainable only with cash. These labour movements are basic today to the economy of the Ovambo people. To cut them off would cut off all cash coming into the area and would set them back very sharply.

The same is true with the Okavango people but on a more limited basis because the Okavango area is not as densely populated as Ovamboland.

So the area today is one of relatively primitive peoples in a great many ways but at a much higher level than the areas of the Kaokoveld or the areas of the Bushmen, that we were speaking about earlier; these peoples are beginning to merge into a cash economy of today out of the completely subsistence economy of the past.

Mr. MULLER: Are any attempts made in the areas of Ovamboland and the Okavango to assist the inhabitants in moving into a cash economy?

Prof. LOGAN: Yes, there are a great many efforts being made not only to move them into a cash economy but to stabilize their existing economy. The principal problem here, as everywhere else in South West Africa practically, is the shortage of water and in order, first of all, to get away from the extraordinary shortages of water that occur during the winter ordinarily, the Administration has undertaken a whole series of efforts to improve the water situation.

The first of these was started, I do not know exactly when, long before I came into the area, I would estimate about 1950. This was the construction in the area of very large and numerous reservoirs. These reservoirs are of a very unique nature, unlike anything that exists, I think, anywhere else in the world. You see, most all of Ovamboland is underlaid at a shallow depth, ranging from perhaps as little as 8 feet to as much as 25 feet, by a layer of salt water. This salt water is the residue of water that has come into the area annually, especially in the annual floods from the north, from Angola, when a sheet of water comes down across nearly all of Ovamboland, so that nearly all of the country is virtually inundated. It travels in very broad, very shallow, channels, but then, during the ensuing winter, it evaporates and the salts, which have been picked up over all the ground it has travelled over, are concentrated in this water and this water sinks and then lies at a shallow depth below the surface.

Next year more water comes in the same way and this keeps a shallow zone of fresh water available at the surface but if you dig very deep you come into salt water. Consequently an ordinary well cannot be put down, by digging in the ordinary way, to any depth in Ovamboland without encountering salt water.

Now, in order to overcome this, the Administration began constructing these curious reservoirs which consist of a series of channels leading into a sort of sump, and then, in the centre of the sump, a reservoir raised up

above the surrounding country, the walls of it being raised up above the surrounding country and the centre of it being no deeper than the level of the ground ordinarily.

Into this, water, which has accumulated in the sump, is pumped in over the top and so it is filled up and the reservoir sits up there above the surrounding country, full of water. So we have the curious situation of going uphill to the water supply.

This has been done throughout Ovamboland. Scores of these, of considerable size, ranging from 100 yards up to, some of them, one-quarter of a mile and even greater, in diameter, have been constructed. This gives a domestic water supply and a livestock water supply throughout the winter period.

More recently the diversion of water out of the Kunene River, the river along the Angola border, west of the fourteenth meridian, has been undertaken by agreement with the Angolan Government. The intake for it will actually be in Angola and a series of canals, measuring several hundred miles in length in all, have been constructed (some are still in process of construction, some are in operation already) from Angola, from the Kunene, down into this area to give a much larger water supply.

This water supply will not only augment the existing reservoirs but will actually allow some water to be used for irrigation purposes, to very greatly stabilize the agriculture.

So the pastoral and the agricultural, both, are being augmented by this water situation.

There are also some bore holes which have been put in. These penetrate of course right through the salt water layer into fresh water layers at much greater depths, depths of hundreds of feet below the surface.

In order to take care of the feeding of the Ovambos during the protracted drought which hit all of South West Africa during the period 1959-1960, it was necessary to construct roads into Ovamboland in order to get large vehicles in, carrying large quantities of food to the people. These famine relief measures, then, resulted in a transportation development in the area; and so today much of the area which in 1956, I found totally impossible to reach by automobile, is now reached over quite good roads due to this famine relief measure. More of this is going on in connection with the construction of the canals and reservoirs.

Mr. MULLER: Having dealt with the several regions, will you kindly state your conclusions on your study of South West and its peoples?

Prof. LOGAN: Yes, we can divide the Territory of South West Africa quite clearly, I think, on the basis of what I have been saying here, into two contrasting regions. Now the line between them is not a sharp one, it is rather a broad transitional zone.

We have in the south an area that is poorly endowed as far as all aspects of agricultural and pastoral activity are concerned. Its natural resources are quite limited. The sole big resource is that of the diamonds along the extreme southern coast. The area, otherwise, is lacking in most mineral resources. It is lacking in good, reliable precipitation. It has a relatively poor vegetation. That anything has been done with it, I think, is most remarkable. Vast portions of it, were they under many other economic systems, would have been left totally unused and yet they are today producing a modest income and in some cases, a fairly good income, to the people who have developed them in the last 70 years or so.

The area is partly under White control, partly in Native Reserves. The larger portion of it is under White control but this is the poorer area of the Territory, as far as the physical endowments are concerned.

Now in contrast to this, there is the northern portion of the Territory. The northern portion of the Territory has by far the best soil. It is the only area of relatively reliable precipitation and it is the only area of enough precipitation to allow field crops to be grown successfully in almost every year, perhaps 9 years out of 10. Here is the greatest area, then, for agriculture. It is also the area of the greatest population concentration, a rather stable economy at the subsistence level with the beginnings of cash economy beginning to come into it.

The southern part of the area has Reserves and European farms. Between the two there is no difference in geographical endowment, that is, the Reserves are not put on the worst lands, nor are the farms the worst lands, they are equally endowed side by side within the same area. The difference then between the Reserves and the farms is not a geographical difference. The difference between the Police Zone, the European-controlled southern portion of the Territory, and the area of the north, the Native area, is very marked in its geographical differences, the northern being by far the better endowed area.

Mr. MULLER: Professor Logan, I want to ask you a few questions relative to the inhabitants of South West Africa; would you say that the population of the territory is a homogeneous one?

Prof. LOGAN: I do not believe there is anywhere in the world a more diverse one. There is the European group, with a high cultural development, there is the Coloured population, there is the Ovambo, the Okavango, the inhabitants of the Caprivi strip, the Kaokovelders, the Herero, the Damara, the Nama and the Bushmen. This gives us a large number of peoples within the area, each one of them very distinct from the other one in most ways.

Mr. MULLER: What are the material differences between these population groups that you have mentioned, leaving aside for the moment the European group?

Prof. LOGAN: Just discussing the non-European or perhaps limiting it purely to the Native group, and leaving out the Coloured group in between, there are great ethnic differences. Their basic cultures, their religions, their traditions, their mores are very markedly different from one another. Linguistically they are completely different from one another. There are two basically completely different languages within the area: the Khoisan language of the southern portion (the Nama, Damara and Bushmen language) is basically different in all of its fundamental characteristics from the languages of the Bantu peoples. The language differences between each of the individual groups within the area—the ones I named a moment ago—are, in nearly every case, so profoundly different that one group cannot speak to the other, there is no way of communicating in their own languages between one another, they cannot understand each other. The basic root of the Bantu languages may be the same, but of course so also is the basic pattern between, let us say, Italian, French, Spanish and Portuguese, and yet there are considerable differences in conversing between those peoples, and the Bantu ones differentiate as much as that. Aside from certain curious exceptions, such as the Damara who speak Nama, none of the groups are able to converse with one another within their own language patterns.

As far as the customs and mores are concerned, we have tremendous differences in the area. Just to take two totally different quite exceptional examples, consider the contrast between the Herero and the Bushmen. The Herero are a cattle people and all of their tribal law and tradition, their customs, including marriage, and a variety of things of this sort are based upon the fact that they are a cattle people, that is one buys a bride in cattle, there is a bride price in cattle paid. The fact that they are a cattle people goes all the way through everything in their life. The fact that they were nomadic people and that the men were warriors, and that the women did other things and the children did other things, means that today, following the same pattern, the men, as I indicated before, are, so to speak, "unemployed warriors". The whole pattern of the customs and traditions and mores of the tribe is based on the cattle situation.

By contrast, the Bushmen have no domesticated animals. As a matter of fact most Bushmen bands have not even a dog, some Bushmen groups are today acquiring dogs, but this is only when they come to have a sufficiently stable situation, so they can feed a dog during times when conditions are very bad, and so they have no domesticated animals and consequently they set up a completely different set of patterns, of customs and so on.

As far as their social conditions and their political organization (I am not talking about politics, but I mean the framework of their structure of their tribe or whatever it happens to be) are concerned, the Bushmen stop at the clan, they do not go up into higher levels of tribal organization; they only vaguely recognize even their linguistic groups as being a unity; basically they stay in much smaller groups than that.

On the other hand, the Ovambo—taking another example—have an extremely strong tribal relationship, with all sorts of hierarchies of individuals and political positions within the group, with tens of thousands of members within any one of the individual tribal units. And so there are great differences here, as far as the ethnics of the groups are concerned, as far as the culture basically of the groups is concerned.

Mr. MULLER: Are these groups similar in their stages of technological development?

Prof. LOGAN: No, once again there are the same sort of contrasts. If you take the Bushmen, other than those which have been recently stabilized at Tsumkwe, the Bushmen are at the lowest technological level. Aside from a few arrow points that they always have which are made of iron which have been obtained in trade with some surrounding group, or today perhaps have been cut out of tin cans that they have obtained somewhere in trade, aside from this one item they make things only out of bone, sinew, wood, stone and hides and skins, and vegetable materials, nothing in the way of metals or anything of that nature. In other words, they are still in a sense in the Stone-Age—if you can use that terminology, because most of them live in an area where there is very little stone—but they are still in this level of culture, as far as technology is concerned. They are at a hunting and gathering level—they are nomadic and they do not ordinarily build houses, as a matter of fact they do not even build huts. They build a sort of crude shelter, perhaps a new one each day, as they move along, merely to keep the sun off them if they are sleeping in midday or to keep the wind off them at night. They build a sort of a windbreak and sleep huddled

together on a cold night, under such a windbreak. They practise no preservation of food, they kill an animal and then sit down and eat it before the meat spoils. In hot weather this may mean they have to eat it within 24 hours, and so they are used to eating prodigiously and then going for very long periods without eating. They have only the simplest of tools and they have very little for clothing, getting along with usually various skin aprons and nothing else, except in colder weather when they may put a hide or a skin over their shoulders.

By contrast, the Hereros are cattle people, now quite sedentary. They have adopted European clothing; they have donkey carts; they have sometimes even ordinary European-style trucks or lorries; many of them are today selling cream from their cattle herds, and in return are getting regular cash incomes. They have always been at a considerably different technological level from the Bushmen, they have had fixed houses, fixed villages and have been quite definitely a stabilized group; their fixed village maybe being only permanent for a year or two, but still with houses and so on; a quite different technological development from the other group.

Mr. MULLER: Professor Logan, are the economic bases of the different groups whom you have mentioned in South West Africa similar?

Prof. LOGAN: No. Once again there are great contrasts between the various groups. I have already mentioned considerable discussion here about the Bushmen living at a subsistence level, an elemental level, with no cash, practically no trade, practically not even any barter of goods or services. In contrast the Ovambo and the Herero are more highly developed on the economic basis. Many of the Ovambo and the Herero work for cash—the Ovambo in the movements out of the area of Ovamboland to work as contract labourers, the Herero, living in the towns such as Windhoek and other places in the Territory, working as employees, of Europeans usually, for cash. There are quite a number of both Ovambos and Hereros who have begun to run businesses for themselves. By this I mean businesses in the European sense of the term. They have become engaged in trade and are working as traders, both in the Reserves, in the locations or townships for Natives within the Police Zone, and in the Native territories of the north. Many of them, on the Reserves where they have large herds of cattle, sell cream and the live animals for meat and the hides of animals and so they get a cash income in that way. Sometimes this gets quite considerable. For example, I was on the Reserve Otjituuo in May, only two months ago, at which time the cattle sale was going on, a cattle auction, the cattle being sold to a large number (I would say approximately 40 to 50) of European bidders, bidding for the animals, and in the two days of the sale, 60,000 Rand, that would be £30,000, of sales were made. This represents a considerable amount of cash coming on to a Reserve from outside.

There is a considerable range of development in various ways possible among these different groups and yet the differences between the different ones make different types of development possible and likely. But today there certainly is a very markedly contrasting economic base between the different groups.

Mr. MULLER: From what you have been telling the Court, will you state your opinion as to whether the different population groups can be treated uniformly for purposes of economic development and administration?

Prof. LOGAN: As I just indicated here a moment ago, there are such profound differences between the groups today that it is absolutely necessary, in my opinion, to recognize these differences. To ignore these differences produces, or would produce, great hardship for many of the groups and for many of the individuals within the groups.

You must recognize first of all, I think, that there is a profound difference between the European and the non-European. Then, in exactly the same way, within the non-European group there are very marked differences and to try to apply the same kind of practices, the same kind of administrative techniques, to one that is applied to another might be very detrimental to one group or the other. Rather, it is quite necessary to tailor the attempts to advance each of the individual groups to the immediate needs of that particular group, rather than to try to spread one type of blanket development over all of the groups.

I think one has to differentiate between a situation in South West Africa and that in some of the other areas of the world and the way in which we often look at things. I am an American and I am somewhat familiar with the situation in some parts of America, and the difference between the Negro and the White in the United States is not nearly the same situation as that which exists in South West Africa. I grew up in a quite tolerant, non-segregated, part of the United States; I am not a Southerner that might have some other influences brought in. The background that I grew up in and in which my children have grown up since we have lived in California is that of a completely mixed society. But this mixed society has the same basic cultural pattern. There are minor differences in the cultural pattern, but not profound ones. There are great similarities in the economic base, there is no linguistic problem. The Negro and the American speak the same English in America—slight differences in dialect, but basically the same thing—we are certainly able to communicate with one another. The differences in the United States have come to be based, pretty largely, on the matter of colour, not on all sorts of customs and mores and traditions and religious differences that go very deep into the past, and not based on existing great differences in economic pattern—a totally different economic system does not exist for the Negro that exists for the White in America, the two are very comparable.

But in South West Africa it goes very much deeper. There is a total culture difference. All aspects of the culture are different. So it is not just a matter that one group is one skin colour and one group is another skin colour, there is instead a very great difference in the economy; there is a difference in the basic philosophies of the different groups; there is a linguistic difference so great that they are unable to communicate with one another; each has its own mores, each has its own religions; each has its own basic traditions, and so the difference is very great.

Mr. MULLER: Do the various groups in South West Africa identify themselves as separate groups?

Prof. LOGAN: Yes, they distinctly identify themselves as separate groups. They not only identify themselves as separate groups but they want to be treated separately in most cases. They do not mix together to any great extent.

This is evident in all sorts of ways and at all sorts of levels. You look on the street: you will not see a mixed group of Hereros, Damaras and

Namas walking together; on the street you will see a group of Hereros, and you will see a group of Namas, and you will see a group of Damaras, but they are not associating together in any mixed fashion. It is only when they are actually employed side by side that you see them side by side, but they separate immediately on leaving the employment, whether it be in a permanent way or just leaving at the end of the working day. I believe all of them want self-identification. Each one of them speaks of himself as being a such-and-such, the same as I speak of myself here as being an American and others recognize themselves in this room as being of other national groups. It is the same thing in this case—each one represents and considers himself to be a member of a distinct group, a separate group.

This is sometimes a friendly difference, as between the Nama and the Damara; sometimes it is quite an antagonistic difference, the groups do not get along well together; if they are mixed thoroughly, then all kinds of friction may develop. One goes onto a farm in which there are Herero and Damara—one will find that the group of buildings that they have built, huts that they have built to live in, will be distinct from one another, very often on opposite sides of the European farmer's residence; one side there will be the Damaras, on the other side there will be the Hereros' houses. When the locations were set up, such as at Katutura in Windhoek that I spoke of here yesterday, there were separate areas set apart for each of the different groups. You might say that this was something that was forced upon them by the European in setting it up; I am quite sure that they would have separated themselves had they all been mixed together. This I say on various bases—for example, when the first church was completed at the Katutura township it was occupied in the first service by Damaras, whereupon the Hereros refused to use it, because the Damaras had already been in it, and it was necessary to build a second church, of the same denomination, for the Hereros to occupy. They would not go into the same church that had already been occupied by, as they considered, an inferior group.

Now what the Administration in South West Africa has attempted to do is to treat each of these groups separately, so as to not ride roughshod over the feelings of these different groups towards one another, because there is no point really in trying to force one group to be like another group. It was felt much better to allow each group to develop in its own way, and then to develop it efficiently in that way. To try to apply blanket techniques all the way through to them would be a great waste of effort: some groups would not need this, other groups very definitely would, and so if a particular measure was to be applied to all groups equally it would be quite a wasted effort. Rather there is an attempt to treat each one separately which often, of course, means at great expense; to, for example, print an elementary textbook in each of the Native languages is obviously much more expensive than to print a textbook in one language and make all of them learn that language, but this is not conducive to education in the best way; more students can be gotten into the first years by carrying out instruction in their own language than by attempting to force them all to converse in one language.

With great expense, and I think great patience, a considerable amount has been done in developing the Native groups. At the present time there exists in South West Africa a peaceful co-existence between the different groups, and this is the first time (from 1910 onwards) that there has been

peaceful co-existence. Previous to that, through all of history, there has been nothing but antagonism between the various groups.

This permits each group to have an equal opportunity, but a different kind of opportunity—an opportunity tailored to his own particular needs and his own particular desires.

To permit totally equal opportunity for all groups to do everything that they wished would result in exposing many of the groups to very unequal competition. This competition would come, of course, from the more advanced groups. This might be competition from the European. For example, I mentioned that the Hereros and the Ovambos are today carrying on trading within their Native areas, whether it be the Reserves of the south or whether it be the areas of the north. To open this to equal opportunity would mean that the White man would be allowed to come into the area; if he came into the area in an uncontrolled way (there are traders in the northern area today, but they are very severely controlled by the Administration in regard to their prices and their bargaining and their extension of credit, and everything of this sort, even in regard to their personnel that they employ). Now if this was thrown open to equal opportunity, all sorts of avaricious entrepreneurs would move into the area, and in a short time the existing system would be a shambles, and the Native traders, who are today able to compete quite well with the permitted White traders in the area, would be totally out of business.

This would also work out in various other ways: for example, if in all ways the thing were opened up to complete equal opportunity, it would be only a very short time before either one of the two more important groups of Natives in the area would dominate the others; this would be either the rather outspoken, aggressive, forward Hereros or the much more numerous Ovambos. If things were done on a voting basis, obviously the Ovambo would outvote the Herero many times. If, on the other hand, it was done in a business way, or something of this sort, the much more opportunistic Hereros would probably dominate the Ovambo.

But the even worse thing to consider is what would happen to the Bushmen, to the Damara and to the Nama, to the Kaokovelders and people of this sort, who would be exposed to a very serious situation of encroachment upon their rights in all ways by the other tribal groups. Consequently it comes to be a matter of applying controls over the whole situation and allowing opportunity as far as possible, but not developing things in the same way for all of the tribal groups.

Mr. MULLER: Do you consider that measures of differentiation to protect the various groups are necessary?

Prof. LOGAN: Yes, I think there are protective measures in existence today that have to be continued. The first of these, I think, are protective measures to reserve the lands of the Natives—this is to reserve the lands of the Natives against the Whites. I have just painted a quite nice picture before the tea recess of the northern part of the Territory.

There are a great many White farmers on rather drought-stricken farms in the south who would be delighted to move into the Okavango and push a group of Okavango Natives out of the area. They would do much better with the area than is being done today: for example, they would immediately start irrigating and they would produce very high productivity within the area. This is being encouraged today by the Administration, but not for Whites, being encouraged instead for the Natives to carry on irrigation agriculture. There is a scheme, at the present time, at Vungu-

Vungu, near Runtu, where a small area is being irrigated as a demonstration to the Natives of what can be done. This is no experiment, it is known very well what crops can be raised in the area, and they are almost multitudinous, provided irrigation water is put on. Now, today, the encouragement is being given by the Administration, to the Okavango Natives, to enter into irrigation agriculture. Were controls to be pulled off, we would find that, instead, we would have some European irrigationists in the area very quickly.

The same is true of Ovamboland. Much of Ovamboland is very fine agricultural land. If it were not under control, certainly many Whites would move into the area and take it over.

A second thing, I think, that has to be controlled and protected, is a thing I have mentioned already, the matter of trading interests. There is only a nascent trading business, a beginning trading business among the Natives, with the Natives. This is just in its embryonic stages, it has only been a thing of the last 15 years or so, in most cases. Given another 15 years, we ought to have a rather considerable merchant class, I think, started, within the Ovambo particularly, and to a very considerable extent, among the Herero. To remove controls of this sort would leave this wide open for others to move in and destroy this thing that is beginning.

It is necessary, I think, to control population movements within the area. You see, to many of these people, the city becomes the same goal that it has throughout the Western world. We have had everywhere throughout the Western world the abandonment of agricultural areas and the influx into cities, because of the many attractions of cities. We have seen this in England and in Western Europe, we have it in the United States, it is developing in many other areas of the world. In the recently independent Republics of Africa, there has been tremendous flocking to the larger cities.

All of this causes a very serious problem—a very serious problem from two sides—a serious problem from the side of the city itself, which is faced with a housing shortage, a sanitation problem, a health problem, and a very serious problem from the side of the Native too, or the person coming into the city, whoever it is. This is a problem of employment, of supporting himself. First of all, it must be realized that he is probably an untrained person, coming from a rural area into a quite complex and intricate urban situation. He is not skilled and, therefore, he can only do unskilled labour until he is trained, and if there are a great number of such people, then they come to create a terrible problem of unemployment and, of course, then of support.

In order to try to prevent this sort of thing, there is the attempted influx control, of population movement control, so that the cities will not come to be inundated in a tide of humanity flooding in because of the—so to speak—bright lights of the city area, the desires for city living and so on.

At the same time, there is the attempt to make the Reserves more attractive to them, the Native territories more attractive to them, by introducing therein a better way of life, and that is the basic attempt being carried out at the present time.

Finally, I think that the really, perhaps most important, of all of these, is the need to protect and to allow to develop, the traditional institutions of the people. I am not thoroughly convinced that our Western way of life is absolutely ideal (we seem to have a few flaws in it from time to time) and perhaps some of the Native institutions are as good as ours.

I do not think there is any crying need to abolish these totally, and to superimpose upon a group of people a totally different way of life. There is a lot of dignity, there is a lot of common sense, there is a lot of self-respect, there is a lot of good, in a lot of the various types of Native tradition and culture. To wipe this out by superimposing a Western way of life instantly upon them, can very well bring about a rather chaotic situation, a deculturized society. We have seen this in many areas. We have seen it where groups have flocked into cities, for example. We see it where we attempt to force, for example, an American or European way of life upon the American Indian. It often has resulted in a personality disintegration, in social disintegration, alcoholism, things of this sort.

Now perhaps the better thing to do is to permit the original traditional institutions to remain and then to develop, within the framework of the traditional institutions, something in the way of a better way of life from the practical point of view, from the very materialistic point of view, to give them better food, to give them health services, to educate them, but to educate them still within the framework of their old traditional society; and the modern ideas can come in gradually, but not be suddenly forced upon them. I emphasize, perhaps most importantly, "forced upon them", that is, to let the idea come gradually, but not to impose a new way of life instantly upon them. So, in each case then, it is a matter of allowing to develop the individual group within itself, rather than to force a different type of culture upon all of the individual groups.

Mr. MULLER: One final question, Professor Logan. What, in your opinion, would happen if these measures of protection and control that you have referred to, were to be done away with, in South West Africa?

Prof. LOGAN: Well, I think probably what I have said during the past few minutes has somewhat led up to this: that to remove the controls would result in the domination of many by a few, would perhaps result in the subjugation or almost the obliteration, of some of the existing tribal groups, it would result, I think in many cases, in a reversion to an old way of life and that was a way of violent antagonism and frequently of warfare.

The economy, as it has been developed, both on the European basis, and on the Native basis, would, to a large extent, fall apart. In other words, what I would visualize myself, if all controls were to be abolished in the area and all differentiation between groups ignored, I am afraid a rather chaotic situation would develop.

Mr. MULLER: Mr. President, I have no further questions to put to the witness.

The PRESIDENT: Mr. Gross, would you wish to cross-examine?

Mr. GROSS: Yes, I would, Mr. President. I shall endeavour to do so with respect for the time requirements. There may be some difficulties to sort out, particularly the answers to the last questions and the rather lengthy responses, and it may not be possible, therefore, to include those within the range of the cross-examination, which I should like to commence now, with your permission, Mr. President.

Professor Logan, in your testimony yesterday, you defined geography, I believe, as the relationship between man and the land. Is that not correct?

Prof. LOGAN: Yes, that it is correct.

Mr. GROSS: And you said also—I refer to page 337, *supra*, of the verbatim of yesterday, which I shall . . .

Prof. LOGAN: I do not have the verbatim.

Mr. GROSS: I will quote to you, and I will cite the page in each case. Mr. President, if the witness wishes to have a copy of the verbatim . . .

The PRESIDENT: I think the witness may leave himself in the hands of both the Court and of counsel who have examined him.

Mr. GROSS: Thank you, sir. In the verbatim of yesterday (which I shall refer to from time to time)—7 July 1965—at page 337, *supra*, you said that it was necessary "to know about . . . the stage of material development of these people" (this was parenthetically)—I stop quoting now—in respect, I think, of your analysis of what was involved in the study and considerations germane to the field of geography in general and in particular, your own analysis of the local situation. Is that correct?

Prof. LOGAN: Yes, that is correct.

Mr. GROSS: You said that you were "also interested in the economic phases because the whole basis of economy is an integral part of the study of the geography of an area". I remind you that you have said that; that is correct to your recollection, is it, sir?

Prof. LOGAN: Yes, that is correct.

Mr. GROSS: And you said also, on the same page: "The geographer focuses upon the land . . . the anthropologist in man. In each case we are an integrated discipline, in that we draw upon all of the surrounding fields for a great part of our knowledge . . ."

Prof. LOGAN: I think that should read "integrative".

Mr. GROSS: Integrative discipline.

Prof. LOGAN: Yes, we are drawing upon other fields.

Mr. GROSS: So that in your consideration of the problems with which you were dealing and the conclusions you reached concerning them, it is fair to say, is it not, that you took into account economic phases of the situation in the various parts of South West Africa that you studied?

Prof. LOGAN: Yes, to the best of my abilities.

Mr. GROSS: And that this included the southern sector—what you refer to as the Police Zone—as well as the other areas?

Prof. LOGAN: Yes, certainly.

Mr. GROSS: And particularly in respect of the southern sector or Police Zone, that included also the areas outside of the Reserves in that sector, did it not?

Prof. LOGAN: Definitely.

Mr. GROSS: And you said also, in your testimony, at page 339, *supra*, that you "stayed on and lived upon European farms in each of the basic areas of the country". That is correct, is it not?

Prof. LOGAN: Yes, that is correct.

Mr. GROSS: And those farms, I believe, did they not, included a certain number of farms in the Police Zone or southern sector, outside the Reserves?

Prof. LOGAN: Yes, well there would not be farms anywhere else.

Mr. GROSS: There would not be White farms anywhere else?

Prof. LOGAN: That is correct, yes.

Mr. GROSS: There are farms in the Reserves, are there?

Prof. LOGAN: Well, it depends what one calls a farm. In South West African terminology, a farm is an area of land that is allotted to a particular European individual, as far as I know, always a European individual, and that this has certain prescribed boundaries surrounding it, and is his own personal development. In contrast to this, on a Reserve, the land is

allocated to the tribe or a portion of the tribal unit, and then is administered by the tribal group, a Reserve Council ordinarily handles it. Then within this, there are not any prescribed boundaries allocated to an individual tribesman, instead they graze by agreement with one another, and so this would not be a farm, in our ordinary western sense of the term, I think.

Mr. GROSS: Thank you. If I understood you correctly, in the southern sector of the Police Zone outside the Reserves, the word "farm" is synonymous with the phrase "White-owned farm".

Prof. LOGAN: Yes, with the exception of the Rehoboth territory where there are Coloureds owning farms in the same way as the Whites elsewhere, that would be the only exception.

Mr. GROSS: There are approximately how many persons classified as Whites in the southern sector outside the Reserves?

Prof. LOGAN: There would be practically the White population of South West Africa, which if I am correct, runs around 70,000 now.

Mr. GROSS: That would be my understanding as well, approximately.

Prof. LOGAN: I do not have a good mind for figures and I would not be able to quote right here the population, but it would be something of that sort.

Mr. GROSS: Yes, I think the record demonstrates that; I just wanted to establish it in this context. I do not want to hold you to exact numbers.

Prof. LOGAN: Not all of these would be farmers, because there will be the towns-people, but the point I was in a sense making, is that there are virtually no Whites living on the Reserves or in the northern territories, aside from a small administrative personnel.

Mr. GROSS: There are approximately 70,000 or so persons classified as Whites, and how many persons in the same area (that is, in the southern sector outside of the Reserves) are classified as non-Whites—can you tell the Court?

Prof. LOGAN: Again I cannot quote the figure—I would guess it was perhaps 120,000 or something of that sort.

Mr. GROSS: That I think would be about the ratio. For the purposes of my forthcoming questions I wanted to have these approximations in the record at this point. Going back to your testimony to establish the ambit of your study and analysis, and therefore perhaps your conclusions, you said that you "do not mean to exclude politics from culture". I think you said that on page 343, *supra*, of the transcript of yesterday. Shall I read the entire sentence to you or do you recall what you said in that respect?

Prof. LOGAN: I think I recall what I said: the implication I meant was that we study in geography most aspects of the culture of a group, and then you asked me specifically about politics, about the political situation, and I said that this was not in my field, and that while I do not exclude politics from culture, I do not here study politics particularly.

Mr. GROSS: I think then perhaps just for the sake of clarity, with the permission of the President, I should like to read one sentence which may otherwise leave this colloquy somewhat obscure. I then asked you, sir, the following question at page 343, *supra*, of the verbatim report:

> "Did you have discussions, extensive or otherwise, with respect to the political or economic relationships of individuals to the

society, or were your discussions primarily centred on the relationship between man and land?"

And your answer, according to the verbatim, subject to your correction, is:

> "I have not held any political discussions to any extent with anyone; I am not interested particularly in politics *per se*, and consequently I am not an authority on the politics of the Territory, and have not really been seriously interested therein. As far as the economic aspect is concerned, yes. As far as the cultural aspect—by this I do not mean to exclude politics from culture, but at any rate the study of the culture of the peoples, whether they be the Europeans or the Natives, is very much a part of my field of study. Consequently I have talked with and observed the various culture groups within the area quite intimately. This means having talked with at close range, over considerable periods of time, Natives as well as Europeans."

That is the full context, Mr. President.

Prof. LOGAN: I would stand by that, if there is any question.

Mr. GROSS: It is just that I wanted to fix that in your mind, so that you should have the full context. Also, in respect of the question I asked you, at page 343 and I will read it to you:

> "And did you, Professor Logan, regard that it was a part of your study and analysis, from any technical or scientific point of view, to consider the questions involved in limitation of rights or freedoms of individuals, or any aspect of the relationship between man and society on a political or individual basis?"

And your answer according to the transcript on page 343, was: "Well, as I just said, I am not interested in the political aspects, and I have not gone into that." And then I think it is a fair paraphrase of the rest of the paragraph that you said that you were not able to recite, or did not know thoroughly, the laws and regulations involved in the relations between Natives and Whites, or the types of laws in the area, that you were not in any way an expert on legal aspects, and that you are, I will read this:

> ". . . quite aware, however, of the rights and privileges and the limitations thereon, as anyone living in and observing critically and carefully as a society ordinarily is, and consequently I think I can talk with a fair degree of certainty in regard to how much freedom or lack thereof there is on the part of the Native group in South West Africa".

That is at page 343, *supra*, of the transcript. Do you recall, sir, that that is substantially correct?

Prof. LOGAN: Yes that is correct.

Mr. GROSS: I would like just to ask you one more question in this general range of the setting in which your studies and analysis of conditions in South West Africa took place, and also of your description of various techniques or disciplines which enter into this area. That is by way of background to my question. According to the transcript on page 344, you said that economic and sociological—meaning I think, interests—"begin[s] to get more into my realm". This is, for your comment, quoted—would you explain that please, sir?

Prof. LOGAN: I think you had better give me the sentence before.

Mr. GROSS: I would be very glad to, sir. I asked you for clarification, and I think that I had better start here, following the quote I just read into the record with regard to your answer to my question about "analysis or considerations of questions involved and limitation of rights or freedoms". You then gave the answer which I read a moment ago. Then I said:

> "And would your observations and opinions on that subject reflect scientific or technical observations or analysis?"

And you replied at page 343, *supra*:

> "No, they would not reflect scientific or technical analysis. They would be that of a person who has lived in the area, who has observed it carefully and keenly as a part of obtaining the total background of the area, but in order to report scientifically or technically upon it, I am afraid I would have to have a legal background or a political science background, and I do not have this; I would not set myself up as an expert in those fields."

And then I asked you, sir:

> "Those fields being the political, economic and sociological fields? I just ask you for clarification, sir."

That was my question—your answer was:

> "No, I said political fields and legal fields; when it comes to economic and sociological fields, this begins to get more into my realm, and there on at least a number of facets I think I can testify with a fair degree of certainty and with a fair degree of technical knowledge."

It was in the context of that response that I asked you whether you could perhaps clarify or elucidate for the consideration of the benefit of the Court, the meaning of the phrase: "When it comes to economic and sociological fields, this begins to get more into my realm." Would you explain that, sir?

Prof. LOGAN: Well I mean, as I had said earlier, I was not concerned with and not particularly interested in the political aspects, and then the question was raised in regard to economic and sociological, and I said that at this point I begin to be interested; the point being that the relationship between man and the land, which is the focus of my particular field of interest, is not borne upon too greatly by the legal aspect or the political aspect, but much more so by the economic and the sociological aspect. Furthermore, I am not trained, in the first two, in the legal and the political, I am trained primarily in the geographical, and in the geographical we reach out into the fields of economics and sociology, not absorbing all of those fields by any means, but drawing from those fields such aspects of their branch of knowledge as are appropriate to the relationship between man and the land and the development of man in the physical environment.

MR. GROSS: Now I would like then, in the context of the distinctions you have been drawing or seeking to present to the Court, with respect to such generic terms as "politics", "economics", and "sociology", to ask what relevance those distinctions may convey, or what you intend to convey by those distinctions, with respect to the

following statement which you made in response to a question, at page 343, *supra*, of the record, in which you said:

> ". . . I can talk with a fair degree of certainty in regard to how much freedom or lack thereof there is on the part of the Native group in South West Africa".

Were you excluding—if I may break this down to a series of short questions, hoping for short answers if that is possible and fair—when you used the phrase "freedom or lack thereof" in that context are you excluding political considerations? What elements do you take to comprise the concept of freedom or lack thereof, in that sentence?

Prof. LOGAN: I would say it was freedom to move about, freedom to carry on one's way of life as already established, freedoms of this sort. I would probably exclude basically political freedoms, because again I repeat, I am not an expert on the political aspects and I would not want to testify before this Court on the matter of the political freedoms in South West Africa, because I have never studied it. I do not feel competent in it.

Mr. GROSS: Therefore would it be fair to say that you wish the Court to understand that when you, during your testimony, referred to the imposition of controls, or the releasing of controls, or the wiping-out of controls—phrases of that sort—that by "controls" you do not refer to legal controls, or controls of a political nature? Is that what you mean?

Prof. LOGAN: No. I think the controls obviously have to have a basis in law and so they would be legal controls and I would continue to include them but don't ask me, please, to cite chapter and verse or to cite the Statutes, because I am not aware of the Statutes. I have never studied the matter from the legal point of view. I do not know about the Mining Law of 1920 something or other. This sort of thing I am not aware of. I am aware of its consequences, I am aware of it in its generalities, but I cannot quote the specifics of it at all. That I would leave to a legal mind, which mine is not.

Mr. GROSS: And the same thing would apply to the political aspects as well—a political mind?

Prof. LOGAN: To the political aspects, as far as it is a matter of politics. Now, I certainly am aware of the difference between the political institutions of, say, the Ovambo, in contrast to the political institutions, or the lack thereof, of the Bushmen. Political institutions become a sort of sociological institution in a sense when we are talking this way. But, as for the political movements within the country today, the different political parties within the country today, of these I am not cognizant to any extent. I would not want to testify on them.

Mr. GROSS: Then, shall we discuss for a moment this question in terms of the relationship of the individual to the society, rather than in terms of political groups or movements? The individual, you would feel or concede, is a political being, lives in a political society and has a political relationship to that society?

Prof. LOGAN: Yes.

Mr. GROSS: And is the object of that society normally to confer a certain measure of political freedom or discretion upon him, normally speaking?

Prof. LOGAN: Not in all parts of the world at all times, no.

Mr. GROSS: Can you think of a society in which no degree of political freedom or political liberty is reposed in the individual?

Prof. LOGAN: I think we have had many such societies in the past, yes.

Mr. GROSS: We have had slavery in the past, have we not, sir?

Prof. LOGAN: Yes.

Mr. GROSS: I am talking about contemporary society. Do you wish to qualify the answer or did I misunderstand you perhaps?

Prof. LOGAN: Well, no, I think in our modern world today there are some societies in which the individual has practically no political freedom.

Mr. GROSS: Can you name one?

Prof. LOGAN: I don't want to, sir. No, I would prefer not to.

Mr. GROSS: Well, will you withdraw your answer if you do not care to specify what you had in mind?

The PRESIDENT: I don't think so, no, Mr. Gross. If the witness declines to answer, if he says he does not desire to answer, the Court will note what he said and the value of his answer will be judged accordingly.

Mr. GROSS: Yes, Mr. President. Thank you, sir—I just gave the witness the opportunity, if he wished to exercise it, to withdraw the answer.

Returning to the statement that you could talk with a fair degree of certainty in regard to how much freedom, or lack thereof, there is on the part of the Native group in South West Africa—please ask me to clarify the question if you find it too general, Professor Logan—do you consider that in your responses to the questions addressed to you by my distinguished colleague, Mr. Muller, that you have expressed opinions with regard to how much freedom, or lack thereof, there is on the part of the Native group in the southern sector outside of the Reserves?

Prof. LOGAN: I don't think I have been asked the question by Mr. Muller as to how much freedom there is, or perhaps I misunderstand your question.

Mr. GROSS: Well, I can repeat it if you wish me to, sir.

Prof. LOGAN: I think you had better, perhaps, yes.

Mr. GROSS: With the Court's permission—can you say whether or not, in any of the responses you gave to questions addressed to you by Mr. Muller, you expressed an opinion, or intended to express an opinion, with regard to how much freedom, or lack thereof, there is on the part of the Natives in the southern sector outside of the Reserves?

Prof. LOGAN: No, I do not think I was asked that question and I do not think I answered it. If you wish to ask it I shall be glad to reply to it.

Mr. GROSS: Thank you sir, I will ask it if I wish. The answer that you gave was that this question was not within the range or scope of any of the answers you gave to Mr. Muller—this question of the rights and freedoms of Natives in South West Africa in the southern sector outside the Reserves—is that correct?

Prof. LOGAN: Yes, I think that is correct, but I repeat that I will be glad to answer the question if it is desired.

The PRESIDENT: You must answer the questions put by Mr. Gross.

Mr. GROSS: I think that invitation will be accepted in due course.

When you said (in one of your statements which I quoted from yesterday's verbatim with respect to the economic phases) "because the whole basis of economy is an integral part of the study of geography

of an area"—that I quote again from page 337, *supra*, I should like to ask you whether, in considering the economic basis of the economy of the southern sector outside the Police Zone, you took into account in your studies the role of the Native (the person classified as Native in that area) in the "White economy" (as it is sometimes called in the Odendaal Commission report) the role of the Native, in any definition of the word you wish, in the economy.

Prof. LOGAN: Yes, I very definitely did.

Mr. GROSS: How would you describe to the Court what the role of the Native in the so-called "White economy" is?

Prof. LOGAN: The Native in the White economy is distinctly an employee of the European, or White, farm owner, business man, industrialist, or householder. The land, as far as the Territory outside the Native Reserves within the Police Zone is concerned, is all under European ownership. The businesses are under European ownership. The Native is therefore, wherever he is living or working, an employee of the White business man or farm owner or householder, and so on. He is working for wages plus, as I indicated before in discussing the farms, usually a considerable amount of his subsistence, that is, in the form of rations, clothing, housing, etc. This is true whether it be in an urban area, normally, or whether it be on a farm. The ratio is usually, on a farm, in the neighbourhood of perhaps four or five Europeans on the farm to 50, or thereabouts, Natives. This is not 50 employees, it is 50 individuals living on the farm. Of this number, somewhere in the vicinity of five or six are usually male employees as herdsmen, or people of that sort, plus two or three people working as house servants, laundresses and so on.

Mr. GROSS: Thank you. Are you finished, sir?

Prof. LOGAN: Is this sufficient?

Mr. GROSS: Well, I will ask you if I feel that the Court might possibly benefit by further elucidation; the Court might do the same, of course, at any time.

The question that I should like to follow the one I have just asked you is whether or not, in your study of the economic base (first taking South West Africa as a whole, and then taking separately the southern sector outside the Reserves) with respect to South West Africa as a whole, you would regard the economic base of the Territory as a whole to be interdependent for its successful functioning?

Prof. LOGAN: The entire Territory to be interdependent? No, I don't think so. The southern Police Zone area, if it were carved out from the rest of the area, could subsist very well on its own. It is not dependent upon the northern territories as a basic part of its existence. The present European population in the area could exist very well without having either the Native Reserves or the Native territories of the north in existence at all—if they were surgically removed, so to speak.

Mr. GROSS: If that area were excised from the Territory, it could survive and even thrive, according to your judgment?

Prof. LOGAN: Yes, I think so.

Mr. GROSS: Would it be true in reverse? Would the areas of the Territory that would remain after such excision be able to thrive in the same sense?

Prof. LOGAN: They would be able to thrive in the same sense, yes. They are basically still subsistence economies. They would suffer greatly from

the loss of health services, educational services and the cash income which has enabled them to raise themselves considerably above the former subsistence level that was a pure subsistence level. But they could still exist, yes.

Mr. GROSS: On a subsistence level?

Prof. LOGAN: They would lower their level, but they would still exist.

Mr. GROSS: But would there be any prospect or hope of them rising above a subsistence level under those circumstances?

Prof. LOGAN: I am afraid it would be very difficult for them.

Mr. GROSS: Would it be possible?

Prof. LOGAN: This is without any outside assistance of other sorts? Are we operating in a vacuum, in other words?

Mr. GROSS: In the same sense that you referred to the possibility of the southern sector surviving and thriving as a unit—in that same sense, I ask whether the areas outside the southern sector could survive and/or thrive, except on a subsistence basis?

Prof. LOGAN: They would survive and continue to thrive on a subsistence basis. They would progress only with very great slowness and with great difficulty and I doubt very much if there would be virtually any progress.

Mr. GROSS: Now, specifically, for example, it has been established, I think, in the record that approximately some 26,000 Ovambos are recruited for labour in the southern sector. Does your understanding correspond to that figure, sir, approximately?

Prof. Logan: Yes.

Mr. GROSS: Now, is the labour of those persons essential to the effective functioning of the "White economy", as it is referred to in the Odendaal Commission report?

Prof. LOGAN: I don't necessarily agree with everything in the Odendaal Commission report, and this is perhaps a case in point.

Mr. GROSS: May I correct the record, sir, just so that the answer to that exchange will not be misunderstood. My reference to the Odendaal Commission report merely related to the description of the "White economy", not to any of the substance or policy implications of what it said.

Prof. LOGAN: I think that the southern White economy would adjust itself rather quickly to the loss of the Ovambo labour were this to be cut off, and this would mean that the southern economy would have to mechanize very rapidly and I think that the economic base is such that it could afford to mechanize rather rapidly. I think that this would result in the economy operating almost immediately if this were a sudden cut-off; within a year or so it would be adjusting itself well to the lack of the labour. On the other hand this would cause a very serious problem in Ovamboland because there would not be the flow of cash into Ovamboland and therefore the Native economy of Ovamboland would suffer far more than the European economy of the south.

Mr. GROSS: So that—if I understand you correctly—there is a very definite inter-relationship, economically, between the two areas?

Prof. LOGAN: There is a definite economic relationship between the two areas, but the southern area could get along without the northern, but the northern would have difficulty because of its lack of cash income if it were cut off.

Mr. GROSS: Now, Professor Logan, I should like to ask you whether the southern sector could "get along", as you express it, without the use of so-called non-White labour?

Prof. LOGAN: Well, we were first discussing only the Ovambo labour. I think it could get along . . .

Mr. GROSS: No, I am now talking about non-White labour, using that phrase in the sense in which it is generally applied in the Territory.

Prof. LOGAN: The non-White labour employed on the farms, the labour which is basically from the residents on the farms, this is still a rather integral part of the economic pattern, and I think that this would suffer considerably. Not the imported labour from Ovamboland, but the local labour is an integral part of it and I think that this would probably cause some difficulties at the outset.

However, I think it would be, again, a matter of only a relatively short time before the European farmer, if deprived of that labour, would again adjust himself, through mechanization and other things, to the point where he again would get along without that labour.

I say this on the basis of the contrast between the number of labourers employed in South West Africa and the total number of individuals employed in similar operations—cattle or sheep ranching—in the United States, where there is no Native labour available (with quotes around the word Native in this case) and where, consequently, the American ranch owner has had to learn to do his own work from the beginning and does not depend upon the Native labour at all. In the case of the South West African farmer there is a very definite intent, very often, to find work for the Natives living upon the European farm.

Mr. GROSS: Professor Logan, can you think of any reason, or reasonable basis, upon which, in your phrase, the farms should be "deprived" of Native labour? Is there any basis upon which that should take place? I was puzzled by your answer to my question.

Prof. LOGAN: Just this moment, you mean?

Mr. GROSS: Yes. You said that if they were to be "deprived" of it—by "deprived" did you mean simply if there was a law which prohibited it?

Prof. LOGAN: If the labour were removed, I thought that was your question?

Mr. GROSS: Yes, well I just wanted to understand what you meant by "deprived".

Prof. LOGAN: No, if the labour were removed from the farms by any means, by any requirement.

Mr. GROSS: Such as by legislation?

Prof. LOGAN: By legal action, yes.

Mr. GROSS: By legal action, or by total separation of the groups?

Prof. LOGAN: Alright, yes.

Mr. GROSS: In this context, do you understand the policy which you observed, and which you perhaps learned about in discussions with persons in South West Africa—do you understand the policy being applied, or suggested, to have in view the total separation of the Whites from the non-Whites in this area?

Prof. LOGAN: I do not think that the total separation has ever really been envisaged. I am not the author of any of these reports and consequently I do not know what was in their minds, and I am not certain consequently of the intent, but I believe that all of the plans that have ever been envisaged have envisaged a continuing use of Native labour on the European farms and in other ways within the White area of the Police Zone. The matter is then up to the voluntary movement of the peoples from the Reserves, which are inherently their land, on to the Eu-

ropean farms, which are inherently today in White control, and I think that all of the plans, as envisaged, envisaged the continuation of this Native labour supply.

Mr. GROSS: For the indefinite future, so far as you are aware?

Prof. LOGAN: I think so.

Mr. GROSS: And you have never understood from any of your observations—political, sociological, or cultural investigations—in South West Africa that there was any policy proposed for total separation of the races at any time in the future?

Prof. LOGAN: I do not believe so, no.

The PRESIDENT: Mr. Gross, I wonder if you could complete the picture by asking the witness—I think it might be of assistance to the Court—the number of contract employees (I think it is about 25,000) and of the 120,000, how many of those would be employed on the farms, or live on the farms. It might complete the picture.

Mr. GROSS: Thank you, sir. With your permission, sir, may I borrow your phraseology and put it in the form of a question to . . .

The PRESIDENT: Please use your own, for more impact.

Mr. GROSS: Would you answer the question as if it had come from me, if the President will permit me to handle it that way?

Prof. LOGAN: Yes. Of the 120,000 Natives living on the farms, of course this includes the women and children and therefore the actual number of employees is very, very, much less than 120,000. I do not know the figures, I am sorry.

Mr. GROSS: Perhaps we could endeavour to obtain those and supply those for the record.

Prof. LOGAN: I would be glad to, yes.

Mr. GROSS: We would be prepared to co-operate to that end?

Prof. LOGAN: Yes, I think we could.

Mr. GROSS: Thank you. I would like to continue with the analysis, such as you may have had opportunity to make in your studies in South West Africa, with respect to the economic base and the relationship of the Native, according to the census classification, to the so-called "White economy". You have mentioned farms. Now, did you have occasion to examine, or observe, or discuss the matter with respect to industry, or mines?

Prof. LOGAN: With respect to industry in a minor way—a very minor way; in regard to mines, no.

Mr. GROSS: You have no views with respect to the role of the Native, or the necessity of the Native, with regard to the . . .

Prof. LOGAN: I have views, yes, but I did not conduct investigations, no.

Mr. GROSS: Did your views enter into your conclusions with regard to the economic basis of your studies of the relationship between man and land?

Prof. LOGAN: Yes, to some extent. Remember we are talking about land, and when we start with industry it is much less of the land than is the case when we are dealing with farms, etc. Therefore my interest in the role of Native labour and things of this sort in the industry is much less than my interest in the role of Native labour on the farms.

Mr. GROSS: Would you wish the Court to understand, in evaluating your testimony and your views, that you do not primarily concern yourself with, or have not addressed yourself to, the problem of relationship

of the Native to the industrial or mineral sector of the economy? Is that a correct statement?

Prof. LOGAN: Well, remember that the numbers of people involved in industry are very few compared to the total numbers involved in agriculture and pastoral activities, and that the numbers involved in mining again are relatively few, with exception of the diamond mining of the extreme south.

Mr. GROSS: May I ask you, sir—when you say "relatively few", relative to what?

Prof. LOGAN: To the total number of population, or to the number of people involved directly in the agriculture or the pastoral activities.

Mr. GROSS: Are you referring to the total population of the Territory?

Prof. LOGAN: No, I am referring to the total population involved in industry, in contrast to the total population involved in agricultural and pastoral pursuits, or the number of employees in industry in contrast to the number employed in agriculture and so on.

Mr. GROSS: I think we can clear this up readily to dispel any confusion my question may have engendered. Referring to the southern sector, outside the Reserves, we have established, I believe, that there is a total permanent non-White population of approximately 125,000. How many of that number, roughly, are engaged in farming enterprises or work for farmers?

Prof. LOGAN: The number I cannot state.

Mr. GROSS: Percentage-wise?

Prof. LOGAN: Percentage-wise, yes. Probably 80 per cent.

Mr. GROSS: Probably 80 per cent. So that 20 per cent. are presumably engaged in some sort of gainful employment elsewhere, or otherwise, are they not? Would they be then, normally speaking, employed in mines, or industries, or domestic service, that sort of thing?

Prof. LOGAN: That is right.

Mr. GROSS: About 20 per cent.?

Prof. LOGAN: That would be my estimate.

Mr. GROSS: Now, with respect to that 20 per cent., which at my calculation is roughly 25,000 people . . .

Prof. LOGAN: Not employed, however—25,000 people dependent upon, because remember we are including women and children . . .

Mr. GROSS: I am talking about all those to whom employment means a living, not those to whom employment merely means working. I was referring to the group that is dependent on a certain sector of the economic life. With respect to those 25,000, whose life is dependent upon non-agricultural functions in the southern sector, outside the Reserves, have you then considered and analysed their role with respect to that sector of the economy, in any respect?

Prof. LOGAN: Yes.

Mr. GROSS: In that context, have you considered what the effect would be upon the economy if those persons working in that aspect of the "White economy" were to be removed, either voluntarily or otherwise, from that economic context?

Prof. LOGAN: Yes. This goes right back to the question I answered a few minutes ago here, and I stand by it, that there would be relatively little effect upon the industrial aspect—which includes the fish canneries, etc.—and there would be an immediate effect, which would in time be eliminated, upon the rural, pastoral, agricultural economy.

Mr. GROSS: This is on the basis, essentially, of the automation of the mines and of the industries, is it, sir?

Prof. LOGAN: And eventually the fencing and taking over of the grazing aspect by controlled grazing, not by human herding.

Mr. GROSS: Would you regard this, in connection with your analysis of the economic basis, as something in the nature of a major revolution in the economic functioning of that area?

Prof. LOGAN: No, I think it would be merely a change, of not great degree, which could be easily done by merely patterning it upon the same sort of thing which is already in existence in many other parts of the world. To operate a farm without the Natives upon it would be exactly the same thing as is being done today in Australia, in Argentina, in the United States, under very comparable conditions. To operate a factory without a large number of manual labourers would be merely to do the same thing which is being done today in Holland, or in the United States, or in many other parts of the world.

Mr. GROSS: This would not be characterized by you as a revolutionary change?

Prof. LOGAN: No, I would not think so.

Mr. GROSS: Would it have any perceptible consequences upon the human factor?

Prof. LOGAN: Well, it would have no great consequence as far as the White group was concerned. It would have, of course, a tremendous effect upon the disemployed Native, the disemployed contract labourer from Ovamboland, the local man who suddenly was left—if this is envisaged in your mind—with no employment and with no home.

Mr. GROSS: So when you disclaimed, or rejected, the phrase "revolutionary change", you were not thinking of the "revolutionary", or other, "change" upon the individual employee?

Prof. LOGAN: Yes, that is correct. I was just talking about an industrial revolution effect, that sort of thing.

Mr. GROSS: I did not want to mislead you.

Prof. LOGAN: No. It would have a revolutionary effect upon the individuals concerned, yes.

[Public hearing of 9 July 1965]

The PRESIDENT: The hearing is resumed. Professor Logan, will you come back to the podium?

Mr. MULLER: Mr. President, before Professor Logan proceeds with his evidence, my learned friend Mr. de Villiers wishes to apply for permission that certain witnesses be entitled to sit in Court.

The PRESIDENT: Mr. de Villiers.

Mr. DE VILLIERS: Thank you, Mr. President. The application concerns Professor Groenewald and the Reverend Mr. Gericke. They will both testify later on ethical aspects of policies of differentiation and so forth—the attitudes of religious leaders and the churches in that regard—and their evidence will not concern factual aspects, on which Professor Logan is now testifying, or in respect of which Mr. Cillie, if he comes on later today, will testify, and I apply whether they could be allowed to attend today's proceedings, Mr. President.

The PRESIDENT: Have you any objection, Mr. Gross?

Mr. GROSS: No, Mr. President.

The PRESIDENT: Granted.

Mr. DE VILLIERS: Thank you, Mr. President.

The PRESIDENT: Mr. Gross.

Mr. GROSS: Thank you, sir. Professor Logan, during the course of the proceedings yesterday, following a question which I had addressed to you, there was an intimation from the honourable Court that it might be of convenience to the Court to have certain information with respect, I believe, to the number of non-Whites and persons classified as Natives, in the southern sector outside the Reserves—the number in the rural areas who presumably substantially all live on farms—do you have that information this morning?

Prof. LOGAN: I am afraid I do not have the information in detail, no; I believe it is in the Counter-Memorial, but I could not quote the population figures, no.

The PRESIDENT: I think you understand my enquiry—it is the breakdown of the 125,000, as to how many are women, how many are children, how many live on the farms and those who do not live on the farms.

Mr. GROSS: That clarifies a certain doubt I had, Mr. President. Thank you sir. That information you will undertake to provide?

Prof. LOGAN: If it is so desired—I could not do it at the moment, without leaving the stand.

The PRESIDENT: It can be supplied through Professor Logan, or the Applicants can supply it at some other time.

Mr. DE VILLIERS: As the Court pleases.

Mr. GROSS: May I continue, Mr. President?

The PRESIDENT: Certainly.

Mr. GROSS: Thank you, sir. Professor Logan, to set the framework for a number of questions which I shall be addressing to you, I should like to refer to general testimony on your part with respect to the scope of your study in the Territory within the field of your competence and expertise—I will be very brief about this; I refer specifically to the verbatim record of 7 July, and at page 337, *supra*, as I think has been brought out, you stated that the whole basis of the economy entered into a study of the geography of the Territory—that is correct, is it not, sir?

Prof. LOGAN: Yes, that is correct.

Mr. GROSS: And then, at page 344 of the same verbatim record—I paraphrase—you stated that you had considered and analysed the social implications and effects of the policies and practices affecting the freedoms of individual persons—is that substantially your recollection, sir?

Prof. LOGAN: I think so, yes.

Mr. GROSS: Now, keeping those in mind (because they will be of general applicability and not necessarily related to each of the questions I may propound to you)—first, with regard to certain factors relating to the economic basis—the phrase you used was "basis of the economy"—you testified on that same day, at page 352 of the verbatim record of 7 July, that the central plateau area "is the real centre of the country economically". The central plateau area, Professor Logan, is within the Police Zone or southern sector, is it?

Prof. LOGAN: Yes, it is.

Mr. GROSS: Entirely so?

Prof. LOGAN: Yes, it is.

Mr. GROSS: For your purposes—for the purposes of this comment?

Prof. LOGAN: Yes.

Mr. GROSS: Yes. When you say it "is the real centre of the country economically", is the Court to understand that that means that the Territory as a whole, regarded as a unit, is interdependent with that sector economically?

Prof. LOGAN: Yes, economically it is closely interrelated with that area, with the exception of the purely subsistence economy areas which are of course standing on their own feet.

Mr. GROSS: And the subsistence economy is what you testified to, as I recall—correct me if I am wrong—as the subsistence economy which is now struggling to become modernized or stabilized at a higher level than subsistence—is that correct?

Prof. LOGAN: That is correct.

Mr. GROSS: So that it would be a fair interpretation of your answer, would it, to say that the only basis upon which it could be said that the Territory as a whole is not interdependent with the central plateau area as the economic centre—that the only respect in which it could be said that this is not a correct statement, that the Territory is interdependent as a whole—would be on the assumption that the areas outside the southern sector would remain at a subsistence level—is that correct?

Prof. LOGAN: I am not sure what you are saying, exactly.

Mr. GROSS: I just want to make certain that we understand each other as to the apparent qualification, and I understood you to say that it would be true that the Territory as a whole is economically interdependent, subject to the qualification that that would not necessarily be true if the Territory outside of the southern sector remained at a subsistence level—is that correct?

Prof. LOGAN: Yes, that is correct.

Mr. GROSS: I will try to make my questions somewhat less involved—I apologize to the Court. The question that suggests itself, then, is whether you would elaborate on testimony you gave yesterday with regard to the effect upon the Territory outside of the southern sector if that should be either—I will break my question down into two parts—excised from the Territory as a whole, or if the non-White population of the southern sector, or a substantial part of the non-White population, were to leave the area for any reason—would you be able to answer that question?

Prof. LOGAN: Yes. If there was an excision of the area, shall we say, for simplicity's sake, beyond the Red Line in contrast to the area of the Police Zone—if there was a complete excision along the Red Line, then the area outside of it would be forced to remain at a subsistence economy or something very, very slightly above that, because trade out of it would be virtually non-existent, and because the efforts that are being made today to raise the economy of the area by the Administration's efforts would be cut off, and the ability of the Native of the area beyond the Red Line to come within the Police Zone as a contract labourer, this also would be lost, and so the supply of cash income coming in to that area would stop. Therefore such excision would seriously injure the area beyond the Red Line, holding it at its present standard or lower than its present standard—probably the latter; that is answering the first portion of the question.

Mr. GROSS: If you will continue, sir.

Prof. LOGAN: Yes. Now, answering the second portion of the question:

it is my firm belief, and this belief of mine I find I do not share with all members of the South West African community, of the European group of the community, but I believe that if this excision took place the industrial developments and other employers of labour other than the farmers would very quickly and quite easily adjust to the absence of the contract labour coming in from outside, and that if the Native labourers now employed within the Police Zone were forced by this excision to return to areas or to go to areas outside the Police Zone, this too would be taken care of by adjustments within the framework of the industries. On the other hand, the farmers would undergo a period of considerable difficulty until, after some several years probably, they had adjusted their internal workings, after which they too would be able to get along without Native labour. Of course, at the same time, if such an excision did take place and there became a dearth of labour within the area, there are other areas in Africa that would be delighted to supply this labour—for example, Bechuanaland and Angola, from which already considerable numbers, not so much from Bechuanaland but from Angola, of Native labourers come in today because of the superior wages and working conditions within South West Africa, and so there is a large number of Ovambos today from Angola crossing the border to work in the Police Zone of South West Africa. If this excision did not prevent this international exchange of personnel, then this would occur to supply Native labour within South West Africa, I am sure. This would be not unlike the international labour migrations that occur in Western Europe, like the Italians coming into Germany today, and this sort of international exchange.

Mr. GROSS: In this case, however—I will not pursue this hypothetical and perhaps somewhat absurd hypothesis to its ultimate absurdity—I thought the Court might perhaps obtain some clarification with respect to interdependence from the standpoint of the basis of the economy, and the labour supply would obviously enter into that pattern. In the hypothetical case that you have mentioned—I think you described members of the Ovambo tribes from Angola—they would, so far as you are aware of the policies and practices in South West Africa, be classified as non-White, would they not?

Prof. LOGAN: Oh, yes.

Mr. GROSS: So that the question with respect to the dependence of the economy if there were no non-Whites there, which is really the question I have addressed to you . . . I think that, unless you have something further to say, I will turn to another question.

In your testimony—and this is related, I believe—at page 384, *supra*, of the verbatim record of 8 July, you responded to a question I addressed to you, which I will read, if I may, with the permission of the Court. I asked you whether you understood the policy which was observed and which you perhaps learnt about in discussions with persons in South West Africa, and I quote now—". . . do you understand the policy being applied, or suggested, to have in view the total separation of the Whites from the non-Whites in this area?" And your answer, which I will read from the verbatim record, is, in part: "I do not think that the total separation has ever really been envisaged . . . I think that all of the plans, as envisaged, envisaged the continuation of this Native labour supply."

This is recollected by you as your testimony, sir?

Prof. LOGAN: That is correct.

Mr. GROSS: Now, by the phrase "total separation", which you say had never been envisaged—perhaps you misunderstood the point of my question yesterday—do you mean that total separation, in the sense you used the term, refers to every single, last individual being removed from the area, voluntarily or otherwise, or were you thinking of it in terms of substantial movement, what might be called a great migration or something of that sort? What did you understand the term "total separation" to be, in your own concept?

Prof. LOGAN: I believe, at that point, we were talking on the matter of excision as we were just a moment ago here, and I believe, in that case—you just stated now the "total removal" of the people, and that is what I think we were discussing there.

Mr. GROSS: The total removal?

Prof. LOGAN: Yes.

Mr. GROSS: Substantially all?

Prof. LOGAN: Yes.

Mr. GROSS: Yes. There might be one or two ill or aged persons left behind, that sort of thing. We are talking about a substantial removal when we talk about "total separation", is that agreed?

Prof. LOGAN: That is correct, yes.

Mr. GROSS: Now, I would like to read to you—because of your comment with regard to your understanding that this policy, as we have just defined it, has never really been envisaged and that all the plans, as envisaged, contemplated the continuation of the Native labour supply—a statement by the Prime Minister, which is quoted in the Rejoinder of the Respondent (that is Respondent's pleading, as you perhaps understand), and ask whether, when I have read it, this policy ever came to your attention in your discussions with persons in South West Africa, or otherwise.

The Prime Minister, in a House of Assembly debate, in 1963 (and the citation may be found at V, page 251, of the Rejoinder, I will not put it in the record at this point unless you wish me to, unless the Court wishes me to) is as follows:

> "The only possible way out . . . is . . . that both, i.e., the White man and the Bantu, accept a development separation from each other. The present Government believes in the domination *(baasskap)* of the White man in his own area, but it equally believes in the domination *(baasskap)* of the Bantu in his area."

Then there is an intervening paragraph, and then—

> "I also see to it that I choose a course by which on the one hand I retain for the White man alone full rights of government in his area, but according to which I give to the Bantu, under our care as their guardians, a full opportunity in their own areas to put their feet on the road of development along which they can make progress in accordance with their capabilities. And if it so happens that in future they progress to a very high level, the people living at that time will have to consider how further to re-organize those relations . . ."

Now, I call your attention to the phrase "total separation" as used in the excerpt from the Prime Minister's statement in the House of As-

sembly. I ask whether this concept and this particular phraseology did arise in your discussions and consideration of the economic basis of the society, or in your study of the geography of the area?

Prof. LOGAN: Well, yes, but the "total separation" talked about I think by Dr. Verwoerd there is not the "total separation" that you and I were discussing before the Court here, because in the one case we are talking on an economic matter and we are talking, in a purely hypothetical situation, of removing all the population out of the area (I mean all the Native population out of the White area, or vice-versa). But in the case of Dr. Verwoerd's statements I am not sure of all of the precedings to the statement you have just read, but I believe that this fits in with the whole programme by which there would be the opportunity for Natives from the Reserves, or homelands, or Native areas, to come into the White area to work and also that there would be some White representatives within the Native areas until the Native areas had raised themselves, economically and politically, to the point where they were capable of conducting their own affairs.

So there would be total separation, but not down, as we said here a few moments ago, to the last individual. There would still very often be people temporarily in the opposite groups' area, and so there would be total separation as far as permanent places of domicile are concerned but not as far as any momentary situation was concerned.

Mr. GROSS: Now, by "momentary situation" you mean—let us take an individual who is born, lives, works, and ultimately dies in the southern sector, let us confine our attention to that individual—in what sense, if any, is he separated from anything else in that area?

Prof. LOGAN: He would not be separated from anything else in that area if he remained in that area. He would be separated, of course, as far as voting is concerned, as far as a number of things are concerned in that way—if that is what you are referring to.

Mr. GROSS: I really do not presume to ask you to interpret the intention, or what was in the mind, of the distinguished Prime Minister when he used this phrase. On the basis of your analysis and consideration of the economic basis of the society as well as of the social implications and effects of the policies and practices affecting the freedoms of individual persons (to which I referred from your earlier testimony at the outset of this morning's session), in the light of the basis of the economic study you made, and of the social implications of the policies and practices affecting the freedoms of individual persons, what would you consider to be the implications and consequences of separation, whether total or otherwise, of an individual such as I have described? How would you determine what he is separated from, and how would you define the term "separation" in that context?

The PRESIDENT: I think it might be better if we have one question at a time, Mr. Gross.

Mr. GROSS: I am afraid I was allowing my enthusiasm to take me . . .

The PRESIDENT: Not at all, but I think it will be easier if we get one question at a time.

Mr. GROSS: Yes, sir. If you have understood the questions would you take them all one at a time.

Prof. LOGAN: Thank you, Mr. President. Yes, I will endeavour to. This is difficult to answer either yes or no, and I presume I should make a speech at this point.

Mr. GROSS: Yes, if you will address yourself to the question, please, sir.

Prof. LOGAN: The first thing I think that has to be considered is that under the statements, as developed by Dr. Verwoerd, and under the whole idea as developed, as I understand it, in South West Africa, the person who was born, lived in and died within the Police Zone area outside the Reserves would be doing so by his own volition and he would have—based upon his culture group affiliation as a Nama, or a Dama, or Herero, or whatever group—a homeland to which he properly belonged and on that homeland he would have a right to a vote and a right to a participation in whatever form of government was existent upon that homeland. Now this type of government would vary considerably, depending upon the nature of the culture of the group—the culture level of the group—at the particular time. That is, there would be a different type of government in a Bushmen surrounding than there would be in a Herero or Ovambo milieu.

Now he would have, in the Police Zone, no voting rights; he would not be entitled to vote for the officials of the area in which he was then, of his own volition, domiciled. But the man for whom he was working would, at the same time, have no voting right within the area of the Dama homeland, or the Nama homeland, or whatever it happened to be. That is, each would develop in a separate way, separately within his own homeland area.

I do not know whether I have answered this question . . .

Mr. GROSS: Well, sir, I wish you to answer to your own satisfaction. I will pursue the line and perhaps you can elaborate it in response to specific questions. I will, for the sake of clarity, withdraw at this point, Mr. President, if I may, any other questions which I may have compounded to my first, addressed to Professor Logan.

Now, in the context of the answer, which you have just given, you used the expression, if I am not mistaken, "by his own volition" and you used the expression, the homeland to which he "properly belonged". These are the phrases I noted at the time. Now, in your use of the term "volition", do you consider the economic constrictions which frequently interfere with free choice in the lives of all of us, including Natives?

Prof. LOGAN: Yes.

Mr. GROSS: Therefore, at best, "volition" is a highly qualified concept, is it not, sir?

Prof. LOGAN: Yes.

Mr. GROSS: Well, to what extent is it an absolute? Could you tell me, for example, under what circumstances, by what objective criteria, a determination could be made whether an individual was residing or remaining at work in the southern sector by his own "volition"?

Prof. LOGAN: Yes, today, with the economic development of the homeland areas still in an embryonic stage, it is quite likely that many people are quite forced, economically, to stay in an area in which they are able to obtain a higher standard of living than they would if they returned to the Reserves. With the development that is going forward as rapidly as it has been in the nine years that I have known South West Africa, this is a temporary thing and eventually, a considerable portion at any rate—do not ask me for percentages please—of the people of the Native groups who are residing today in the Police Zone and working there, will be able to find economic opportunity at least equal to what they are getting

today in the Police Zone, and so they will be able to return to the homeland areas.

There are such things, for example, as the proposed development of meat canning factories, in connection with Ovamboland. There is the already established furniture factory in Ovamboland. These are going to start to employ people, these are going to bring cash into the area and the cash being brought into the area will support traders and other entrepreneurs, within the area. These traders and entrepreneurs will be Natives. The furniture factory will be operated by Natives. Consequently, there will be the opportunity to return, and this is increasing very rapidly within the area today, you can see it visually increasing.

Mr. GROSS: I do not want to interrupt you, but your reference to the word "return" is puzzling to me, and perhaps, might need clarification to the honourable Court. We are talking about an individual who, in this case, is born (and perhaps, if you want, you can add his family as well), in the southern sector. In what sense, if any, can he be said to "return" to a homeland?

Prof. LOGAN: Well, in a great many cases, it is a case of returning to the homeland. The Herero . . .

Mr. GROSS: The "homeland" of that individual, sir?

Prof. LOGAN: Yes, if I may . . .

Mr. GROSS: Please, I just wanted to be sure . . .

Prof. LOGAN: A Herero, born in the Windhoek location, considers from the time he begins to walk and talk, that he is a Waterberg, or an Otjituuo or an Epukiro or an Aminuis or an Ovitoto, Herero. At puberty, this child, male or female, who has been dressed in a certain costume, which is that of a small European child, returns to his home Reserve and there undergoes the puberty ceremonies, which are very long and extensive. He or she stays there for some months.

Mr. GROSS: In every case, Professor Logan?

Prof. LOGAN: Well, I would not say in every case. There are, perhaps, some individuals who do not do this, but in the great majority of cases they return to the home Reserve. Furthermore, the child, in many of these societies, is not brought up by the parent, but the child is brought up by the grandparent because there is the jumping over of one generation in the development of the child, and . . .

Mr. GROSS: You mean a grandparent in the southern sector?

Prof. LOGAN: Well, this is the point I am about to get at. In many cases, the grandparent is on the Reserve and the child returns to the grandparent on the Reserve at some age, such as 5 or 6 years old, stays there through puberty and then, if he or she wishes, returns to the Police Zone. So there is a strong affiliation, even in the quite sophisticated society of the town Native of Windhoek, the most sophisticated city as far as Natives are concerned, with the Reserve, which may be, in some cases, several hundred miles away. I am sorry to prolong this so long.

The PRESIDENT: Not at all, give your answer.

Mr. GROSS: Pardon me, Mr. President?

The PRESIDENT: The witness was apologizing for being long and I simply remarked "not at all" and to give his answer to his satisfaction.

Mr. GROSS: Yes, sir, thank you, sir.

Prof. LOGAN: Thank you, sir.

Mr. GROSS: I will try not to match your responses with the length of my questions. With respect to the concept of "return"—let me put it

to you—you have, I believe, testified that you have spent some time on 20 or more so-called "White farms" on which persons classified as Natives resided?

Prof. LOGAN: That is correct.

Mr. GROSS: These were, were they not, in the southern sector outside of the Reserves?

Prof. LOGAN: That is correct, yes.

Mr. GROSS: Now, is that perhaps, where you, among other places, observed the practice of the non-White children "returning" to their homeland (in that sense of the word) to go through these puberty rites, which you referred to, or other exercises of that nature?

Prof. LOGAN: In part, but this also happens with the Natives in the location at Windhoek, at Katutura or the old location in Windhoek. Both the town Natives and the farm Natives.

Mr. GROSS: I was asking whether you had observed situations . . .

Prof. LOGAN: Yes, I have, that is, I have known individual cases where I can name the person, and the child sent and so on.

Mr. GROSS: Yes, so that, for example, how long would he spend in his so-called "homeland" which he had never seen up to that point?

Prof. LOGAN: This would be a tribal matter, as well as a personal matter, but in many cases the Herero child returns at a very early age, 5 years old, 6 years old, something of that sort, and remains there until 13 years old or something of that nature—I mean, a matter of a number of years in quite a formative stage of the child's life.

Mr. GROSS: And normally goes to school in Ovamboland or wherever it might be, during this formative period?

Prof. LOGAN: Well, if I may correct this, it would not be Ovamboland because only the male Ovambos come to work in the Police Zone and there are relatively few Ovambo families living in the Police Zone. It would be in the case of a Herero and so on.

Mr. GROSS: Yes. First, let us confine ourselves to the Ovambos. How many Ovambos permanently reside in the southern sector outside of the Reserves? Can you tell the Court?

Prof. LOGAN: I could not tell the Court.

Mr. GROSS: There are some hundreds or some thousands, as far as you are aware?

Prof. LOGAN: Probably several thousand.

Mr. GROSS: So that when you were talking about return to the homeland in the sense in which you used the phrase, you were not referring to those several thousand Ovambos?

Prof. LOGAN: No, I am referring to the large number of Hereros and Damas and Damaras and others, and so on.

Mr. GROSS: Well now, if we confine ourselves for the moment to . . . I am anxious for the Court to understand quite clearly what you mean by the concept of "returning to the homeland", because it enters so deeply into the policy and concept; for example, with respect to the several thousand Ovambos who are permanently resident, and not recruited for labour, but are *permanently* resident, has it been the result of your observation and experience that many of the offspring of these Ovambos permanently resident in the southern sector, outside the Reserves, return to Ovamboland, during the tender age of 5 to 13?

Prof. LOGAN: I know nothing about detribalized Ovambos. I have had no connection with them whatever. I have been discussing the Herero and

the other groups that make up the great proportion, not this small fragment of Ovambos. As far as I was concerned, I was talking here about the tribes that are resident within the Police Zone outside the Reserves generally, and return to the Reserves still within the Police Zone. Because, you see, that is where the large numbers of families are concerned.

Mr. GROSS: We are talking in the mass, here, in the round?

Prof. LOGAN: Yes.

Mr. GROSS: You said "fragment", I am talking about 3,000 individual human beings, and you refer to a "fragment".

Prof. LOGAN: Well, yes, but I am talking about some hundreds of thousands of others.

Mr. GROSS: Quite so. But would you be willing—I do not mean to argue with you—to clarify the matter, to talk about what I am talking about?

Prof. LOGAN: Well, I cannot, because I do not know about it.

Mr. GROSS: Well, that is what I am trying to explain. Now, the 3,000 Ovambos is what I am talking about. Now you described them, if I understood you correctly, as a "fragment".

The PRESIDENT: A fragment of the total number.

Mr. GROSS: Of the total number. Now, I am talking about even a smaller "fragment" of the total number. I am talking about one person: the individual I put to you at the outset of this line of questions. Your reply to me, if I understood you correctly, and please correct me if I am wrong, involved a total picture of a group and practices which you described as pertaining to a group or certain members thereof. Is that correct?

Prof. LOGAN: Of several groups and the individual members thereof, yes.

Mr. GROSS: Now, then, I have asked you and would like to repeat my question for clarification, with the Court's permission, about those individuals who do not go through the procedures which you have described and who may or may not be, therefore, "returning" to their homeland in the sense in which you used the term. I would revert to that expression. In the case of an individual who has been born and who has always lived in the southern sector, who is a Herero, let us say, who would be returned to or who would voluntarily go to, the homeland, the Reserve—in what sense could he be said to be "returning" to that homeland or that Reserve, in any sense of the word?

Prof. LOGAN: Yes, I think so. I think that there is the strong thought in their minds that they are of a particular group and of a particular area and that they belong to that. There is, of course, always the renegade, always the person who is the non-conformist. Even in Native groups, I am sure there are these individuals but they are the rare ones, and to try to steer an entire programme to fit the one individual or the small number of individuals who do not want to conform to the over-all pattern is, I think, quite impractical. Basically, all of the Natives feel that they belong to a particular group and not just a Herero group, but a Herero Waterberg group, and they would consider that as their original area.

Mr. GROSS: Professor Logan, perhaps it would clarify further—you referred to "all of the Natives". Would you please define the term "Natives"?

Prof. LOGAN: Yes, a Native is a member of one of the indigenous tribes of South West Africa.

Mr. GROSS: "A member?" How would you define the term "member" in that concept?

Prof. LOGAN: A person who was born within the parentage of this particular group.

Mr. GROSS: And how would you determine the classification or membership of the parent? By the same device, by the same procedure?

Prof. LOGAN: Yes, it is a lineage matter.

Mr. GROSS: Now, I refer to the Memorials, which are one of the Applicants' pleadings, at **I,** page 109, and which contain the census according to the classifications of which rights and status are allotted, and the laws and regulations apply. I would like to read to you the definition of "Native" which counts with regard to the individual rights and individual liberties, the "fragments" of the total group. "Natives—Persons who in fact are, or who are generally accepted as members of any aboriginal race or tribe of Africa." Are you familiar with that census category?

Prof. LOGAN: Not in those words, I could not recite it, no. But it is essentially, I think, what I just said. You use the word "aboriginal", I use the word "indigenous".

Mr. GROSS: Well, this is not my word, sir. I did read the census category—"aboriginal race or tribe". I did not understand you, in response to my question, to refer to a concept of general acceptance. Did I misunderstand you?

Prof. LOGAN: Well, I would gladly put it in, if it would help.

Mr. GROSS: It would help us understand the meanings which you are attaching to words that affect the lives, welfare and freedoms of individual beings. I am anxious that the Court understand the terms fairly you are using and that I am trying to elicit . . .

Prof. LOGAN: I think it is generally accepted by the individual, himself, that he identifies himself as being a member of one of the indigenous aboriginal tribes or races of the Territory.

Mr. GROSS: Do you understand the policy which you are testifying with respect to, and I speak now specifically with reference to the analysis which you say you have made of the social implications and effects of the policies and practices affecting the freedoms of individual persons—in that context of your study and consideration, did you consider the implications with respect to individual freedoms and related questions of the concept of basing classification on "general acceptance", as distinguished from birth (in this case, from antecedents)?

Prof. LOGAN: But I do not think that they are generally separated in the minds of the people concerned, that the person who is born . . .

Mr. GROSS: Which "people", for the sake of clarification?

Prof. LOGAN: We are speaking about the Natives, I think, are we not?

Mr. GROSS: We are talking about how you tell a Native and therefore I thought that we . . .

Prof. LOGAN: Well, the way that you would tell a Native is a twofold one. If there is any question in your mind, the easiest way is to ask him and I think he will almost unquestionably say "I am a . . ." and then he will tell you. He will tell you his tribal group and he will tell you the sub-group even although he is a business man in the Location of Katutura in Windhoek, he still considers himself as a Herero of a certain group.

The second way is by looking at him. When you look at him you will see two different things: first his pigmentation—the shape of his face, the nature of his hair—this separates immediately the Nama, let us say, from the Herero, it separates the Khoisan group from the Bantu group: secondly, his garb, because he will wear clothing in almost all cases that matches the others of his particular group. So he associates himself, he affiliates himself, with the group and so he is generally accepted as a member of that group by that group and by all the other groups because he advertises exteriorly, in his very dress, which group he belongs to. You can tell a Nama from a Dama or from a Herero woman by the nature of the hat she wears or the wrappings of a turban about her head and this is general acceptance, I think, by her of the fact that she is Herero, Dama or Nama. Also she is accepted by the group as being of their group, otherwise she would have great difficulty walking about the streets of Windhoek wearing the wrong tribal dress. I think for a Nama woman to appear in a Herero dress would cause a great deal of consternation among the Hereros and would react very violently upon this woman, and so there is a great deal of conformance within themselves in this regard.

Mr. GROSS: Have you ever encountered a so-called Native of South West Africa outside the Territory of South West Africa—say, in the streets of New York or San Francisco?

Prof. LOGAN: No, I have never met one in New York or San Francisco.

Mr. GROSS: Have you ever seen a Native fully clothed who was not wearing the special garb of the tribe.

Prof. LOGAN: Yes, the business men that I spoke about earlier and some of the others in Windhoek, dressed in clothing exactly like you and I are wearing here at the moment. Yes.

Mr. GROSS: Well in that case, under your concept of classification or differentiation would it not be easier to tell what race or tribe they belonged to if they were not wearing clothes?

Prof. LOGAN: Then you would have to go strictly to the physical characteristics which are quite clear cut among the different groups. You can tell them facially from one another, you can tell them by stature and so on from one another, in most cases quite clearly and the second thing is, if you ask the individual, to return to what I said earlier, what group he is he will tell you instantly and usually quite proudly because they are proud to belong to their particular group . . . they are not ashamed of it. They are proud to belong to their group, there is a strong feeling of *rapport* and of pride in their particular group.

Mr. GROSS: I am sure of that, sir. Would you say it is comparable, perhaps, to the feeling of *rapport* and pride of one of our fellow countrymen thinking of Ireland, from which his ancestors came, for example?

Prof. LOGAN: I think it is much deeper than that, much deeper.

Mr. GROSS: I see, sir. Well, now I noticed in your reply that you referred a good deal to appearance, garb and dress. On the basis of your analysis of the social phenomena and economic basis of the society, would you say that rights, duties and status are allocated on the basis of garb, dress or appearance?

Prof. LOGAN: No, only in a roundabout way. They are allocated on the basis of belonging to a particular culture group and this culture group is, in part, identified by the garb it is wearing but nobody is

allocating the rights or privileges on the basis of the way in which a turban is worn. No.

Mr. GROSS: It is a rather serious thing, would you not agree, to consider the basis upon which individuals are classified, which classification determines their rights, duties, privileges, and the limitations imposed upon their freedoms, that the classification method is, shall we say, first, relevant to the question of a study of their relationship between the individual and the society?

Prof. LOGAN: That was a very involved one.

The PRESIDENT: Do you understand the question?

Prof. LOGAN: I am afraid I do not.

The PRESIDENT: Perhaps Mr. Gross would put the question in a different form.

Mr. GROSS: I asked you, sir, in your study of the economic basis of the society, and I am talking now specifically about the southern sector outside the Reserves . . .

Prof. LOGAN: Yes, I understood.

Mr. GROSS: In your study of the economic basis of the society—in your study of the social implications and effects of the policies and practices affecting the freedoms of individual persons in that area—did you take into account, or do you give any weight to, the method by which individuals are classsified, and on the basis of which classification rights, duties, privileges and burdens are conditioned?

Prof. LOGAN: I did not make any statistical, any analytical study of this. This falls, I think, within the political category in a way in which I said I was not expert. However, I am quite capable, I think, of making some non-quantitative but qualitative judgments upon it. Yes.

Mr. GROSS: Would it help to clarify the matter in your mind if I said that I was addressing myself solely and exclusively to the qualitative aspect of the matter, from a sociological and human point of view?

Prof. LOGAN: Yes.

Mr. GROSS: Thank you. Will you continue, then, with your answer on that basis? What conclusions, if any do you reach, as an expert or otherwise, with respect to the relevance of the basis upon which classification is made, in the context of the determination of individual rights, of liberties?

Prof. LOGAN: The classification is made chiefly on the basis of the culture group to which the particular individual belongs. Now this culture group, in the census classifications that were just read, lumps a large number of groups together as Natives and as such gives a general category, but this category is split immediately into a number of different classifications based upon the tribal or cultural affiliations of the group and for administrative purposes it is always handled on the tribal or culture group level. This to my mind is the reasonable and practical way of handling the situation because of the basic affiliations of the individuals within the tribes with one another and with their tribal group and because of the contrast in cultural levels which exist between the different groups. To try to do it by any other basis would work great hardships on large numbers of people.

Now it is quite obvious that there are always exceptions, that there are some individuals in any tribal group who do not fit into the general pattern that is established by the Administration in handling it. I think this is true in any kind of society that we want to consider any-

where. There is always the individual that does not fit the general pattern. This may be the outstandingly good individual, I mean, outstandingly well-developed individual, it may also be the extremely backward individual, speaking personally now, the one whose personality has not developed and so on, or the one whose personality has developed very rapidly and gone much further. I think there is the same individual variation among any of the Native tribes that we have been talking about here, that we will find among any European community or any Oriental community or any other community that we want to look at. There is this same individual variation but the pattern, the norm of the individual group that is being concerned with, sets a standard that is aimed at in the development of that particular group, aimed at in the development of that group by the Administration, and rights and privileges are accorded to these people commensurate with their standards, commensurate with their cultural position at the given time. At the present time, in some cases, it is very low. Among the Bushmen, for example, there . . .

Mr. GROSS: Are we talking about the southern sector, outside the Reserves?

Prof. LOGAN: I am sorry. But you see each of the individuals that is within the southern sector is still affiliated with a Reserve or homeland that is not within the White area of the southern sector and the thing cannot be dissected, it cannot be excised as we did earlier as a hypothetical exercise. In practice it cannot be separated, it must be looked at as a whole picture, as a totality. If we chop it apart, especially as far as the southern sector is concerned, the Reserves must be included with the farm areas and the town areas in order to get the proper picture. Consequently (we will have to eliminate the Bushmen because they are essentially outside that area) there is still great cultural difference between the different groups within this and each of them is accorded rights and privileges in accordance with his cultural position, his cultural level.

Mr. GROSS: Are you aware, sir (and this will be the only reference again to the census classification), that the rights and duties and privileges and status of individuals, let us say, within the southern sector outside the Reserves, are based upon the classification which I have read, and which makes no reference to tribe or culture or configuration thereof? It uses the term "Natives", and that describes them as an aboriginal descendant or words to that effect. We are together on that, are we sir, that that is the census category?

Prof. LOGAN: That is the census category.

Mr. GROSS: And that is the basis, as far as your studies showed, on which rights, privileges and status are based in the southern sector?

Prof. LOGAN: Well, no, because the rights and privileges in the southern sector are not based on the census.

Mr. GROSS: Classifications, sir?

Prof. LOGAN: I don't think they are based on the census classifications, they are based on the tribal affiliations.

Mr. GROSS: May I, then, read to you, from the Rejoinder (which is the pleading of the Respondent I referred to before) the following statement by Prime Minister Verwoerd, which is quoted at **VI,** page 41:

> "The Bantu [I mark the word] must be guided to serve his own community in all respects. There is no place for him in the European community above the level of certain forms of labour."

Does the word "Bantu" convey to you a linguistic, a racial or a tribal implication?

Prof. LOGAN: All three.

Mr. GROSS: All three—and therefore it is synonymous is it, or is it not, with the word "Native" in your use of the term?

Prof. LOGAN: No, it is only partly synonymous with the word "Native" because the Khoisan group, the Namas, must be included.

Mr. GROSS: I see. So that when you take the term "Native" as you use it (and as it is commonly used in the Territory, I assume), it is synonymous with "Bantu" and "Khoisan" and they are regarded as aborigines. And, secondly, is it or is it not correct that the rights and duties and privileges of individual persons in the southern sector outside the Reserves (we are talking about that for simplification) are determined and allotted on the basis of classification as a Bantu? Is that your understanding?

Prof. LOGAN: No, I repeat that it is still on the basis of tribal affiliation and Bantu is a larger category and so it is on the basis of Herero or whatever the Bantu group may be, and the Khoisan group has to be included because they are considered equally in the eyes of the administration.

Mr. GROSS: Then when the statement is made by the Prime Minister—I am not asking you to interpret his statement, but whether it reflects your understanding and analysis of the policy pursued in the Territory you studied—that there is no place for him, i.e., the Bantu, "in the European community above the level of certain forms of labour", does that, or does it not, have any relevance to whether the Bantu in question is a Herero or a Dama or, by chance perhaps, the offspring of a combined or mixed marriage? Does it make any difference in respect of this statement, or this type of statement, which relates to Bantus generally?

Prof. LOGAN: I'd like that question again.

Mr. GROSS: Is there any relevance to the problem we are discussing—is there any relevance or any consideration which bears upon whether a Bantu is a Herero, a Nama or Dama, or the product of a mixed marriage —is there any bearing between his so-called tribal affiliation or cultural configuration and the fact that a Bantu cannot rise above the level of certain forms of labour in the European community?

The PRESIDENT: Does the witness understand the question?

Prof. LOGAN: I am afraid I do not, no.

Mr. GROSS: I will try it once more, with the Court's permission, and I will try to simplify it.

The statement which I have quoted is in your mind, is it? "There is no place for the Bantu in the European community above the level of certain forms of labour."

Prof. LOGAN: Yes.

Mr. GROSS: Did I understand you correctly to say that the tribe, or culture, or any sub-group within the Bantu concept, affects the determination of the level to which the Bantu may rise in the White community? Does his tribal affiliation have anything to do with it?

Prof. LOGAN: Well, I am just afraid that I am lost as to what is being requested here. I understand the words but I don't understand what is being asked.

The PRESIDENT: Perhaps Mr. Gross will put it again to you.

Mr. GROSS: I hesitate to trespass on the Court's time. With all respect, Mr. President, I have tried three times . . .

Prof. LOGAN: I am not trying to evade the question, sir.

The PRESIDENT: I think if the question is put in a shorter context Mr. Gross.

Mr. GROSS: I am endeavouring to do so. This, of course, involves a complex of ideas and concepts and it is difficult, in fairness to the witness, to put it in a sentence.

The PRESIDENT: It is because of that that it is difficult to understand.

Mr. GROSS: I will try it once more because I think it is important and will not perhaps, I hope, trespass on the honourable Court's time.

The statement is made by the Prime Minister that "there is no place for the Bantu in the European community above the level of certain forms of labour".

Prof. LOGAN: Yes.

Mr. GROSS: Does the fact that a Bantu happens to be a Herero or a Dama, or a child of a mixed marriage, have anything to do with the level which he can achieve above certain forms of labour in the "European community"? Do you understand that?

Prof. LOGAN: Yes, I understand that. The . . .

Mr. GROSS: Can you answer yes or no, perhaps? I tried to formulate it so that it could be answered yes or no. Does it have anything to do with it—yes or no? You can qualify the answer if you like.

Prof. LOGAN: No, I think it has nothing to do with it.

Mr. GROSS: It has nothing to do with it? Thank you. The phrase "European community"—have you heard that expression used?

Prof. LOGAN: Yes.

Mr. GROSS: What do you take its signification to be? First, may I ask you what the word "European" in that context refers to?

Prof. LOGAN: "European" means a person whose origin, either directly or ancestrally, was from Europe. His parents, or he himself, have immigrated from Europe at some time in the last 300 years or so.

Mr. GROSS: So, for example, if you or I should go to South West Africa, we would be "Europeans", would we?

Prof. LOGAN: Yes, because our ancestry also came from Europe by way of America and so we would be Europeans. That is correct.

Mr. GROSS: Now, suppose, for example, that you had a child of a mixed marriage between a "European" in this sense and, let us say, an Asian, a person born in Asia, would that child be a European?

Prof. LOGAN: I wouldn't know how that would be looked at.

Mr. GROSS: You don't know what the word "European" would mean in that situation—the word "European" as used in South West Africa?

Prof. LOGAN: Well, if it was a child of a mixed marriage between one of the indigenous tribes and a European I could answer it, but how a Eurasian child would be viewed I don't know.

Mr. GROSS: Does appearance have anything to do with it, with the concept or classification of European?

Prof. LOGAN: If one were to have to determine what a particular person was, the first thing to go by would be his appearance. There is also, I believe, a certain qualification in part if he is generally accepted as a European, that is, by the other members of the European community and by the members of the non-European community.

Mr. GROSS: May I phrase my question this way, does the fact of colour or appearance determine whether he is accepted as a European or not?

Prof. LOGAN: To a large extent. Not totally, because it could also be the manner in which he lived in parts, in a small part.

Mr. GROSS: What do you mean by that?

Prof. LOGAN: Well, if a man was of very slightly mixed blood, that is, largely European with just a bit of Native blood—I am not talking of Asiatic now, I am talking of Native blood—and he was living with a Coloured community, then he might be considered a Coloured, even though he looked very much like a White man. There are undoubtedly some Whites who have a bit of coloured blood and pass as Whites.

Mr. GROSS: The phrase "pass as Whites" is of interest, Professor Logan.

Prof. LOGAN: It is actually an American expression I think.

Mr. GROSS: I think it is. I was wondering, for example, how your comments would relate to a person who is, shall I say, obviously White. Is that a form of words which you would accept?

Prof. LOGAN: Yes.

Mr. GROSS: And if a person is obviously White, does that mean that he would be accepted as a European?

Prof. LOGAN: Yes.

Mr. GROSS: This would be then on the basis of appearance solely?

Prof. LOGAN: As I said before, primarily. If he lived, however, as a Coloured, with a group of Coloureds, and was generally accepted by the Coloured community then, even though he looked White, he might very well be considered a coloured.

Mr. GROSS: Suppose this gentleman were a lawyer, a professional person, practising in Johannesburg?

Prof. LOGAN: Well, I really don't know because, first, Johannesburg is outside South West Africa and this is the first time in my life I have ever been in a court and I am not acquainted with court procedure in South West Africa or in Johannesburg. I don't know what would happen.

Mr. GROSS: I will take any city you wish. I am talking about a South West African, who is obviously White, who practises law or a profession in Johannesburg or Birmingham, England, you can call it any place you say.

I want to ask you, with regard to the limitation upon his rights on the basis of colour or appearance which I understand to be the case in South West Africa, whether that does relate solely to the fact that he lives in South West Africa and that the standard upon which his rights are based depend on his colour—do you understand my question?

Prof. LOGAN: Yes.

Mr. GROSS: Do you regard this classification and these limitations of rights, on that basis, as having any implications and effects in the sociological sense that you took into account in your analysis of the situation, with respect to the policies and practices affecting the freedoms of the individual persons?

Prof. LOGAN: Yes.

Mr. GROSS: Do you think that it is by some objective standard or criterion which you may have in mind—a valid basis, sociologically speaking—I ask you as an expert?

Prof. LOGAN: Do I think it is a valid basis?

Mr. GROSS: Yes.

Prof. LOGAN: Do I think it is a valid basis to use colour as the basis for allotting rights and burdens?—no, I do not.

Mr. GROSS: You do not take it as a valid basis?

Prof. LOGAN: No.

Mr. GROSS: Are there any objective criteria or standards on the basis of which you express that judgment?

Prof. LOGAN: Yes, because I think I expressed earlier here that I think there are great variations within any particular group, and I think there is as much variation within a Coloured society or within a Native (to use the South West African term), or as we would say, within a Negro society—I think there is as much variation, individual variation, there as there is in other areas, and therefore I think that a culture basis for division is far more important than a purely colour one.

Mr. GROSS: And the classification "Bantu" is one that is cultural?

Prof. LOGAN: No, the Bantu itself is partially racial, partially cultural.

Mr. GROSS: And partially appearance?

Prof. LOGAN: Well, this would be a combination of racial and cultural.

Mr. GROSS: So that with respect to the classification of "Bantu" and the allocation of rights and duties, this has nothing to do with the subgroup or the tribe within which the Bantu individually fall?

Prof. LOGAN: Well, taking the Bantu alone, that is a collective category for a number of tribes.

Mr. GROSS: And that is synonymous with "Native" if you add "Khoisan"—is that correct?

Prof. LOGAN: Yes, in my estimation.

Mr. GROSS: And we are discussing the allotment of rights and burdens and privileges on the basis of classification as a Bantu—that is the question?

Prof. LOGAN: All right, yes.

Mr. GROSS: Do you consider, on the basis of the criteria to which you answered my question with respect to the validity or otherwise of allotment of rights on the basis of colour, that it is valid in the same sense to allot rights and burdens and duties on the basis of whether an individual is a Bantu?

The PRESIDENT: Are you speaking about the southern area exclusively?

Mr. GROSS: I am talking about the southern sector outside the Reserves.

Prof. LOGAN: Yes, I think it is reasonable to allocate rights and privileges and burdens (I believe you said) on the basis of a man being a Bantu in contrast with him being of some other tribal affiliation or some other parentage line.

Mr. GROSS: Yes—"some other parentage line" being in this case—?

Prof. LOGAN: European, or Coloured.

Mr. GROSS: European or Coloured?

Prof. LOGAN: Yes.

Mr. GROSS: Now, what criteria or standards would you apply in coming to your judgment that it is valid or otherwise? We are talking here about individual freedoms and the social implications thereof. Upon the basis of what criteria or standards would one reach a judgment with respect to the validity or otherwise of the allotment of rights and burdens as between, let us say, a Bantu and a White, solely on the basis of that group classification?

Prof. LOGAN: Since that group classification takes, to my mind, into account various things other than race, namely culture and culture level, meaning technological level, meaning degree of sophistication, politically and sociologically and so on, the rights and privileges are awarded to

the individual group, and I repeat group—not the Bantu as a whole, but the individual subgroup beneath the Bantu.

Mr GROSS: That is not my question, sir.

Prof. LOGAN: Well, I am afraid I cannot answer your question, because the Bantu are not considered, other than in census figures, as a total group, they are considered individually on the basis of the affiliation that exists within the larger Bantu category.

Mr. GROSS: Considered by whom, sir?

Prof. LOGAN: Considered by the individual membership—the Herero, the Damara, whichever it happens to be—and at the same time considered by the Administration, by the Government.

Mr. GROSS: Again may I come back to the question we had so much difficulty with, but which again becomes confused in my mind: how, then, do you reconcile the statement by the Prime Minister of the Republic governing this Territory as a mandate, as you are aware, that "there is no place for the Bantu in the European community above the level of certain forms of labour"?

Prof. LOGAN: At the present time none of the Bantu groups, whether it be Herero or Damara or what, is technologically, education-wise, culturally in any way, as a group capable of carrying on activities above the level just mentioned, above the level of labour. I do not think the Prime Minister said—although I am not responsible for his statements, and I do not know all the things that he has in the back of his mind, and I do not know what came before and after the statement that you mention—but I think that the Prime Minister had in mind, as is normally the case in discussing things of this sort in South West Africa, that it is always subject to change, that with the improvement in the level of the Native peoples, their level of privileges and of duties will change; that when they rise to higher levels within their own community, within their own group, then they will acquire a higher status.

Mr. GROSS: Did you in your analysis and study of the situation in South West Africa, in the respects relevant to your testimony, proceed from the focal point of the individual as an individual, or as member of a group in every case?

Prof. LOGAN: Basically as members of a group.

Mr. GROSS: The focal point which you used in your studies, then, regarded each and every individual so-called "Native" in the Territory, within the area we are defining, as a member of a group?

Prof. LOGAN: Primarily, yes.

Mr. GROSS: Did you consider in any respect, and if so what respect, the limitations on freedoms imposed on individuals from the standpoint of any other context or focus than as a member of a group?

Prof. LOGAN: Yes, of course, because there is always the exceptional individual, and where there is the exceptional individual then naturally one has to take him into account. In the case of the exceptional individual, sometimes the regulations bear heavily upon him—I think there is no question of this. There are in every one of the communities, every one of the Native groups, I am sure, in South West Africa one, or some, or sometimes a reasonable number of people who have the ability to have privileges at a higher level than is accorded to the group. This is true in any society, and one has to aim at the best for the greatest number of people, and that is what is being aimed at in this particular case, all the way through—the prevailing level of the greater part of the group.

A few, yes, I think unquestionably are harmed by this; we have exactly the same thing in our own societies.

Mr. GROSS: Professor Logan, I shall endeavour to make my questions shorter and more specific if I possibly can and, with the President's permission, may I invite you to match me if I succeed?

Prof. LOGAN: I'll try, sir.

Mr. GROSS: I would like to refer, Mr. President, to the verbatim record of 8 July at pages 365-366, *supra*, in which you, Professor Logan, were referring, among other things, to the question of population density—and you stated that this was with respect to the northern Reserves, I believe, was it not, sir? Shall I read it first and then ask you to qualify it?

Prof. LOGAN: Please, since I don't know page 365.

Mr. GROSS: Right.

> "The population density [and I quote] as I indicated, is fairly high. It is beginning to push perhaps, against over-population, it is reaching saturation in the area. This means that subsistence agriculture, followed continuously far into the future, would lead to poverty in the area, would lead to malnutrition and so on. The population pressure is seeking escape in several directions."

This is on page 365, *supra*. You recall that?

Prof. LOGAN: Yes.

Mr. GROSS: Then, finally, just one sentence from the same page of this verbatim. Among other things, you referred again to the matter of seeking escape in several directions, and you said finally:

> "... the other means of escape is to shift from a subsistence agriculture base alone, to some sort of base in which cash is involved and, in this, the Ovambo have come to be increasingly interested in going outside Ovamboland to work".

I think it has been established, has it not, sir, that there are approximately 25,000 to 26,000 Ovambos who are normally recruited for labour?

Prof. LOGAN: Yes.

Mr. GROSS: Incidentally, with respect to the Ovambos recruited for labour, you have testified that they go on contracts ranging from one to two years. Is that not correct substantially?

Prof. LOGAN: Yes, that is substantially correct.

Mr. GROSS: I wanted to ask you in that connection, before coming back to my main question, what is the average rate of return of an individual Ovambo labourer—rate of return to the southern sector after his sojourn home, on the expiration of his contract?

Prof. LOGAN: You mean cash return?

Mr. GROSS: What is the average number of times, let us say, in which the individual returns to the southern sector for the purpose of labour? I mean how many successive contracts of shorter duration would be, on the average, negotiated with him?

Prof. LOGAN: I cannot answer specifically, but a great proportion of those who go the first time, return at least a second time and there are many contract Ovambos who have been a number of times into the Police Zone.

Mr. GROSS: So that, from your observation and study, would it be

correct to say that at least a substantial number of the Ovambo male labourers, who are recruited to go to the southern sector, do return often and spend a good part of their working lives there, would you say?

Prof. LOGAN: I would not go as high as that, but they make several one or two-year visits to the Police Zone—one or two-year contracts.

Mr. GROSS: But you are not sure how long in the aggregate how much of their working lives on the average they spend there? You don't have the information?

Prof. LOGAN: No, I don't have the information.

Mr. GROSS: Now, going back to the quotation—going back to the main question I addressed to you before the question of the return of individuals—with regard to the major question of the population pressure and the means of escape by shifting from a subsistence agriculture to cash, the Ovambo have come to be increasingly interested in going outside Ovamboland to work. Is this population density, the population pressure that is involved, a phenomenon which has a tendency to increase or decrease?

Prof. LOGAN: The population pressure?

Mr. GROSS: Yes.

Prof. LOGAN: The population pressure is increasing. Under the old tribal conditions of earlier times the mortality rate balanced the birth rate and there was very little increase in the numbers of people, but with the health measures that have been introduced in recent years the mortality rate, particularly infant and disease rate, has been greatly dropped and this has resulted in quite a soaring of population.

Mr. GROSS: Therefore this bears, does it not, at the present time at least, on the question of the extent of the volition of an individual working and living in the southern sector and not in Ovamboland or, in this case, take your pick, of any Native living and working in the southern sector. The population pressure and its consequences in the northern areas, does it, or does it not have an effect on the exercise of his volition, in the sense in which you use the word?

Prof. LOGAN: Any man in Ovamboland can still live and exist at a normal Ovambo standard without going out . . .

Mr. GROSS: I am talking about the other way round, sir.

Prof. LOGAN: But, if he wishes to achieve anything above this level then his easiest way and his best way of doing it is to go out.

Mr. GROSS: I am talking about it from the other side, sir. Would you take it now from the standpoint of the individual residing, living and working in the southern sector who is considering whether to exercise his volition in favour of staying where he is, subject to the limitations on his freedoms which are admitted to exist, or to go, whether he has been there before or not, to his territory. In exercising that volition, if he were aware of the problems, would the population pressure and its consequences affect his freedom to make a decision?

Prof. LOGAN: But the population pressure just described is only in Ovamboland; and all of the other Natives, which I take you to be talking about, would not be going back to an over-populated Reserve. They would be going back to their own Herero or Dama or Nama Reserve, which would not be over-populated. The southern Reserves are not over-populated.

Mr. GROSS: So that the answer to my question is that the person exercising the volition that we are talking about would have to decide

whether or not to move himself and his family to a Reserve within the Police Zone. Is that it? That was what your answer implied?

Prof. LOGAN: Yes, and therefore there is no relation to this population pressure in Ovamboland. The two are totally distinct from one another.

Mr. GROSS: Yes. Now, with respect to the Ovambo who is recruited for labour and who goes to the southern sector, his volition is affected by the conditions in Ovamboland which you have described, and he goes to the southern sector, as you have testified I think, to obtain cash in order to live above the subsistence level that prevails in Ovamboland. Is that correct?

Prof. LOGAN: That is correct.

Mr. GROSS: So that in his case, in the case of that individual or the group of 26,000—they come to work in the southern sector for economic gain which, to them, means living above a subsistence level or not. Is that correct?

Prof. LOGAN: That is correct, yes.

Mr. GROSS: So that, in their case, if they were subjected to limitations imposed upon the freedoms by reason of being present in the so-called White territory, in your judgment would they have a free choice—exercise of volition—in the sense in which you use the word, as to whether or not to stay home or to go to work for cash elsewhere?

Prof. LOGAN: I believe they are subjected to most of the limitations, as you put it, that are already existent and affecting the other people.

Mr. GROSS: They are, sir, we can take that as given. My question is—that being the case, and they having no place but a bare subsistence economy to live in in Ovamboland, one in which population pressure is increasing—whether you would care to say whether you believe that such a labourer, or such a group of labourers, has a free choice in the exercise of volition, whether or not to stay home or to come to the southern sector for cash.

Prof. LOGAN: They have a free choice.

Mr. GROSS: They have a free choice to stay in a subsistence economy or to try to improve their lot by coming to the southern sector?

Prof. LOGAN: Correct.

Mr. GROSS: And this is the sense of the word "volition" that you used?

Prof. LOGAN: Yes.

The PRESIDENT: What is the meaning of "free volition" or "free choice" whatever was the term you used, Mr. Gross?

Mr. GROSS: Yes, sir, would you explain to the Court, sir, what, in your response to my question, you had in mind with regard to the phrase "volition".

The PRESIDENT: "Free volition?" If those were the words used, what is meant by them?

Mr. GROSS: "Free volition." I asked you and you said "Yes". Would you elaborate, if you please, sir?

Prof. LOGAN: To my mind "volition" means "of one's own will", of "one's own desire", and I think the word "free" is unnecessary in the case here. By this I mean that the people who wish to come to the Police Zone to work make this known to their local chief, to their local headman, and to the proper authorities representing the Whites of the Police Zone; they volunteer, in other words, for labour, they are not conscripted; they volunteer for labour and then at a certain date are

told to report at a certain recruiting headquarters from which they are transported into the Zone.

Mr. GROSS: Mr. President, may I clean up my grammar, with the permission of the Court and the witness by striking out the word "free" and just using the word "volition" in terms of the response. Thank you, sir. The pleadings of the Respondent in the Rejoinder—I have referred to **VI,** page 203—contain the following sentence, which parenthetically refers to the Applicants and States: "Applicants' basic premise is, of course, false: there is in fact no 'population pressure upon the land'." Would you comment on that statement in the light of what you have said?

Prof. LOGAN: Yes, I think that if you refer back to my testimony of yesterday, you will see that I said "this is approaching population pressure", I do not think I said "was over-populated". The area is not over-populated, it is approaching this; furthermore, there is within it—it being a purely agricultural area—no opportunity for developing much of a cash economy under the existing physical conditions. When these are changed by the bringing in of the irrigation of water and so on, the whole situation will change, but at the present time this is the situation. Therefore the area, with its expanding population, is headed towards eventual population pressure which is seeking outlets in various ways as we indicated. But I do not feel that it is an area yet of over-population; already people are beginning to find ways of solving the problem in their own manner. The area is one—if I may clear one point—of subsistence economy, but subsistence economy does not necessarily denote impoverishment or malnutrition or anything of that sort. All of these economies were, or are still, subsistence until the influence of the European within the last 70 years, and consequently this is just one area that still remains at subsistence economy level; but this is not a case of impoverishment or malnutrition or anything detrimental.

Mr. GROSS: I would like to remind you, Professor Logan, that in your testimony which I have referred to on page 365, *supra,* of the verbatim of 8 July, I quote the following sentence: "The population pressure is seeking escape in several directions."

The PRESIDENT: Where on the page it is, Mr. Gross?

Mr. GROSS: Page 365 in the second paragraph—the middle of the paragraph.

Prof. LOGAN: "Population pressure" and "over-population" are two different things, and there is population pressure here but there is not yet over-population: I would make a distinction between the two of them. I do not think the area is overpopulated: there is a pressure upon the land already.

Mr. GROSS: Professor Logan, if I may suggest, sir, I do not mean to curtail your response, but we might save time if we understand the question. I want to go back to the sentence I quoted from the Rejoinder, **VI,** at page 203: the sentence is: "Applicants' basic premise is, of course, false: there is in fact no 'population pressure upon the land'." Now I read the sentence from page 365, *supra,* of the verbatim of 8 July, in which you say: "The population pressure is seeking escape in several directions."

The PRESIDENT: Mr. Gross, if you read the preceding paragraph, you will see it has been said, partly at least in the context, that the population pressure is from Angola.

Mr. GROSS: Well, Mr. President, if I then may, sir, ask Professor Logan

for the clarification or elucidation of this point. When you said that the "population pressure is seeking escape in several directions", what did you mean by the phrase "population pressure"?

Prof. LOGAN: I mean that it is approaching saturation. May I put it on a personal individual basis—a man has a piece of land, he has several children, this land has to be divided among several children: where can they go, they cannot continue to farm that piece because there will not be sufficient food produced upon it. They must go somewhere; so, some go to the east into the forest area and pioneer there; some decide that maybe they can engage in some kind of business locally; others decide that they will go to the Police Zone as labourers; this is not yet over-population, but there is a pressure upon the resources of the land.

Mr. GROSS: One more question on this; would you be prepared to express your expert opinion, as a geographer who has studied the area, with respect to the statement I have quoted from the Rejoinder, that: "Applicants' basic premise is, of course, false: there is in fact no 'population pressure upon the land' "?

Prof. LOGAN: I think we are using two terms.

Mr. GROSS: We, being who, sir?

Prof. LOGAN: The person who wrote that report.

Mr. GROSS: Yes, sir.

Prof. LOGAN: . . . and myself are using the two terms somewhat loosely, as perhaps I have done earlier here. I think that there is no over-population, there is some population pressure.

Mr. GROSS: Would you be prepared to express a view as to whether the Applicants' premise that there is population pressure is false?

Prof. LOGAN: Yes, I would say that the Applicants' contention is false.

Mr. GROSS: That there is no population pressure?

Prof. LOGAN: No.

Mr. GROSS: That there is population pressure?

Prof. LOGAN: There is no over-population, but there is population pressure.

Mr. GROSS: The Applicants' statement said nothing about over-population, would you bear with me. The statement quoted is: "Applicants' basic premise is, of course, false: there is in fact no 'population pressure upon the land'." Would you characterize that statement, that premise of the Applicants, as false?

The PRESIDENT: I do not think you can put a question such as that, Mr. Gross. You can ask the witness whether or not he agrees.

Mr. GROSS: Would you agree, if you were asked the question, "Is the statement that there is population pressure upon the land a false or true statement", how would you answer the question?

Prof. LOGAN: I would answer it, that it was . . . I am sorry I have lost the statement now. The statement is, that there is over-population.

Mr. GROSS: *There is "population pressure upon the land"*—that is the statement. If you were asked your expert opinion as a geographer, having . . .

Prof. LOGAN: I would have to say that there is population pressure upon the land. I would also want to say that there is no over-population.

Mr. GROSS: Thank you. Now, I would like to refer to a comment in your testimony with respect to the communication among various tribes. I refer to the verbatim record of 8 July:

"*The language differences between each of the individual groups*

> within the area—the ones I named a moment ago—are, in nearly every case, so profoundly different that one group cannot speak to the other, there is no way of communicating in their own languages between one another, they cannot understand each other. . . . none of the groups are able to converse with one another within their own language patterns." (*Supra*, p. 368.)

Now, in order to refresh your recollection about the groups referred to I will read:

> "There are two basically completely different languages within the area; the Khoisan language of the southern portion (the Nama, Damara and Bushmen language) is basically different in all of its fundamental characteristics from the languages of the Bantu peoples." *(Ibid.)*

I beg your pardon, I think that the groups you are referring to are further back in the record. I think they are—correct me if I am wrong—"the Ovambo, the Okavango, the inhabitants of the Caprivi Strip, the Kaokovelders, the Herero, the Damara, the Nama and the Bushmen".

The PRESIDENT: Would you give me the page, Mr. Gross.

Mr. GROSS: At page 368, the first paragraph of Professor Logan's answer to the question of Mr. Muller.

Let us clarify the record here, because the context is somewhat confusing, I think. When you refer to the language differences between each of the individual groups within the area (the ones I named a moment ago) were you referring to the Khoisan versus the Bantu, or were you referring to the separate groups enumerated earlier on that page?

Prof. LOGAN: I think there is a parenthetical expression in it that says "for the most part" or "in most cases". If I allow that to stand then I am referring to all the sub-divisions within the groups.

Mr. GROSS: No, that is not what you did say. May I refresh your recollection as to what you said, sir? Would you care for me to read it again?

> "The language differences between each of the individual groups within the area—the ones I named a moment ago—are, *in nearly every case*, so profoundly different that one group cannot speak to the other, there is no way of communicating in their own languages between one another, they cannot understand each other. [And then you said, later] . . . none of the groups are able to converse with one another within their own language patterns."

Now would you . . .

Prof. LOGAN: The last sentence is incorrect.

Mr. GROSS: It may be modified . . .

The PRESIDENT: I think not, Mr. Gross, it says "aside from certain curious exceptions . . . none of the groups".

Mr. GROSS: "Aside from certain curious exceptions, such as the Damara who speak Nama, none of the groups are able to converse with one another . . ." Are there any other curious exceptions?

Prof. LOGAN: Yes, there are a couple of others. The Kaokovelders are either Nama who can speak to other Namas, or splinter-groups of Herero who can converse well, or poorly, with other groups of Hereros. I think that is the limit of the exceptions.

Mr. GROSS: Right, now for the sake of clarity in your response, will you address yourself, if you please, to the groups which do not involve

the so-called "curious exceptions". With respect to these groups and the problems of communication to which you refer, do any of them, or do a substantial number of them, speak a language other than their own language in the sense in which you refer to "their own language patterns" in the testimony?

Prof. LOGAN: No, there is nothing in South West Africa comparable to Swahili, for example, on the East coast, or to Papiamento in the Caribbean, or pidgin English in the South Pacific. There is no *lingua franca* that is generally used.

Now among the Natives of the Police Zone farms and Reserves a fairly high proportion speak Afrikaans and so Afrikaans becomes something of a *lingua franca* there, but Afrikaans is, of course, a European language —it is Holland's Dutch, once removed—and it is the language of a good portion of the White population of the Territory. So this is used by some.

When you get into the Reserves of the north, where the White influence has not been felt as strongly in the local communities, then there is not even Afrikaans as a *lingua franca*.

Mr. GROSS: The testimony given on 7 July 1965 was being given by Dr. Bruwer who, with respect to the question of the development of *lingua franca*, said as follows when he was asked about the language position in response to a question by an honourable Member of the Court:

> "Now, Mr. President, that is the language position, basically, apart of course, from the fact that in the schools, and in practical use, the people also make use of either English or Afrikaans. As to the development of a *lingua franca*, I cannot say that a *lingua franca*, apart from Afrikaans and English, has developed in South West Africa, a language which one could say is, as such, something that was developed in South West Africa and that is understandable by all the people. I have tried, Mr. President, to indicate to the honourable Court the great differences between the two language families that we have."

And then he made the following comment in his testimony, to which I will call your attention:

> "As to the use of English and Afrikaans as media of communication, Mr. President, I have always been astonished that it is possible in South West Africa, practically everywhere, to make oneself understood in either English or Afrikaans. As a matter of fact, in Ovamboland—I have more knowledge of the Ovambo people, I think, than any other—it has always astonished me that they speak an Afrikaans which is not influenced by their own language [and then he goes on to discuss that, which I think is irrelevant to this purpose] . . . one of the things that has interested me very much, Mr. President—the fact of the use of a language in such a form that one could say that it has developed into a *lingua franca*, and that applies actually to both the two official languages, Afrikaans and English . . ." (*Supra*, p. 328.)

Would you comment on that in terms of your testimony with regard to the difficulty of communication in the absence of a *lingua franca*?

Prof. LOGAN: I would agree quite thoroughly with it. I would not have assumed that Afrikaans was quite that widespread in Ovamboland, and I am sure it is not in the Okavango, as perhaps that seems to imply, but I would subscribe to it completely, yes.

Mr. GROSS: Therefore, the development of a *lingua franca*, in this sense, is something which you have observed, is it?

Prof. LOGAN: No, I say that there is not a *lingua franca* other than Afrikaans.

Mr. GROSS: Well I am talking about *lingua franca* in terms of a language used by more than one language group. They communicate with each other through the medium of Afrikaans, is that correct?

Prof. LOGAN: Yes.

Mr. GROSS: Professor Bruwer stated that "the fact that the use of a language [which interested him very much] in such a form that one could say that it has developed into a *lingua franca*, and that applies actually to both the two official languages, Afrikaans and English".

I thought, if I understood you correctly, that you said you agreed with Professor Bruwer's statement which I read to you. Did I misunderstand you, sir?

Prof. LOGAN: Well, I must be misunderstanding myself. Yes, I would agree with what is said there, with what you have just read.

Mr. GROSS: That the language has developed in such a form that it has developed into a *lingua franca* and that applies actually to both Afrikaans and English. You agree with that, sir, do you?

Prof. LOGAN: Yes.

Mr. GROSS: So that anything that might be in the record that might be understood as saying that you do not think there is a *lingua franca* is not correct, is that correct?

Prof. LOGAN: Well you see I use the term *lingua franca* apparently differently from you and Mr. Bruwer. *Lingua franca*, to my mind, is a language which has developed out of several other languages and is used by a wide number of people. That is the case with Swahili, which is not the language of any people, it is a language drawn from several different languages. Pidgin English is the same way, Papiamento is the same way, they are made up of several different languages. But in this case Afrikaans has been adopted as a language which is used by a number of people. Therefore if we use the term *lingua franca* loosely to include a language which has been adopted by others, then yes, this would be correct.

Mr. GROSS: Well, I think that takes us far enough in this direction, the point being, apart from the usage of your interpretation of the phrase "lingua franca", as distinguished from Professor Bruwer's, that there is, in your observations on the basis of study, a large degree of communication possible among the various groups.

Prof. LOGAN: But only by going to a European language, not within . . .

Mr. GROSS: I am trying to avoid confusion by assuming that this is the situation, which I am sure you and Professor Bruwer are right in describing. Regardless of the medium of communication, whether it be English or Afrikaans or both, there is—according to this testimony, if it is understood correctly—is there not, a high degree of communication possible by word of mouth, by speech, among the various groups, even though their own tribal languages differ? Is that correct?

Prof. LOGAN: That is correct, except in the Native Reserves of the north, as I said at the beginning of my statements here, particularly in the Okavango, where Afrikaans is still not even used.

Mr. GROSS: What about Ovamboland, sir?

Prof. LOGAN: Professor Bruwer knows far more about Ovamboland

than I, and, consequently, I would bow to any testimony that he stated, on Ovamboland.

Mr. GROSS: So that an Ovambo, the average or typical Ovambo or however you would describe him in group terms, is capable of speaking a language other than his own, and, in fact, many Ovambos do. Is that correct?

Prof. LOGAN: If that is what Professor Bruwer said, yes.

Mr. GROSS: Have you been in Ovamboland?

Prof. LOGAN: Yes.

Mr. GROSS: Did you discuss matters affecting the welfare or interests or conditions of the people there?

Prof. LOGAN: Yes.

Mr. GROSS: In what language did you speak, sir?

Prof. LOGAN: Principally in English.

Mr. GROSS: Did you speak with any Natives—classified as Natives?

Prof. LOGAN: Yes.

Mr. GROSS: They spoke to you in English?

Prof. LOGAN: In most kraals you can find a person who speaks English because this is a man who has been in the Police Zone, as a contract labourer.

Mr. GROSS: You spent some time in Windhoek, or other areas of the southern sector outside of the Reserves?

Prof. LOGAN: Yes.

Mr. GROSS: Did you discuss matters with non-Whites, persons classified as non-White?

Prof. LOGAN: Yes.

Mr. GROSS: In what language did you speak there?

Prof. LOGAN: In the Police Zone, nearly all Natives speak either Afrikaans or English, basically Afrikaans.

Mr. GROSS: And these persons, with whom you talked, were not all Ovambos, were they?

Prof. LOGAN: Oh, no.

Mr. GROSS: So that an Ovambo who speaks English or Afrikaans is capable of communicating with a Herero who speaks English or Afrikaans?

Prof. LOGAN: Absolutely.

Mr. GROSS: So there is between them that possibility of communication?

Prof. LOGAN: That is quite correct.

The PRESIDENT: I think Mr. Gross that there is no inconsistency between what the witness says now and what he said at page 368, *supra*, because he was there speaking of inability "to communicate with one another within their own language patterns", that is on page 368.

Mr. GROSS: Yes, sir. I had, with respect, Mr. President—I am afraid I did not state my question clearly—proceeded from that to a consideration of the problems of communication and the means, and mode of communication, without implying that this was attributable to the witness's statement. Thank you, sir.

The development of this capability of communication, in a language other than the vernacular, or tribal, or whatever you may call another local language—that was in response to a need, would you say?

Prof. LOGAN: Yes.

Mr. GROSS: And on the basis of your observation and study, would you

regard it as important, from the standpoint of the development of the individual, the ability to communicate with others, that he do receive language instruction?

Prof. LOGAN: Absolutely.

Mr. GROSS: In Afrikaans, or English?

Prof. LOGAN: Yes.

Mr. GROSS: Had you come to a conclusion as to what level it would be desirable or necessary to carry him in his learning, in his learning, his accomplishment in one of the *lingua franca* languages, in terms of Dr. Bruwer's classification?

Prof. LOGAN: Yes.

Mr. GROSS: And approximately what would be your conception of the level to which that education should be carried in the case, let us say, of an individual in the Police Zone outside the Reserves?

Prof. LOGAN: To a level sufficient to allow him to communicate clearly with anyone.

Mr. GROSS: On any particular range of questions, or all questions pertaining to his life in the modern sector?

Prof. LOGAN: Well, yes, so that he can converse in a normal manner with anyone about any practical subject.

Mr. GROSS: The next line of questions I have, relate to a statement you made in your testimony on 8 July in the verbatim record, at page 383, *supra*, in response to a question addressed to you. You stated "I don't necessarily agree with everything in the Odendaal Commission report". Do you recall having said that, sir?

Prof. LOGAN: Yes.

Mr. GROSS: You have studied the Odendaal Commission report?

Prof. LOGAN: Yes.

Mr. GROSS: Did you have anything to do with the preparation of the report?

Prof. LOGAN: Nothing whatever.

Mr. GROSS: In the Odendaal Commission report itself, I quote from page 427, paragraph 1431, the Commission makes the following statement:

> "The moral and economic principles of a modern economic system are different from those of traditional groups where the group and not the individual is the focal point. The modern economic system and the traditional system are therefore not comparable or readily reconcilable. Their problems are different, their human values and motivations are different. Consequently, there has to be a differentiated policy."

In general, is that one of the findings or considerations of the Odendaal Commission report with which you agree, or disagree?

Prof. LOGAN: I do agree with it.

Mr. GROSS: In his testimony of 5 July, which is in the verbatim, at page 269, *supra*, Dr. Bruwer was asked the following question by the Applicants:

> "Do you consider, as a social anthropologist and as a member of the Odendaal Commission, that there are any individuals categorized as non-White in the southern sector who have attained the status of the focal point as an individual?"

The answer was:

> "The focal point, that is where one can now say that it is the criterion of the modern economy that complies, I think that one could well say that there may be individuals of that nature."

That was in the context of the southern sector; we were addressing ourselves to the southern sector outside of the Reserves with 125,000 Native persons, as they are categorized, who live there. Do you agree with the response of Dr. Bruwer that one could well say that there may be individuals in this area to whom the focal point, the consideration of moral and economic principles, is applicable?

Prof. LOGAN: Yes.

Mr. GROSS: As individuals?

Prof. LOGAN: Yes.

Mr. GROSS: Have you held discussions with such individuals in your studies in South West Africa?

Prof. LOGAN: Yes.

Mr. GROSS: By what criterion or standards would you be prepared to express a judgment or reach a conclusion as to whether the individual has attained that point of development, or whatever the phenomenon is, that entitles him to be viewed from the focal point of an individual as distinguished from the focal point of a group? Could you answer that question?

Prof. LOGAN: Yes, when he has acquired a personal stature in business, in education, in his thinking so that he begins to separate himself from the group and stands above the group.

Mr. GROSS: Now, if you were judging a person's rights or duties, on the basis of this consideration, could you advise the Court, or state to the Court, any criteria or standards upon which your judgment would be based, other than what I have just said? How would you know whether to apply these standards which you have mentioned to a particular individual? Would you leave it to the individual to make the determination and advise you whether he has matriculated to that extent?

Prof. LOGAN: No, I think that it is quite clear in many cases, when you encounter such a person, a person who has had an education above the first two or three years of schooling, when the person owns a business or conducts some kind of professional development or operation; this person obviously stands above the rest of the community and is differentiated from the rest of the community.

Mr. GROSS: At that point of his accomplishment, then, is it your view that he has attained a status at which he should be judged as an individual and not as a member of a group in terms of his rights and duties and freedoms?

Prof. LOGAN: He will be judged as a member of the group who has achieved these things and will achieve this status within his group.

Mr. GROSS: So that the limitations imposed upon his freedoms will always be regulated or measured by reference to the fact that he is classified in a certain group? Is that correct?

Prof. LOGAN: Yes, I think so, exactly the same way as you are classified as an American lawyer rather than a Dutch lawyer or a Japanese lawyer, within your group.

Mr. GROSS: Classified by law?

Prof. LOGAN: Just thinking generally, in as far as your passport is

concerned, as far as your salary is concerned, this all fits within your particular group to which you belong.

Mr. GROSS: Are we talking about the classification among professions or are we talking about classification of individuals, for the purpose of determining whether restrictions or limitations should be imposed upon their rights or freedoms? It was the latter that I was talking about.

Prof. LOGAN: Well, I would have to know, first, what you mean by limitations of rights and freedoms.

Mr. GROSS: You have testified, I believe, in the following words, at page 343, *supra*, of the verbatim of 7 July:

> "I am quite aware, however, of the rights and privileges and the limitations thereon, as anyone living in and observing critically and carefully a society ordinarily is, and consequently I think I can talk with a fair degree of certainty in regard to how much freedom or lack thereof there is on the part of the Native group in South West Africa."

I am talking now, about the question of "freedom or lack thereof", with respect to a particular individual and when I use the phrase "limitations imposed upon freedom" I am using it in the same sense in which, I take it, you were using it, or do you have a special sense of the word "freedom"? Would you care to define it for the Court?

Prof. LOGAN: Well, it becomes difficult to know what is referred to by "limitations upon freedom" for the man who is, let us say, a tradesman, a merchant in the Native community, a Herero who has acquired considerable money, and has a shop, and so on; he can continue to be a tradesman in the Native area, in the township of Katutura in Windhoek; he cannot trade, he cannot set up a shop in the White area of Windhoek. This may be looked upon as a curtailment of his freedom. Now, in exactly the same way, however, a White merchant cannot set up a shop within the Native area of Katatura; he can sell merchandise within the White area of Windhoek but not within the Native area; and so there is a limitation and a curtailment in both directions here, upon both of the groups involved.

Mr. GROSS: You say that there is a limitation?

Prof. LOGAN: Yes.

Mr. GROSS: Imposed, or is it voluntary on the part of the individual—is it imposed by the Government, or is it voluntary?

Prof. LOGAN: It is imposed by law.

Mr. GROSS: So that now we understand each other on what we mean by the imposition of limitations; what is left now is to develop an understanding for the benefit of the Court as to what we mean by freedoms—is that correct?

Prof. LOGAN: All right.

Mr. GROSS: Now, are you aware of any deprivation of freedoms with respect, let us say, to the ability to attain a certain level of employment, merely on the basis of race or colour?

Prof. LOGAN: Yes.

Mr. GROSS: Would you regard that as a limitation upon freedom?

Prof. LOGAN: Surely.

Mr. GROSS: Yes.

Prof. LOGAN: But it must be viewed in the whole context of the country, because it works in both directions.

Mr. GROSS: We are talking now, Professor Logan, in the context of the individual who has obtained his degree or status of being a focal point for our discussion as an individual, and I am referring to the imposition of limitations upon the freedom of an individual. May I ask you, sir, do you regard limitations of freedom as being characteristically individual in their application.

Prof. LOGAN: Some are individual, some are group; there are both types of limitations imposed in the area, yes.

Mr. GROSS: Can a limitation be imposed upon a group—a limitation of freedom—which is not imposed upon the individuals composing that group?

Prof. LOGAN: Probably not.

Mr. GROSS: Probably not, sir. But a "group" in that context is a pure abstraction, is it not, if we are talking about limitations on freedoms, and merely describing a number of individual persons whose freedoms are curtailed—is not that correct?

Prof. LOGAN: Yes.

Mr. GROSS: With respect to the individuals whose freedoms are curtailed, we have now established that one of the freedoms would be the freedom to obtain work or to perform services at a level higher than, let us say, some forms of labour, if he has the innate capacity to perform services at a higher level. Would you agree that is a deprivation of the individual's freedom?

Prof. LOGAN: That is correct, within the particular area concerned.

Mr. GROSS: The area of an individual, I should think, would be bound by . . .

Prof. LOGAN: No, not the area of the individual, the geographical area. The Native cannot work above a particular level in the European portion of the Police Zone.

Mr. GROSS: That is what we are talking about.

Prof. LOGAN: Within his own Reserve, however, he can go to any level; within the Native township within the European area of the Police Zone he can go to any level; in Katatura in Windhoek he can operate any kind of machinery, he can be a doctor, he can go to any level desired, but not within the White area.

Mr. GROSS: I think the Court is aware of that, that has been brought out, that there is a compensatory factor. This has been established; that certain people by reason of race are deprived of freedoms here; the compensation or equivalence thought to be fair is that other people in turn are deprived of freedoms somewhere else—this the Court understands. But if we could confine ourselves, if you will, to the individual who is spending his working life in a particular situation—working in a mine, or working in a factory, or living all his life so long as he can work in the home of a White employer in Windhoek—such a person is deprived of certain freedoms, and it is those to which we are addressing ourselves.

Prof. LOGAN: But he is only deprived of these because he likes to live in Windhoek, or to work in that mine, or work in that farm or factory, and if he does not wish to live in Windhoek, then he can go to his Reserve area and live there and enjoy those freedoms.

Mr. GROSS: So that the price of his living in Windhoek, the price which he must pay for the privilege of living in Windhoek, is a limitation imposed upon his freedoms—is that correct?

Prof. LOGAN: A limitation imposed upon certain freedoms, yes. The freedom to go above a certain level economically, but only that.

Mr. GROSS: Is this, Professor Logan, what you had in mind when you testified in the verbatim record at page 354, *supra*—that would be on 7 July—as follows—I will read from the text of your testimony, so that you have it clearly; you said, among other things, as follows on that page:

> ". . . they [that is, in this context I believe you were referring to the Herero] are engaged in a wide variety of occupations. The Herero are quite frequently in town; the women work as laundresses and housemaids for the most part; the men work at a number of different jobs, ranging up to as high as truck driver and chauffeur; they work as deliverymen, and positions of that sort."

I call your attention to the phrase you used "as high as". Would you explain what you meant by that phrase?

Prof. LOGAN: Well, again they are limited in being employed at a higher level by the Job Restriction Act within Windhoek—we are talking about within the towns.

Mr. GROSS: I am talking about any place you wish to talk about within the southern sector, outside the Reserves.

Prof. LOGAN: Yes, that is correct.

Mr. GROSS: Just to localize it, so that we know what we are talking about.

Prof. LOGAN: But it is not true within Katatura.

Mr. GROSS: I am not asking you, sir, where it is not true—we can come to that, perhaps, later, if it is relevant.

The PRESIDENT: I think perhaps the witness had better answer the question, if you can, directly; if you need to add an explanation, then add the explanation.

Prof. LOGAN: But Mr. President, the point is that within the Police Zone outside the Reserves there still is the Native area within Windhoek.

Mr. GROSS: I object to that, Mr. President—it is not being responsive.

The PRESIDENT: Well, I suppose the Court may as well know what is in the witness's mind, Mr. Gross, and this has been said more than once —I think we all know it—what is being said at the moment.

Mr. GROSS: I will not formally object.

The PRESIDENT: Well, continue the cross-examination.

Mr. GROSS: Do you wish the witness to continue?

The PRESIDENT: No, continue the cross-examination.

Mr. GROSS: We are talking about the group of individuals who live in Windhoek, or an individual who lives in Windhoek, now. You have explained to the honourable Court what you meant by the phrase "as high as" in the testimony which I have quoted, and I believe you testified, if I understood you correctly, that you had in mind the restrictions that were put upon his achieving higher employment status—is that correct?

Prof. LOGAN: That is correct.

Mr. GROSS: Now do those restrictions, on the basis of your study and analysis, have any relationship to the individual's innate capacity or personal potential and ability?

Prof. LOGAN: They have no relation to this, no.

Mr. GROSS: They are based entirely, are they, on his classification under the census?

Prof. LOGAN: That is correct.

Mr. GROSS: And would you, sir, in your use of the word "freedom" in the context in which you said that you felt capable to talk about it —to describe it with a fair degree of certainty—regard this limitation as a limitation imposed upon the freedom of these people that we are discussing?

Prof. LOGAN: Within the area to which it applies, yes.

Mr. GROSS: Would you explain to the Court how the individual whose freedom is limited in this respect is made any happier or easier by knowledge that somebody else somewhere else is also being deprived of his freedom; would you please express a judgment concerning what relevance that has to this individual's attitude?

Prof. LOGAN: It has no relevance, but the man has the opportunity himself to go to another area and there have the job at a higher level, and that area may be only one mile away within the Native area of the City of Windhoek.

Mr. GROSS: Suppose he does not want to do that—suppose he prefers it where he is—would that affect your response?

Prof. LOGAN: Yes, it would affect my response—in precisely the same way that the European farmer on a drought-stricken farm in the south would like to go to the Okavango and farm in a good area, and is prevented from this.

Mr. GROSS: Sir, may I ask you, without indulging in anything, or attempting to suggest anything personal about this, do you, in your approach toward this matter, always evaluate the question of whether a person's freedom is being limited by reference to what somebody is doing to somebody else?

Prof. LOGAN: No.

Mr. GROSS: Do you have any objective standards or criteria—would you know when you were being, in the good old American expression, pushed around?

Prof. LOGAN: Yes.

Mr. GROSS: What, then, relevance—again I ask the question—does it have in terms of the individual whose freedom is being curtailed to know that somebody else is also suffering somewhere else—if he chooses to go there, he will see somebody else suffer in the same way he does—is that what you are telling the Court?

Prof. LOGAN: Not exactly, no.

Mr. GROSS: Well then, I would like you to explain to the Court—and I will attempt not to argue with you on this point but genuinely to understand you—for the benefit of the Court: what relevance, if any, is there to what happens somewhere else, or can happen somewhere else, in the question whether an individual's freedom is being curtailed or limited, where he lives, where he works and where he wants to stay—what is the relevance of the other factor?

Prof. LOGAN: I think everyone's freedom has always been curtailed by something, somewhere, and the attempt is being made here to develop an area on a basis of groups.

Mr. GROSS: An area in the southern sector?

The PRESIDENT: He is answering your question, Mr. Gross.

Mr. GROSS: Mr. President, I find it very difficult to understand whether he is being responsive.

The PRESIDENT: Sometimes the Court may find the question very difficult to understand.

Mr. GROSS: If the witness, Mr. President, finds my question difficult I urge that he request clarification, but I apologize for interrupting.

Prof. LOGAN: I am talking about the Territory, the entire Territory, and the attempt that is being made to develop the entire Territory for the best interests of the groups, and I repeat groups, that are inhabiting it; and sometimes, in the development of groups of people, the interests of individuals have to be sacrificed, and I think that in this case the interests of some individuals had to be sacrificed to develop the groups of the area.

Mr. GROSS: Are you finished, sir?

Prof. LOGAN: Yes.

Mr. GROSS: On what basis do you determine, and who makes the determination, who sacrifices what?

Prof. LOGAN: I could not answer that—it is a hypothetical question that could be answered in many ways.

Mr. GROSS: You will limit your answer to the general statement that you made that some people have to be sacrificed?

Prof. LOGAN: Yes.

Mr. GROSS: Would you care to indicate an approximate percentage of the population who must pay that price, in the context of the southern sector of the Territory?

Prof. LOGAN: I find this difficult to do, to put a percentage basis on it.

Mr. GROSS: Are you making a moral judgment, sir?

Prof. LOGAN: No, I am not making a moral judgment—I mean, I find it difficult to say that 1 per cent. or 3 per cent. or 5 per cent. are being sacrificed. It would be a very small percentage in the situation as it stands today.

Mr. GROSS: Would you regard 5 per cent. as a small percentage?

Prof. LOGAN: Yes, I think so.

Mr. GROSS: You would be prepared to sacrifice 5 per cent. of 125,000 people to accomplish the objective to which you refer?

Prof. LOGAN: We have done this in war, as many times.

Mr. GROSS: Do you regard this situation in South West Africa as a matter of war?

Prof. LOGAN: No, I do not know any more peaceful area in the world than South West Africa.

Mr. GROSS: Let us talk about the peaceful context, then. The sacrifice is to be made in a given area by a given set of individuals. May I come back to my question?

Prof. LOGAN: Surely.

Mr. GROSS: On the basis of what criteria is it to be determined who is to be sacrificed and how many?

Prof. LOGAN: The ones who are least in conformance with the pattern of the group, the normal situation of the group.

Mr. GROSS: Suppose, for the sake of our hypothesis that they happen to be persons of a highly superior innate capability—would that affect the answer to the question?

Prof. LOGAN: Yes, it would affect it. I think that the people who were of a higher development would find their own way of handling the situation, that they would not insist on remaining in the area which was antagonistic to them, but would find their means of development within

the area in which they fitted, in which they wished to develop their own group.

Mr. GROSS: In other words, could we say, to escape from that situation? Would you accept that phrase?

Prof. LOGAN: Yes.

Mr. GROSS: You would. And would that, in your judgment as a student of man and his relation to land and the sociological studies you have made, would that course be likely to drive out or induce those to escape who might make the most contribution to the situation by remaining?

Prof. LOGAN: No, I think that they would make their contribution within their own group. If you had a lawyer or a doctor who had been well-trained—I am speaking here of a Native one within the White area of the Police Zone—and this lawyer or doctor, having been trained, would not then attempt to find clients among the White population, but rather would go with the Native population and thereby would raise the whole status of the Native population, of the group to which he belonged.

Mr. GROSS: Suppose that he didn't like to live among the Native population but wanted to live where he was, where he was born—in the southern sector. Does that have anything to do with the decision?

Prof. LOGAN: He could still do this.

Mr. GROSS: Subject to the deprivation of his freedoms?

Prof. LOGAN: No, he could still do this within the Native township in Windhoek. He could be with a group of 15,000 other Natives and find, within that group, a number of his own particular cultural group—Herero or whatever he is.

Mr. GROSS: And that township would be, let us say, near Windhoek? Near the city?

Prof. LOGAN: Yes, a mile from Windhoek.

Mr. GROSS: And would he then, in pursuit of his happiness in this form, would he go to Windhoek occasionally? Would that fit into the scheme?

Prof. LOGAN: Surely.

Mr. GROSS: And for what purpose would he go to Windhoek?

Prof. LOGAN: To buy goods that were not available within the Native township; to take a trip on the train; to do things of this sort.

Mr. GROSS: To attend lectures, perhaps?

Prof. LOGAN: He could attend lectures, yes.

Mr. GROSS: He could participate in the life of the community subject to the limitations on his freedoms?

Prof. LOGAN: Not in the social aspects of the life of the White community, no.

Mr. GROSS: How many non-Whites presently reside in Windhoek?

Prof. LOGAN: In Katatura you mean? In the Native area of Windhoek? There are somewhere around 20,000 between Katutura and the old location of Windhoek.

Mr. GROSS: Do any non-Whites work and reside in the homes of White employers as domestics? You referred to that in your testimony.

Prof. LOGAN: Yes.

Mr. GROSS: Are they people?

Prof. LOGAN: Surely.

Mr. GROSS: Do you have any idea roughly how many there are of that category?

Prof. LOGAN: No, I don't. It will be several thousand.

Mr. GROSS: And are they among those whom you think would find their freedom and pursue their happiness in the townships by leaving Windhoek if they felt that they were being denied freedoms?

Prof. LOGAN: Well, they live in the home in Windhoek. On their day off or their hours off they frequently go to Katutura, which is only a short distance away and there is a regular bus service. They go there to visit their relatives and their friends.

Mr. GROSS: So when you talk about the person escaping from the local situation are you talking about occasional visits to the townships?

Prof. LOGAN: No, we were not speaking in that category, we were speaking about escaping in order to get a higher job classification.

Mr. GROSS: That is what I thought we were talking about, sir.

Prof. LOGAN: Well, now we seem to have drifted towards social aspects.

Mr. GROSS: I apologize for leading us into the drift. I do want to stick to the point, which is a basic point, obviously.

With respect to the several thousand non-Whites who live in Windhoek and work there, is there any way in which they can escape from the limitation upon their freedoms except by going to the townships, to the Reserves, or to some homeland?

Prof. LOGAN: I fail to know what these restrictions are upon their freedom that you are speaking about.

Mr. GROSS: I thought we had agreed, sir, that one of them, and this is one that you mentioned yourself perhaps—maybe I did—is the ceiling placed upon achieving employment above a certain level. I thought you had agreed that that was a limitation.

Prof. LOGAN: That is correct. But you have already employed these people in someone's home and that takes care of the situation then.

Mr. GROSS: The person employed as a domestic wishes to, let us say, become a nurse. Shall we indulge that hypothesis?

Prof. LOGAN: Yes.

Mr. GROSS: Do you consider a nurse as being higher than a domestic?

Prof. LOGAN: Surely.

Mr. GROSS: Actually all forms of labour, I suppose, have a comparable dignity, but this is, in these terms, however.

Prof. LOGAN: Yes.

Mr. GROSS: Now, is the limitation imposed upon this person, or this group, which you testified is irrespective of their innate capacity or ability, is that limitation one which you would regard as a limitation upon the freedom of that individual?

Prof. LOGAN: But there is nothing to prevent this domestic servant from becoming a nurse. There are large numbers of native nurses in Windhoek.

Mr. GROSS: In Windhoek?

Prof. LOGAN: Yes.

Mr. GROSS: All right. Then there are not limitations placed in every respect?

Prof. LOGAN: No.

Mr. GROSS: Now, are there any male non-Whites who live in Windhoek in domestic service or otherwise?

Prof. LOGAN: Yes.

Mr. GROSS: Now, suppose such a person felt he had the capacity to rise higher than, let us say, a truck driver or a messenger and remain in

Windhoek and spend his working life there. Could he do so? Would he be free to do so?

Prof. LOGAN: He would be living in Katutura, not in Windhoek. He would be living in the Native township and he would be curtailed as far as employment is concerned within the area of the outside of Katutura. He would be unable to go to higher job classifications. Within Katutura he could go as high as he wishes.

There is a British Petroleum station exactly like one finds here in Den Haag and it is run by Natives, owned by Natives, there is no European money in it whatever. There is a cinema . . .

Mr. GROSS: I have not sought to suggest that Katutura was a barren wasteland, but I am referring to the individual who wishes to work in Windhoek and live in Windhoek and he is in domestic service now. Can he rise higher than domestic service and remain in Windhoek, living there, is what I am asking you now?

Prof. LOGAN: Not in Windhoek, but in Katutura one mile away.

Mr. GROSS: Or in New York, or in Spain. But I am talking about whether he can live in Windhoek except in the capacity of domestic service.

Prof. LOGAN: No.

Mr. GROSS: Now, with respect again to the use of the focal point of the individual as distinguished from the focal point of the group—I quote from the words of the report of the Odendaal Commission to which your attention has been called—would you say that the difference of perspective with which one approaches this matter is likely to affect one's judgment respecting the degree, and kind, of limitations which should be imposed upon freedoms?

Prof. LOGAN: Yes.

Mr. GROSS: Would you say also that the divergence of the perspective might lead to differing uses of concepts in terms of reference?

Prof. LOGAN: Yes.

Mr. GROSS: For example, let us take the term "the Natives" which you have used numerous times in your testimony—"the Natives". Is this a scientific or technical term as you use it?

Prof. LOGAN: No. If you were going to use a scientific term you would use Bantu or Khoisan, or indigenous or aboriginal population or "one of the Aborigines". Native is a more colloquial term. I am a native of Massachussets. You are a native of New York, or somewhere in the United States.

Mr. GROSS: Now, when you talk about the group in terms of, let us say, from your testimony, the Herero. Let us take that phrase which appears, among other places, in the verbatim record of 8 July on page 369, *supra*. You say, and I would like, with the Court's permission, Mr. President, to read a very brief excerpt so that this is in context, as follows:

> "The Herero are a cattle people and all of their tribal law and tradition, their customs, including marriage, and a variety of things of this sort, are based upon the fact that they are a cattle people, that is, one buys a bride in cattle, there is a bride price in cattle paid. The fact that [I am skipping a sentence] they were nomadic people and that the men were warriors, and that the women did other things and the children did other things, means that today,

following the same pattern, the men, as I indicated before, are, so to speak, 'unemployed warriors'."

Do you recall that testimony?

Now, when you referred to the Herero as "cattle people" what would be the relevance of that description to the half of the Hereros who are, in the words of the Odendaal Commission report, "absorbed in the diverse economy of the Police Zone of the economic sector". Are they cattle people, those Hereros?

Prof. LOGAN: They are no longer cattle people economically, but the fact that they still bring up their children in the tribal traditions reflects a good deal of this (if I may use such a terminology) cattle philosophy —a philosophy involving cattle, involving herds and so on—from the past. This is carried over. The past is very close in South West Africa. They were a cattle people until 1900, 1905, 1910, in 100 per cent. of the cases, and in probably 70 per cent. or so of the cases today still have strong affiliations with cattle. The business man among the Herero in Katutura very frequently owns cattle today on the Reserve in Waterberg or Otjituuo.

Mr. GROSS: Are you through, sir?

Prof. LOGAN: Yes.

Mr. GROSS: Does the fact that a Herero does not own cattle change his category, sir?

Prof. LOGAN: I don't think so as far as his tradition, as far as his thinking, as far as his philosophy is concerned.

Mr. GROSS: But he will always be one of the "cattle people"?

Prof. LOGAN: He still is, but I won't say he always will be, no.

Mr. GROSS: Now, you say also that the Herero "buys a bride in cattle, there is a bride price in cattle paid". From your observation of the Herero who are absorbed in the diversified economy of the southern sector, how many cases have you observed or heard of in which a Herero in that situation has bought a bride in cattle?

Prof. LOGAN: I know of two cases in Windhoek and in the only two cases I do know of, the marriage took place on the Reserve and cattle were paid, and in one case the man was a business man, in the other case a chauffeur in Windhoek.

Mr. GROSS: These were two cases that you encountered? Now are there other cases of which you have heard in which cattle were not paid?

Prof. LOGAN: These are the only two I know of in regard to this.

Mr. GROSS: And are there many cases?

Prof. LOGAN: I don't know of any.

Mr. GROSS: You have never heard of any case in which a Herero living in the economic sector has married without paying cattle or vice versa? You don't know of them?

Prof. LOGAN: I do not know of them.

Mr. GROSS: So that when you refer to the Herero as people who are cattle people and that is one who buys a bride in cattle, you are referring to certain characteristics or customs which relate to a group of people in a particular context and at a particular time, are you? You are not referring to the characteristics of the people?

Prof. LOGAN: No.

Mr. GROSS: Therefore, in terms of the question of the imposition or otherwise of limitations upon freedoms, the fact that the Herero is a member of a "cattle people" is irrelevant, isn't it—would you say?

Prof. LOGAN: I wouldn't say it was irrelevant.

Mr. GROSS: You would not say it?

Prof. LOGAN: I would not say it was irrelevant.

Mr. GROSS: I see.

The PRESIDENT: Would it be convenient, Mr. Gross, if we discontinued at this stage?

Mr. GROSS: Mr. President, may I make a statement to the Court?

The PRESIDENT: If it is in relation to the examination of this witness.

Mr. GROSS: It is in relation to the examination of this witness.

The PRESIDENT: Very well then.

Mr. GROSS: It is really a matter of the balance of convenience of the Court. I am aware of the fact that the testimony of other witnesses is impending and I think that under the circumstances, entirely on my own responsibility, sir, I would say that perhaps I will reserve the right, if you permit me to, to continue cross-examination if it were proper to ask whether Members of the Court also wish to address, because I would not wish to keep the witness here merely for my convenience over the weekend.

The PRESIDENT: Well, it is now one o'clock, Mr. Gross, and I think the witness will have to come back on Monday in any case. And then there is Professor van den Haag who is coming on Monday for cross-examination by yourself. I think perhaps the most convenient course is to interpose Professor van den Haag, but the Court is in the hands of the Parties. The intention was to endeavour to enable Professor van den Haag to return on Monday, I gather, to New York or elsewhere in the United States and, for that reason, I think perhaps it is better to interpose Professor van den Haag. Would that inconvenience you?

Mr. GROSS: Not at all, Mr. President. My hesitation in bringing the matter up at all derives from the fact that I only have 10 or 15 minutes more and I just wanted to raise the balance of convenience.

The PRESIDENT: I think 10 or 15 minutes more is too much.

Mr. GROSS: Thank you sir.

The PRESIDENT: The Court will adjourn until Monday. It is understood that Professor van den Haag will be in attendance on Monday morning at 10 o'clock. Is that correct Mr. de Villiers?

Mr. DE VILLIERS: Yes, Mr. President. That is correct. We would not like to keep Professor Logan unduly if we knew that the rest of his cross-examination and, say, questioning by the Court would not take longer than half an hour at the utmost, perhaps we could dispose of this witness first and then carry on with Professor van den Haag. But I would suggest, if it meets with your approval, Mr. President, that we leave that to a discussion between the Parties and perhaps we could advise you whether we could come to any agreement about it.

The PRESIDENT: I think that is a more convenient course. Certain Members of the Court desire to ask questions but I do not expect that they will run into great length of time, so if it is more convenient to the Parties to continue and dispose of the evidence of Professor Logan first thing on Monday morning, then that will meet with the convenience of the Court. But we are anxious, at the same time, to ensure that we do dispose, if we can, in the morning also, of Professor van den Haag.

Mr. DE VILLIERS: We shall keep that in mind.

The PRESIDENT: If that can be done. If it can't be done then we shall have to go over into the afternoon, so that we do dispose of Professor van den Haag's evidence within the day. That is understood then?

[Public hearing of 12 July 1965]

The PRESIDENT: The hearing is resumed. I regret to state that Judge Badawi has not recovered from his indisposition and will be unable to resume sitting before the recess for summer. Judge Koretsky is suffering from a slight indisposition following an accident. He hopes to be here later in the morning.

I understand that the Parties have agreed that Professor van den Haag should first be called. If so, Professor van den Haag should come to the podium.

Mr. DE VILLIERS: Mr. President, before cross-examination begins may I say something to the Court? Professor van den Haag asked me to intimate that there are two matters on which he would like to make a brief statement to the Court before cross-examination starts. One concerns an impression which he got from reading the record for correction purposes. The record in one respect conveys an impression, or may be read as conveying the impression, which he did not intend to convey. He would just like to rectify that. The other matter concerns a statement which he made in regard to a report which appeared in the *New York Times*; he did not have the source available at the time and he was asked to bring it. He would like to make a statement on those two matters before cross-examination.

The PRESIDENT: Are there any objections?

Mr. GROSS: No, Mr. President.

The PRESIDENT: Very well, Professor van den Haag.

Mr. VAN DEN HAAG: Mr. President, on page 160, *supra*, and also on pages 155-156, *supra*, of the verbatim record for 23 June, I made certain statements which may make it appear . . .

The PRESIDENT: On page 160, is it?

Mr. VAN DEN HAAG: And pages 155-156, of the verbatim record of 23 June, I make statements which may make it appear as though I, myself, testified in the *Brown* case, which was decided by the Supreme Court. I just wish to state that I did not testify in that case. Indeed, in that case no experts were used on the side of the defendants, or respondents, who rested their case on the *stare decisis* of *Plessy* v. *Ferguson* and therefore did not call any experts. My own testimony, to which I refer in the two pages, occurred after the *Brown* case, and in application of it. I wanted to have this clear for the record.

The second point: when I last had the honour of being here, I referred to a statement which I attributed to Professor Clark. This is on page 163, *supra*, of the record of 23 June.

The PRESIDENT: Where does it appear on page 163?

Mr. VAN DEN HAAG: It is in the middle paragraph. In this I stated that I read Professor Clark's advocacy of resegregation in an interview that he had given to the *New York Times*. My memory was somewhat deceptive, what I actually read occurred in the Judgment of the United States District Court in *Stell* v. *Board of Education*. In a footnote (I think I handed this document in already but I will do so again) on page 13 there is this reference which, with your permission, I will read.

> "Dr. Clark, in the interview, suggested special remedial classes for Negroes in Northern schools, in effect a suggestion of resegregation as an educational necessity."

The PRESIDENT: Mr. Gross?

Mr. GROSS: Forgive the interruption, but I am not certain to whom the quotation is attributed, that the witness has just read.

The PRESIDENT: To Professor Clark I think.

Mr. GROSS: But I mean whose characterization was it . . .

Mr. VAN DEN HAAG: Yes, that was the characterization of Judge Scarlett in the federal court in the case of *Stell* v. *Board of Education*, which I only dimly remembered. Since that time I looked up the interview, which is paraphrased in the case, and this interview which appeared in the *United States News and World Report* for 10 June 1963 has a passage which must be the passage to which the federal court referred, which is very brief so I may read it to you.

Professor Clark tells the interviewer that, and this is on page 40 of the *United States News and World Report* for 10 June 1963:

> "I think that in the schools of America today there must be a special type of crash programme to see that Negro pupils are brought up to an acceptable and respectable level of academic performance."

The interviewer then asks:

> "Do you want Negro pupils to be given special treatment because they are Negroes?"

to which Professor Clark replies:

> "Well, Negroes are being treated as Negroes now, to damaging effect, so if they must be treated as Negroes for beneficial effect this must be done."

Obviously the Judge in the case I just mentioned interpreted this as an advocacy of resegregation by Professor Clark and I paraphrased the Judge's opinion. Having looked at the original document, I wish to make it clear that this was apparently a judicial interpretation of the document and I am not as sure as Judge Scarlett was that this is really what Professor Clark meant. Therefore I should like to modify the statement I originally made. I stick to my own view that segregation would be useful for educational purposes, but I do not wish to attribute this view to Professor Clark. I am not altogether sure what view he would hold on the matter at this time. Thank you.

The PRESIDENT: Mr. Gross, will you cross-examine?

Mr. GROSS: Thank you, Mr. President. Dr. van den Haag, incidentally I notice that learned counsel for the Respondent refers to you as van den Hague; which is the correct pronunciation?

Mr. VAN DEN HAAG: It depends in which country I am in.

Mr. GROSS: In Holland?

Mr. VAN DEN HAAG: van den Haag.

Mr. GROSS: I shall refer, Mr. President, with your permission, to the page citations in the first instance to the verbatim record of 22 June and, for the Court's convenience, shall simply refer to "at page so and so" without referring to the verbatim each time, unless the President wishes it otherwise.

The PRESIDENT: Is it from the same verbatim?

Mr. GROSS: Yes, Mr. President. When I switch over to another verbatim, as I shall subsequently, I will endeavour to advise the Court. Is that satisfactory, sir?

The PRESIDENT: Certainly.

Mr. GROSS: Dr. van den Haag, I should like to address a few questions to you, if I may, to complete the record with respect to certain answers you gave in response to one or two questions. You stated that you were born of Dutch nationality. You were born in Holland, sir?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: And then you went to the United States. You are an American citizen, sir?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: I should like to ask you a few questions in connection with your appearances as expert on matters concerned with segregation in the United States, according to your testimony at page 135, *supra*. You testified that you had appeared as an expert three times in the United States federal courts and once or twice in New York State courts, and I understood you to say that these cases concerned segregation?

Mr. VAN DEN HAAG: The ones in the federal courts. The New York State cases were cases in which I qualified as an expert in sociology but had nothing to do with racial matters.

Mr. GROSS: I see sir, thank you. Now, with respect to the three appearances as expert in the federal courts, could you, without trespassing too much on the honourable Court's time, indicate very briefly the major issue in each of those cases?

Mr. VAN DEN HAAG: Yes. In each of these cases a group of local citizens appeared as interveners in court cases brought by the parents of Negro pupils who wished that the *Brown* decision be applied locally, a desire resisted by the School Board, and in which the party for which I appeared as an expert took part. My testimony in all these cases referred to the factual basis of the *Brown* case which, as you will recall, refers to "modern authority" and to psychological experts, if my memory does not deceive me, which would have shown that segregation is inconsistent with the Fourteenth Amendment of the United States Constitution inasmuch as it refuses the equal protection of the laws to Negro pupils. This was based on a demonstration of injury, attributed to "modern authority" and I discussed the proof for such a demonstration of injury and indicated that it very clearly had not been proved, that indeed the major evidence given by Professor Clark was clearly indicating that desegregation is injurious to Negro pupils rather than segregation.

Mr. GROSS: And what was the disposition of those cases, if you please, sir?

Mr. VAN DEN HAAG: If my memory does not deceive me, two were won in the courts in which I appeared, the third was lost—that is, in two the School Board won and in the third the applicant won—and in the Court of Appeals, as far as I remember, one or two are still pending and one was overruled because the Court of Appeals felt that the factual proof did not interfere with the Supreme Court's judgment in *Brown*, which the Court felt was based on legal rather than factual considerations.

Mr. GROSS: Do I correctly understand, sir, that in each of those cases, then, that you mentioned, you were testifying as an expert witness against the factual basis upon which you assumed the Supreme Court's decision in the *Brown* case rested?

Mr. VAN DEN HAAG: That is quite correct.

Mr. GROSS: May I ask, sir, were you a paid professional witness in each case?

Mr. VAN DEN HAAG: I did submit a bill in two of the three cases.

Mr. GROSS: And you appeared in the *New York State* case, you say, in a case which had nothing to do with race relations?

Mr. VAN DEN HAAG: Nothing at all.

Mr. GROSS: Thank you. I should like to refer to your testimony at pages 140-141, *supra*, and we are referring to the record of 22 June, Mr. President, in which you said "I reject the idea of racial inferiority or superiority, though I am willing to accept the idea of racial differences". Before I ask several questions *à propos* of that testimony I should like to read into the record at this point, with the permission of the honourable President, the following sentence from the Counter-Memorial—that is, of course, Respondent's pleadings, as you know—**II**, page 471, paragraph 23, as follows:

> "The policy of separate development is not based on a concept of superiority or inferiority, but merely on the fact of people being different."

I will not ask you, sir, to comment on the Counter-Memorial unless you wish to, but my questions relate to your own statement, and I should like to ask you first whether the idea of "racial inferiority or superiority", in your phrase, refers to innate or biological distinctions?

Mr. VAN DEN HAAG: I think it does, yes.

Mr. GROSS: And does the phrase "racial differences" as you used it refer to physical distinctions only?

Mr. VAN DEN HAAG: No, sir, I think it refers to physical distinctions which are correlated with psychological differences.

Mr. GROSS: Then you draw a distinction on a race basis, do you, between differences of a psychological nature between races as such?

Mr. VAN DEN HAAG: I think, and I think this is very generally recognized, there is a correlation between physical genetic differences and differences in endowment of a psychological sort. May I add, Mr. Gross, that I am not an expert on this particular point? I merely reflect here what I regard as the consensus of the experts on this point.

Mr. GROSS: What I should like to make certain, if I may, for the clarification of your testimony and the Court's edification, is what you had in mind when you used the term "racial differences". Do I understand you to say, sir, that you have in mind physical distinctions plus (I think you used the word) endowments or psychological characteristics?

Mr. VAN DEN HAAG: To be entirely clear, plus observable psychological characteristics which the experts think may be in part inherent.

Mr. GROSS: With respect to your use of the term "endowment" or "psychological distinction", do you regard that as an innate distinction?

Mr. VAN DEN HAAG: Some of these the experts regard as innate, and I tend to reflect their opinion on this point.

Mr. GROSS: Would it be as accurate to say that the experts reflect your opinion, sir? I would like the Court to have your opinion.

Mr. VAN DEN HAAG: No, it would not be, I think, because you see I have not made any investigations, nor would I be competent to make any investigations on whether some traits, be they physical or be they psychological, are genetically inherent—I am not competent to make these, but I am competent to indicate, if you wish, the reason why I convinced myself that the experts' view on this matter is likely to be correct.

Mr. GROSS: And as you understand the experts' view which you are, in your phrase, "willing to accept", the racial differences to which you refer are endowment, and appearance, and psychological characteristics, and you are willing to accept them as applicable to races as such?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Do you consider that there are exceptions possible within a given race?

Mr. VAN DEN HAAG: Well, I do not think it is even a matter of exceptions, Mr. Gross; there is a strong degree of overlap. To indicate what I mean, suppose you take a simple physical characteristic, such as colour of the hair, or its texture, it is likely to apply to an average of a given racial group, but within that given racial group—suppose that it is black-haired, just as an illustration—there will be some blond-haired people that are as blond as, if not blonder than, the members of a different group; so that we speak, then, here of averages—there are obviously individual cases in which there is a fairly strong overlap.

Mr. GROSS: Would you be willing, Dr. van den Haag, then to qualify your phrase "the idea of racial differences" to read "the idea of average racial differences"?

Mr. VAN DEN HAAG: Yes, sir, I had that in mind.

Mr. GROSS: You have that in mind. Now, sir, in that context, then, would "average" refer to a mathematical or a numerical average?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: By a majority?

Mr. VAN DEN HAAG: Well, a numerical average—now, you are asking me a little more than I know—certainly would involve differences among the pluralities of true races; whether it involves the majority I am not willing to say, because I do not know.

Mr. GROSS: With respect to those members of the race, the less than plurality or less than majority, would you then regard that there are no racial differences between them and another race?

Mr. VAN DEN HAAG: This I could not say; I would say that on certain traits they may overlap with another group, but whether they will overlap as a whole I could not say.

Mr. GROSS: So that would you agree that your use of the phrase "racial differences" is not a scientific or technical phrase?

Mr. VAN DEN HAAG: No, I think that scientific use involves a reference to the average. As far as I know, no scientist has specified so far the quantitative proportions.

Mr. GROSS: Are the "racial differences", in your use of the term, relevant to the imposition of limitations upon the freedom of individuals merely by reason of their classification as members of a particular race?

Mr. VAN DEN HAAG: I think they would certainly be relevant to make a rational classification, which would then involve the allocation, possibly, of distinctive activities and, possibly, limitations. I would be careful to use the phrase "limitation of freedom" which you use because that would involve, if I understand it correctly, that the freedom of one group is more limited than that of another group, and I would not justify that.

Mr. GROSS: You would not justify that, sir?

Mr. VAN DEN HAAG: Not that the freedom of one group be more limited than that of another group, but I would justify the freedom of both groups in certain respects being limited so as to establish a differentiation.

Mr. GROSS: Thank you. When you referred to "rational classification",

would you regard the following as a rational classification in your meaning of the phrase: a classification of Whites as "persons who are obviously White, but excluding persons who though obviously White are generally accepted as Coloured"—would that be a rational classification, in your use of the phrase?

Mr. VAN DEN HAAG: Yes, if I understand your question. You mean to say, if I may rephrase it, whether a classification should be a social one . . .

Mr. GROSS: No, sir, I asked you whether, in your use of the phrase "rational classification", you would regard the classification which I have just cited to you as a "rational classification", in your use of the phrase.

Mr. VAN DEN HAAG: The classification you have cited is how people regard each other—is it not based on that, or did I misunderstand you?

Mr. GROSS: It is how the Government classifies people in the case of South West Africa, to be specific.

The PRESIDENT: Mr. de Villiers?

Mr. DE VILLIERS: May I put something, please, to the Court? My learned friend has on previous occasions put this classification to witnesses. I have no objection at all, obviously, provided he puts it correctly and fully. When he says "persons who are obviously White", that is not the classification. The classification is "persons who in appearance obviously are White"—that is stated as the first criterion, and then corrected by this exception of "but excluding persons who although in appearance are obviously White are generally accepted as Coloured persons". That is all I wanted to bring to the Court's attention.

The PRESIDENT: Mr. Gross, when you are putting the question I am sure you will do your best to keep it precisely to the classification which is revealed as that which the Government made for census purposes.

Mr. GROSS: Yes, Mr. President—I regret that I did not have the text before me—I thought that I had repeated it a sufficient number of times in this honourable Court to remember it—I obviously did not, and I shall endeavour to correct my ways.

Would you, sir, having listened to the correction made by Mr. de Villiers, then revert to my question: do you regard the classification, properly read, as a "rational classification" in the sense in which you used the term?

Mr. VAN DEN HAAG: Possibly so—I would have to know more about the basis of the classification, but I think it could be a rational one.

Mr. GROSS: In your usage of the term? Thank you. Now, does the existence of "racial differences", in your use of the phrase, warrant the enforced social, political or economic subordination of one race to another?

Mr. VAN DEN HAAG: If by subordination you mean oppression, the answer is no, in my view.

Mr. GROSS: Does it justify the imposition of the limitation of freedoms in the sense of setting a ceiling on economic achievement?

Mr. VAN DEN HAAG: If the purpose there merely is distribution of income that is disadvantageous to one of the groups, I certainly would not think it is justified. If the purpose is to enforce or keep to a differentiation to avoid clashes and strife, then I think it might be justified.

Mr. GROSS: The justification in that case would be for public order, would it, sir?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: On page 142, *supra*, in discussing groups and group formation, you made the following statement:

> ". . . no-one has really been able to show exactly what is required [this is with respect to group formation]—a group becomes a social group if it feels and acts like one . . . [then you added] . . . there are cases where there are rather few common customs, but perhaps a common enemy, or something like that . . .".

I should like to ask you, sir, whether it begs the question of what is a social group to say that "a group becomes a social group if *it* feels and acts like one"—is not the question at issue precisely what *it* consists of?

Mr. VAN DEN HAAG: Well, if it begs the question, Mr. Gross, then we have all begged the question for quite a while—that is all sociologists.

Mr. GROSS: That I have no doubt is true, sir, yes. Would you answer my question?

Mr. VAN DEN HAAG: Yes; I do not think it does. I think when we refer to a group in the sociological sense we refer to a consciousness of kind, or of group membership, that expresses itself in observable external manifestations.

Now when I referred to the group I referred to these external manifestations and I was trying to establish why they occur in a manner characteristic for the group, the special feelings of solidarity that, say, Americans have in common as distinguished from Frenchmen who have them in common with other Frenchmen rather than with Americans. Let me say once more I have found no reason for that but the feeling itself, which I simply have to take as an ultimate datum, and then I speculated on what may lead to the feeling and I found that there are a variety of things that seem to be helpful but none that seem to be totally indispensable.

Mr. GROSS: When you then refer to the word "group" in this sense, do you also include national groups? Are the people of the United States a "group" in this sense?

Mr. VAN DEN HAAG: Yes, sir. They are what is called a secondary group in sociology.

Mr. GROSS: And if there are people within the group who do not feel like the other members of the group, are they still members of the group?

Mr. VAN DEN HAAG: Yes, but they form a sub-group—a sub-culture being a member of the major culture.

Mr. GROSS: Is that always on a group basis or can it be also applied to with respect to an individual attitude or feeling? Do you understand my question?

Mr. VAN DEN HAAG: Not fully.

Mr. GROSS: A group is composed of individuals, is it?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: And feelings—are they emotions of individuals or groups?

Mr. VAN DEN HAAG: Yes, sir. They are certainly emotions of individuals; we speak of a group when the emotions of individuals seem to lead to similar manifestations which seem to be identical or similar among individuals in respect of particular objects.

Mr. GROSS: So that when I referred to the feelings of an individual and asked if an individual feels he is not a member of a group, whether that means that he is not a member of that group—is that a correct statement?

Mr. VAN DEN HAAG: No, sir, I do not think so. What it probably means is that he is alienated from the group of which he is a member and as I tried to indicate in direct examination, this is usually partly an effect of neurotic disorder. Let me, if I may, illustrate this. Take a group based biologically, but elaborated culturally, such as man and woman. I have not the slightest doubt that there are some men who identify not with other men but with women; and there are some women who identify not with other women but with men. Nonetheless, I think, if we are asked to classify groups, I would classify the men with men regardless of their individual feeling though I would admit that they constitute perhaps a sub-group of men; and similarly among women; that is, I would say that biological identity and their original psychological characteristics classify them with a group with which they are classified from the outside, even though they might individually protest. This individual protest, this alienation from their own group I would regard as a sign of pathology.

Mr. GROSS: You testified I believe that in a sense of the term "group" which you use, that the citizens of the United States form a group.

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: If an individual citizen of the United States decides to move shall we say to England and reside there permanently, is that a sign or symptom of alienation or neuroticism?

Mr. VAN DEN HAAG: Not at all. The residence is not I think in this case terribly relevant. However, if he moved to England and disavowed his American citizenship and origin, and denied it, so to speak tried to pass as an Englishman, then I would be somewhat more suspicious. But may I also add in this particular case you have chosen an example of two groups that are very similar having rather common traditions, language and so on, so that the passing from one to the other by an individual may be due to motives that are not pathological, provided that it is, so to speak, an avowed and open passing, such as, say, the poet T. S. Eliot made, who as you certainly know was born an American and became an English citizen largely because, I think, not only did he reside in England but he felt that his roots were there. I think in this case there was nothing pathological about it.

Mr. GROSS: You yourself came to the United States at what age, sir?

Mr. VAN DEN HAAG: I think I was 22.

Mr. GROSS: You became an American citizen?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Did you abandon or forsake your original group?

Mr. VAN DEN HAAG: Well I certainly never denied it. I did not feel that there was a conflict between the two groups. But, since I decided to make my life in America I decided to become an American citizen.

Mr. GROSS: But you do not feel you are passing as an American in your sense?

Mr. VAN DEN HAAG: Well, to tell the truth, sir, the longer I stay in America the more European I have been feeling in some ways.

Mr. GROSS: By European do you mean Dutch or . . .?

Mr. VAN DEN HAAG: Specifically yes. Dutch/Italian—I was brought up in Italy.

Mr. GROSS: Would you regard that . . . I will not pursue this matter further . . . it is difficult to retreat from the pleasure . . .

The PRESIDENT: You had better stop where you are.

Mr. GROSS: Yes, sir. At page 142, *supra*, you testified as follows that

the word "ethnic" means both culture and biological origin, or at least a perception of biological similarities and dis-similarities including such things such as various physical characteristics, and you were asked the question by the learned counsel "Perhaps we could get it clear . . . what distinction would you draw . . . between an ethnic group and racial distinctions", and so forth, your answer was "ethnic group is a sub-group of a race", for example—"the Jews as an ethnic group being part of the Caucasian race". Then you said—"these terms are used in a variety of ways by a variety of people". Focusing down to one person and that is yourself who is using the terms, how do you define the term "Caucasian" in that context?

Mr. VAN DEN HAAG: Well, I think I meant generally speaking the major group called "white" usually.

Mr. GROSS: You would use the word "Caucasian" as a synonym for "white"?

Mr. VAN DEN HAAG: Yes. I did in this context.

Mr. GROSS: In this context of course. Now are there, as far as you know, Jews in North Africa or Yemen or elsewhere who are not white?

Mr. VAN DEN HAAG: I do know that for instance in Abyssinia there is a tribe, the Falashah, who are Jewish, at least hold a form of biblical Judaism; and there are Negroes who are Jewish in Harlem (a part of New York). It is a small sect of Negro Jews; some of them have recently become Jews. I would make a distinction here between religious and ethnic groups, that is, an ethnic group may have a variety of religions. On the whole, in the case of the Jews, the religion has been quite correlated to the ethnic group, but there are exceptions.

Mr. GROSS: You would qualify the statement?

Mr. VAN DEN HAAG: Of course.

Mr. GROSS: I will now turn to certain questions, if I may, Mr. President, with regard to certain national situations and I refer first to page 143, *supra*, in which you referred to the partition of India, the Indian subcontinent, and also the removal of ethnic Germans from Poland and Czechoslovakia at the end of the war. The question was asked to you whether the instances you cited seemed to be merely as having a negative effect of separation, of discrimination, or what-have-you, or whether it was also to be perceived of as having a positive value and your answer was—"perhaps partition was the best way of preserving in the long run the peace among them"—by which I take it you mean between India and Pakistan and the populations thereof?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Was this, sir, this answer of yours, what you would regard as a value judgment?

Mr. VAN DEN HAAG: No, sir. This is an empirical prediction. It may be wrong but it is not influenced by my personal preferences for partition or against it. If you take, and the question I think referred to it, order as a value—and this is simply the value judgment of the questioner, then the question arises how is it best preserved? My answer was that in some cases I think separation may preserve order better than non-separation.

Mr. GROSS: We are talking now about this particular case to which you testified in the sense of actually saying that "perhaps partition was the best way of preserving in the long run the peace among them".

Mr. VAN DEN HAAG: Partition would be the means and peace would be the end—peace is the value judgment.

Mr. GROSS: But "the best way" is not a value judgment?

Mr. VAN DEN HAAG: No, "the best way" is not by war—using the word "best" in an instrumental sense—that is, it is simply a more efficient or effective means to achieve an end which is of value.

Mr. GROSS: And you say that that is based on experiential prediction?

Mr. VAN DEN HAAG: This is my prediction and judgment of the situation—obviously also that of the Indians and Pakistanis; but it would be very hard to prove this either right or wrong ultimately since this is the way history went, we cannot say what would have been the result if it had been otherwise.

Mr. GROSS: You say that this is the attitude of the Indians and the Pakistanis?

Mr. VAN DEN HAAG: They separated and I guess they wanted to.

Mr. GROSS: Are you guessing now, sir? Are we talking now about your experiential prediction with regard to the preservation of peace in this area—you have made a statement here which relates to a given situation—you are testifying as an expert and forgive me if I seem to be pressing this point to argument but I would like to know whether your reference to the Indians and the Pakistanis as feeling the same way you do reflects your experience or is it based upon evidence which is in your possession?

Mr. VAN DEN HAAG: No, sir, I have no special evidence. It is my interpretation of the fact that partition took place.

Mr. GROSS: Are you saying to the Court—do you wish the Court to believe—that this is the "best" way of doing it because it happened?

Mr. VAN DEN HAAG: No, sir, I did not imply that this is the best way possible—alternative ways might have been better. This is the way that has been taken and I was asked "might it have advantages" and my response was that it might have the advantage of preserving the peace, possibly better than other ways but now that you ask me I would be unable to say that it is the best of all possible ways.

Mr. GROSS: In other words, you would qualify the answer you gave to this in this way, I take it, and let it stand at that.

Mr. VAN DEN HAAG: Let me put it this way, if people were different from the way they are, there would perhaps have been found a better way. People being what they are they chose this way and I think, apart from passion, those who were at least more cool-headed among them probably assumed that this would be a costly way but also the best of the available ways to reduce strife and conflict. My suspicion is that they might have been correct but I would not say that I can prove that any more than anyone else.

Mr. GROSS: Now on page 144, *supra*, you referred to Ruanda-Urundi, which you described as formerly a Belgian colony. Are you aware, sir, of the status of Ruanda-Urundi?

Mr. VAN DEN HAAG: It is true that they are two independent countries.

Mr. GROSS: No: prior to their independence.

Mr. VAN DEN HAAG: I thought that they were a Belgian colony, I might have . . .

Mr. GROSS: For the record, you would not dispute the fact that they were actually under United Nations trusteeship?

Mr. VAN DEN HAAG: I did not make this distinction, Mr. Gross.

Mr. GROSS: Now there you said, at page 144, referring to separation that: "though economically quite unviable, in my opinion, [it] nonetheless

was indicated for reasons of group conflict." Now was that a value judgment, sir?

Mr. VAN DEN HAAG: Perhaps I should make clear that this was an opinion—a value judgment is an opinion but not all opinions are value judgments. This is an opinion that I have of the facts in this matter. It may be a false opinion, but it is an opinion on facts and not on values.

Mr. GROSS: Is your opinion in this respect based upon what you would regard as objective standards?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: What for example? Would you give the Court an illustration?

Mr. VAN DEN HAAG: My impression was that the separation avoided bloodshed which would have been greater had there been no separation.

Mr. GROSS: So the Court may take your testimony in this respect as your impression?

Mr. VAN DEN HAAG: Yes, sir. I have not been in Ruanda-Urundi.

Mr. GROSS: Now with regard to your testimony with respect to the United States, at pages 145-146, *supra*, particularly, you refer to the "Japanese relocation" which you described in the following terms—"the line of demarcation was an ethnic line"—I think the words you used were on page 146. Unfortunately, Mr. President, I do not . . .

The PRESIDENT: It is at the *top* of page 146.

Mr. GROSS: Thank you, Mr. President.

The PRESIDENT: The Japanese were certainly not the only group in the United States that was ethnically related to an enemy alien group.

Mr. GROSS: Thank you, sir. Now you refer to the fact that Dean Rostow of Yale had expressed the view that the United States Supreme Court decisions upholding this action were, in the words he used and which you quoted, "extraordinary", that is at page 145. And that the "decision was opposed by many people", in your phrase (p. 146). Will you indicate to the Court whether you oppose that decision in the sense in which the term is used in the testimony?

Mr. VAN DEN HAAG: I think the decision at the time was rather unwarranted and hastily taken and I would not have approved of it, had I sat in Court.

Mr. GROSS: Yes, sir. Now with regard to the United States immigration policy and quotas, to which you referred, you cited the comment at page 146, by Professor Bruton Berry, President of the State University of Ohio, in his book called *The Race and Ethnic Relations*, and you referred to his statement "the quota system based upon national origin has remained intact". First, may I ask you, Dr. van den Haag, do you regard the examples of the Japanese removal action, which you oppose, and in my view, if I may say so, sir, properly oppose, do you regard that action and the immigration restrictions to which this quotation refers, to illustrate a general policy or practice on the part of the United States Federal Government, in the area of race relations?

Mr. VAN DEN HAAG: That is a question which I find very hard to answer because what is the general policy of the United States, in this respect, is highly controversial. Now you see, the very words "the United States" leave me in doubt. Right now, for instance, the President has proposed reform of the immigration law, and if I may, I would like to quote from an article in the *New York Times*, which appeared on 19 June 1965:

"The United States Immigration Law based upon racially angled national origins quotas, makes a strange counterpoint to its progressive laws against racial discrimination at home."

So what the *Times* here is saying, in this first paragraph, is, that in the United States we have, on the one hand, policies which deny differentiation and certainly deny any form of oppressive discrimination, but we also have, on the other hand, policies which affirm this, sometimes on the state and, in the case of the Immigration Law, on the federal level. Now the Immigration Law may be changed in Congress, but, as the editorial I just quoted points out, though the President wants it changed, it is very uncertain that the Congress will change it, so when you refer to United States policy, it depends whether you have in mind the President, the Congress or the courts. Each seem to have a slightly different policy in this respect.

Mr. GROSS: I would like to come back to my question, if I may, sir, and ask you in a slightly different way than I did before, would you be prepared to express an opinion whether the two situations to which you referred, this Japanese relocation action and the Immigration Law, are exceptions to the federal policy and practice, with regard to race relations?

Mr. VAN DEN HAAG: They run counter to the developments since *Brown* v. *Board of Education* on the federal level, yes.

Mr. GROSS: Would you answer my question, if you wish to, more directly? Would you regard these two cases as illustrative of a general practice, or as exceptions to the general policy and practice, of the United States Government?

Mr. VAN DEN HAAG: I am sorry, but this involves a judgment I cannot make, but I would be willing to say that both policies exist and that the policy indicated in the Immigration Laws and the Japanese relocation is rarer than the other.

Mr. GROSS: Do you know of any other illustrations?

Mr. VAN DEN HAAG: Yes, on the State and local levels . . .

Mr. GROSS: No, sir, that is part of the confusion which I am engendering as a failure on my part to keep . . .

Mr. VAN DEN HAAG: You mean, on the federal level? I do not know of any other cases . . .

Mr. GROSS: The distinction between the federal level . . . so when you say it is rarer, you are not referring to any other cases?

Mr. VAN DEN HAAG: Not that I know of, no.

Mr. GROSS: So far as you know, it is unique?

Mr. VAN DEN HAAG: Since there are two cases, neither can be unique . . .

Mr. GROSS: I am talking about the Japanese relocation action.

Mr. VAN DEN HAAG: Recently—of course if you go further back and even the present policy towards Indians—it would not be unique.

Mr. GROSS: So you analogize this to the fact that the Indians are what, sir?

Mr. VAN DEN HAAG: The Indians were located . . .

Mr. GROSS: At what time are you speaking of now, sir?

Mr. VAN DEN HAAG: At various times; there is a long history, as you are certainly aware, Mr. Gross, of locating and relocating Indians forcefully to various Reservations.

Mr. GROSS: Is that the policy in practice today, sir?

Mr. VAN DEN HAAG: At the present time, they still are being located

and relocated, for instance the Senecas in New York. Just recently, they were forcefully deprived of their home ground, and relocated because some, the majority, apparently, of the people of New York, or at least, of the state government, represented in this case, by Mr. Moses, wanted to use part of their reservation for electrical dam building, and so on.

Mr. GROSS: Are you aware, sir, that their land was bought at fair prices determined by the courts?

Mr. VAN DEN HAAG: Yes, by the law of eminent domain, and quite against . . .

Mr. GROSS: And you refer to this as "forcible removal", do you?

Mr. VAN DEN HAAG: Yes, sir, it was enforced by the courts.

Mr. GROSS: Was this on the basis of the fact that they were Indians? Was this on a racial basis?

Mr. VAN DEN HAAG: Yes, sir, they owned that land on a racial basis; it had been given to them because they were members of an Indian tribe.

Mr. GROSS: Have you ever heard of the law of eminent domain being applied in New York to property owned by Whites?

Mr. VAN DEN HAAG: Yes, I have. Lots of people are so relocated and not on a racial basis, but in this case it was on a racial basis.

Mr. GROSS: In this case, it was on a racial basis, in the sense that eminent domain was exercised because they were Indians? Is that what you mean by "on a racial basis"?

Mr. VAN DEN HAAG: That I could not say, sir. I do know that it affected them as Indians, and broke, in the opinion of many legal experts, treaties that they, the Indian tribes, had made with the United States, which were overruled, as it were, by the law of eminent domain. But I do not think it was applied *because* they were Indians, it was applied because people wanted the land.

Mr. GROSS: That's right, I think. Thank you, sir.

The PRESIDENT: Was all the land in the Reservation required for the public purpose which you indicated?

Mr. VAN DEN HAAG: Sir, I did not quite understand.

The PRESIDENT: Was *all* the land in the Reservation required for the public purpose that you indicated?

Mr. VAN DEN HAAG: No, only part of it.

Mr. GROSS: On page 147, *supra*, of the verbatim of 22 June 1965—you are now referring to the United Kingdom—you said "the last Conservative Government imposed some restrictions" and then later, "as the Labour Government came to power it, contrary to its promise, did not change these restrictions", and then you said "the reason given, very largely, was that owing to cultural and ethnic differences, it would be very hard for the population to absorb a great number of these aliens" (p. 147). Now, without the least intention of engaging in and intervening in British political affairs, what was the nature of the promise made by the Labour Government?

Mr. VAN DEN HAAG: To abolish these restrictions that had been imposed by the Conservative Government, at least, in electoral speeches, that was the drift of the matter.

Mr. GROSS: That was the drift, sir? And that was for total abolition, was it, or for modification?

Mr. VAN DEN HAAG: As I understood it, it was total abolition.

Mr. GROSS: And did the promise include accomplishment at any particular time, by any particular period, so far as you are aware?

Mr. VAN DEN HAAG: I have not followed British politics sufficiently to say that, but, Mr. Gross, I have before me an article in the *Sunday Times* of 13 May 1965, the headline of which is "Labour to put New Curb on Immigrants", the body of the article clearly indicates that what are meant are Coloured immigrants, so I think I got the drift correctly. I have not read all the electoral speeches.

Mr. GROSS: You were referring to a "drift" then, sir?

Mr. VAN DEN HAAG: Yes.

Mr. GROSS: And, now, you further testified, on page 147—you were asked in this context with regard to these restrictions, the question, "For the good of the population as a whole?" And your answer started with "Undoubtedly" and then proceeded. Now was this response a value judgment on your part?

Mr. VAN DEN HAAG: It assumed certain values, Mr. Gross. It assumed that order is a value. Then it made a statement on whether this policy would be promoting order or not, and I felt it would. But of course, there was a value judgment, or at least an acceptance of a value judgment, inasmuch as I implied that the preservation of peace and order are desirable. They may require the use of some means which, in turn, may be regarded as costs.

Mr. GROSS: And in this case, applying that to the situation to which you are referring here specifically, it was your opinion that this was fitted into that category?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: And that reflected the value judgments or the values upon which your judgment was based—is that correct, sir?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Now in respect of both the United States and the United Kingdom, is it within your knowledge to state whether or not, when persons within restricted categories are admitted, limitations are imposed by law upon their freedoms in the countries to which they are admitted, respectively?

Mr. VAN DEN HAAG: To my knowledge, not. The purpose, I think, of the immigration restrictions both in the United States and in England now, as I understand it, is to keep people in their original location so as to avoid relocating them once they have entered either the United States or England. In other words, to make it possible within these countries, to pursue a policy of free and unhindered movement, immigration has, in part, been restricted.

Mr. GROSS: And when they are admitted and become members of the national community are any ceilings placed upon their economic opportunities by reason of their origins?

Mr. VAN DEN HAAG: Not *de jure*, no, not by law.

Mr. GROSS: Not by law. I am talking about by law. Are any limitations placed upon their freedoms on the basis of their national origin?

Mr. VAN DEN HAAG: Not that I know of, sir.

Mr. GROSS: Now, I should like to turn to page 147, *supra*, of the verbatim of 22 June 1965, in which you compared language employed in the *Canada Yearbook* of 1932, to that employed in the *Yearbook* of 1963. In the former you testified that the phrase "assimilable type" had been used, and in the latter the phrase—I take to be the key phrase—"adaptability to the Canadian way of life." You stated that: "My feeling is that it means quite what was meant in 1932, although it put it a little less

bluntly." What knowledge, if any, sir, do you have with regard to Canadian immigration practices in 1963?

Mr. VAN DEN HAAG: No more than I have quoted, sir.

Mr. GROSS: This is all you know about the situation?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Do you have any more information or knowledge concerning the immigration policies of Canada in 1932?

Mr. VAN DEN HAAG: No, sir.

Mr. GROSS: Excuse me, did you finish?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Is there any evidence which supports your so-called "feeling"—a word you used—that the different language used in these two *Yearbooks* means the same thing?

Mr. VAN DEN HAAG: I think that I gave some statistics at the time, which I could find again, which seemed to me to bear out the statement but at any rate my interpretation was simply based on a comparison of the two texts.

Mr. GROSS: And of your personal judgment concerning it?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: In respect of your testimony with regard to Canada, the United States and the United Kingdom, may I ask you, sir, whether you would characterize your testimony in respect of each or all of these areas as "expert testimony" in your understanding of the term?

Mr. VAN DEN HAAG: My testimony was based on a study of the documents which I quoted and an interpretation thereof and I would regard this as properly falling within the province of my expert . . .

Mr. GROSS: Would you say, sir, that any opinions based upon a study of a document become "expert opinions" by reason of that fact?

Mr. VAN DEN HAAG: Not any opinions, but reasonable opinions sometimes do, yes.

Mr. GROSS: On the part of anybody?

Mr. VAN DEN HAAG: No, sir. I think the study of a medical document by a medical expert—even if he only has that document before him—I would classify as leading to an expert opinion. A study of the same medical document by a non-expert, a non-physician, may not be leading to an expert opinion.

Mr. GROSS: So that what qualifies him to express an opinion is his range of expertise?

Mr. VAN DEN HAAG: He brings to the study of the document experience with similar documents and of the facts that are being described in them. Yes, sir.

Mr. GROSS: And you consider that the testimony which you have given is all directed to, is opinion based upon, your expert knowledge?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Without exception, sir?

Mr. VAN DEN HAAG: Well if you mention a particular point I might be classifying as an exception but on the whole, of course, I tried to present to this Court my opinion as an expert.

Mr. GROSS: And that would reflect, for example, your characterization of the meaning of the language in the two reports of the Canadian *Yearbook*?

Mr. VAN DEN HAAG: Well there are two kinds of experts who generally undertake this sort of characterization, either legal experts whose spe-

ciality would have been a study of the language, or social experts who are accustomed to comparing language sometimes with history and with historical uses of it and historical customs and derive their conclusions therefrom. I would not qualify myself as a legal expert but I would qualify myself as a social expert.

Mr. GROSS: Now, addressing you as a social expert, I turn to pages 147-148, *supra*, of the verbatim record. You were asked by Counsel for Respondent—this was *à propos* of aspects of the situation in the United States—you were asked for examples of official action, other than by federal action, making racial distinctions in the United States. Then, on page 148, you referred to certain unofficial and voluntary movements in the United States, including certain characterizations of a group called "The Nation of Islam" to which you referred. Do you recall that testimony generally in that respect, sir?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: And you referred to the facts that certain writers had expressed extremely high regard for the movement, and that its protagonists have pointed out, and you said, ". . . I think quite correctly, that the members of the movement are distinguished from many other Negro citizens of the United States by their better deportment, their abstinence from alcoholic beverages, and various drugs, their exemplary family life, and generally what you would speak of as an integration of personality". Do you regard this, sir, and is this what you want the Court to understand, as your characterization of the "members of the movement" in question?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: You testified on page 148 in response to a question which I will read to avoid the risk of paraphrasing erroneously, at the bottom of this page:

> "Mr. DE VILLIERS: Now, before you leave those, is it not sometimes suggested that leaders of a movement like this—Moslem movement you have just referred to—are rather eccentric or fanatic?"

Then you said:

> "I rather think they are myself but that I think is usually the case with the founders of either new religions or new movements of this kind."

Would you care to clarify the apparent inconsistency between the reference to the designation of the members of this group as people of "integration of personality" and "fanatics and eccentrics"?

Mr. VAN DEN HAAG: Yes, sir. The leaders of new, political and religious movements are quite often, in my opinion, people who are pathological, usually paranoiac with megalomanic and persecution delusions. To give one illustration, Mary Baker Eddy is very well known as the founder of the Christian Science movement. From the documents available to us it seems entirely clear that she had the characteristic symptoms of delusions of reference which are characteristic of paranoia. When she had some bodily pain she attributed it, for instance, to someone far away using magnetic rays on her and so on and so on. These are indications normally regarded as indications of paranoiac system of delusions of reference. This did not in any way prevent Mary Baker Eddy from founding a major Christian denomination and my experience with the followers

of that denomination is that they are often exemplary people who in all psychological respects I would regard as not only well adjusted but partly better adjusted than the average. I would make a similar statement about the Jehovah's Witnesses, another . . .

Mr. GROSS: . . . I would appreciate, if the President permits, if you would confine yourself to one question at a time. Mr. President, I did not want to trespass on the Witness's answer but I would like to keep on this subject if I may, sir?

The PRESIDENT: By all means.

Mr. GROSS: Is the view you have just expressed with respect to the membership of this group, would you say, as a social expert, the general attitude held by Negro leadership in the United States towards the "Black Moslems", as they are called?

Mr. VAN DEN HAAG: Most of the non-Moslem leaders are opposed to the Moslem movements and consequently act as opponents of it but I am neither opposed nor in favour of it not being directly involved in Negro politics so I am giving an outside judgment on the psychological integration of the members of the movement.

Mr. GROSS: You would not be prepared to deny that, or would you be prepared to say whether or not, the announced programme of the group includes violence and threats of violence against the White community?

Mr. VAN DEN HAAG: The movement in itself has often been accused of that, it denies that its aim is violence although I would certainly be willing to say that sometimes speeches made and actions taken seem to indicate that it is in favour of it so the situation here is equivocal and I can do no more than indicate that.

Mr. GROSS: I will not pursue this line too far, Mr. President, unless the Court wishes, otherwise I would, however, like to ask one other question in regard to it. The question I have is with respect to the distinction you draw between the leaders and, as you call them, "members" of the group. The leaders of the group you do not regard as persons with what you have described as "integration of personality"?

Mr. VAN DEN HAAG: Well, this would get us into something rather technical there, their paranoia may be egosyntonic, but it still remains paranoia; that is, it may be highly integrated, it may even lead them to engage in more effective action, nonetheless, I would regard it as a pathological phenomenon.

Mr. GROSS: I would like to refer to your testimony on page 148, with respect to what you described as "major Negro movements in the United States are certainly not the ones I have mentioned". You referred to an organization which you described twice as the "National Association for the Improvement of Coloured People". Is that the same organization as the National Association for the Advancement of Coloured People?

Mr. VAN DEN HAAG: Yes, sir, I am sorry I have misquoted.

Mr. GROSS: You said that the "National Association for the Improvement of Coloured People", and others, are taking a much more moderate line, are probably more influential among Negroes as a whole, and you said that when I asked on page 149, with reference to the National Association for the Advancement of Coloured People, whether it advocates some form or other of voluntary re-location. Your answer was: "I do not think so." Do you have any doubt about that matter, sir, as to the programme or declarations of the National Association for the Advancement of Coloured People, with regard to re-location?

Mr. VAN DEN HAAG: I am convinced that they do not advocate re-location.

Mr. GROSS: So, you would amend your response to clarify the record.

Mr. VAN DEN HAAG: I think it meant the same, but . . .

The PRESIDENT: He does not agree with it, he does not think so.

Mr. GROSS: I understood the context to mean that you do not think their programme is one for re-location.

Mr. VAN DEN HAAG: I think you are correct.

Mr. GROSS: And are you certain that it is not?

Mr. VAN DEN HAAG: Reasonably certain, yes, sir.

Mr. GROSS: Now on page 149 of the transcript, you made the following statement, among others, of which I will cite just one sentence, although you may wish to consult the context—I think it is fairly cited: ". . . Negro leaders are the first to point out that desegregation has made very little practical progress". That is in the middle of page 149. Is that still your view today, sir?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: That that is the view of Negro leaders, sir?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: I should like, Mr. President, with your permission, sir, to emulate the witness and refer to the *New York Times* of Sunday, 27 June 1965, from which I should like to quote a few brief excerpts, and will produce for the documentation, with the President's permission.

The PRESIDENT: Mr. Gross, you are cross-examining at the present moment. If you wish to refer to the document in order to make a quotation to the witness and ask him whether he agrees or disagrees, it would be competent for you to do so, but not for the purpose of producing it.

Mr. GROSS: Thank you, sir. I wanted to make clear that the entire story was available and in the Court. The following is datelined Washington D.C., 26 June, and reads as follows:

> "In its first year in force the Civil Rights Act of 1964 is believed to have eliminated more racial discrimination than all the Federal Laws, Court Rulings and Executive Orders in the decade preceding it. Government officials and civil rights leaders agree that the Act has met with greater and easier compliance than anyone expected, and it has become a tremendous psychological force in softening resistance to desegregation."

Then quoting briefly further in the same story:

> "The law has also brought compliance by entire communities that had held out against Court order desegregation. Leroy Collins, director of the Community Relations Service, an agency created by the law to help bring compliance, said: 'For every incident of defiance and violence you can name, I can name you hundreds where, without fanfare, Southerners White and Black, are putting aside the old ways and facing up to the necessity of resolving their common problems'."

Could I ask you, sir, whether or not you agree with the statement in this *Times* story, that in the first year of its existence the Civil Rights Act of 1964 has eliminated more racial discrimination than all the federal laws, court rulings and executive orders in the decade preceding it? Do you agree with that, sir?

Mr. VAN DEN HAAG: I certainly do not.

Mr. GROSS: Yes, sir. And do you agree that it has become a tremendous psychological force in softening resistance to desegregation?

Mr. VAN DEN HAAG: I do not agree with that either, sir.

Mr. GROSS: So that you would disagree with the concededly un-named government officials and Civil Rights leaders that are referred to?

Mr. VAN DEN HAAG: Not only that, but I would also point out that Leroy Collins has a rather interested view point. He is in charge of bringing about and making effective the law, and I think he says it is effective because he is in charge of it. He would otherwise have to say that he did a very bad job.

Mr. GROSS: So you think he is a biased witness in that respect?

Mr. VAN DEN HAAG: Very much so, sir.

Mr. GROSS: Now we turn now to a new line of questions, Mr. President, if I may, that relate to pages 149-150, in which you gave the following evidence:

> "... one has to make a distinction between segregation and discrimination ... I would like to use the word segregation to mean separation, which, of course, need not require or be connected with oppressive measures, but can be so used in the same way a knife may be used to cut a roast or can be used for murder".

And then referring back to your view that "segregation does not have to lead to discrimination", you then defined discrimination as follows:

> "... if by discrimination we mean, as I propose we ought to, placing someone, or placing a group, at a disadvantage that is not warranted by any relevant element in the situation in which the group is found".

Do you adhere to that definition?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Now would the word "disadvantage" as used in that definition, include limitations imposed upon freedom of members of a racial group as such: such as, for example, setting a ceiling on their economic advancement?

Mr. VAN DEN HAAG: As I tried to indicate before, sir, that would depend on the situations. There are two factors that I would regard as relevant here, first the qualifications of the members of the group: if they are prevented from taking a job because they are not qualified to take it, this I would not regard as ...

Mr. GROSS: May I repeat my question—you seem to be confused?

Mr. VAN DEN HAAG: I am trying to give the background for my answer. The second relevant consideration would be: supposing that some members of the group are qualified for a position that they are prevented from holding, despite their qualifications—I think this is what you had in mind—it may still be in the interest of the two racial groups or communities involved not to allow them to do so under certain circumstances, namely when, although this, the assumption of this job, would serve their personal and individual interests, it may bring about disorder within the community and may lead to the dissolution of tribal or cultural bonds, which is regarded as undesirable. So that, may I put it this way, any social measure, whether it be a traffic law or laws of the kind that you have indicated, though meant to be for the benefit of the great majority, and to yield a net benefit to society, may lead to some disadvantage for individuals who find themselves in special situations. This is undoubtedly so, both in my writings and teaching, I have always told my students

that I cannot think of a single social measure which would not affect some individuals in a way which, with regard to the individual situation, is unequitable, but which nevertheless can be justified in terms of the general social advantage or disadvantage.

Mr. GROSS: Sir, would it be possible to answer the question which I intended to put to you: does the term "disadvantage" as used in your definition of "discrimination" include legal limitations imposed upon freedom of members of a racial group as such, for no other reason than their membership—on no other basis—and I have given as an example the setting of a ceiling on economic advancement. Could you answer the question whether this is within the concept of your term "advancement", as used in your definition?

Mr. VAN DEN HAAG: This is sometimes, but it is not always, a net disadvantage, that is it may work to their benefit in the long run and to the benefit of the average of the group, but it may also be a disadvantage for some individual members.

Mr. GROSS: Dr. van den Haag, in your testimony at page 135, *supra*, of the verbatim on going back to that page, if I may—as part of your qualification of expertise, you testified that you had given special attention to minorities problems and then you used the following expression or characterization: "as to all groups other than the dominant one in any given society." Would you explain to the Court, sir, what the concept of the "dominant group" is in this context?

Mr. VAN DEN HAAG: It is the group that sets the tone, influences, informs and shapes the culture that prevails in the territory.

Mr. GROSS: Does it have any economic implications?

Mr. VAN DEN HAAG: Not necessarily, no.

Mr. GROSS: Does it have any economic implications in any situation? You said "not necessarily".

Mr. VAN DEN HAAG: An implication I take to be a necessary attribute and that is not the case. Of course, it could.

Mr. GROSS: In other words, is it your testimony that if a group exercises economic control it is a dominant economic group?

Mr. VAN DEN HAAG: Well, certainly I would call it a dominant economic group, yes.

Mr. GROSS: And that would fit in within your concept of "dominant" group as you used it?

Mr. VAN DEN HAAG: It could be a part of it, yes.

Mr. GROSS: Thank you, sir. Now, I should like to read a quotation from a work by Professor Brewton Berry, whom you cited, on techniques of dominance, and the citation is from Chapter 14 in *Race and Ethnic Relations* (published in Boston in 1965), at page 327. You cited this authority, as you may recall, at page 146 of the verbatim, in another context. The passage which I should like to quote to you and then, subsequently, follow with a question or two, is as follows:

> "Whenever racial and ethnic groups come into contact [and then I skip some irrelevant phraseology] the group which enjoys the greater prestige and wields the power is invariably jealous of its status, will not surrender its prerogatives without a struggle and is determined to defend its own values and its culture against competing and conflicting systems."

That is from page 327.

Mr. van den Haag, I should like to ask you—in terms of your simile of separation or segregation as a knife which could do harm or good—do you agree that segregation, or separation (whichever you prefer) readily becomes discrimination if a dominant group wields the knife—dominant in the sense that you used the term?

Mr. VAN DEN HAAG: That depends entirely on the intention of the dominant group. If you are asking me to tell you what I think this intention usually is, I can only tell you it depends on the particular circumstances. I would not agree with Professor Berry's idea that this is invariably so and I wish to call to your attention that I have used Professor Berry's book . . .

Mr. GROSS: In a different context?

Mr. VAN DEN HAAG: Not only that, but only to quote passages which he himself quoted from other authorities.

Mr. GROSS: You disagree with the opinion or judgment which I have quoted from Professor Berry?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Now, if, however, it may be that in certain situations (and I take that from your answer) this would be valid in certain situations—is that not correct, sir?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: In "certain situations"—which I believe is the phrase you used, or words to that effect—if one group exercises economic control or "economic domination" in the sense we have established between us, what safeguards, if any, would be necessary and feasible to assure that such dominant group exercises its control in a disinterested manner for the general public welfare?

Mr. VAN DEN HAAG: Well, I think it is in the interest of the dominant group itself to do so.

Mr. GROSS: "To do so", meaning what, sir?

Mr. VAN DEN HAAG: To exercise its power in the interests of all, for if it did conceive of its own interests quite narrowly and impose great disadvantages on those who are not dominant, I think in the long run it would be to its own disadvantage. I do not know of any external controls that could be so used and I would like to point out, Mr. Gross, that it is contended, at least in the United States, that in the South, where they have been segregated, Negroes have been exploited and I do not deny that that has been the case, I merely deny that it must be the case. It is also contended in the United States that in the North, where Negroes have not been segregated, the Negroes have been equally exploited and in fact people say more so. So that the presence or absence of segregation is, in my opinion, not significant in trying to determine whether there is exploitation.

Mr. GROSS: You understood, sir, did you, that my question was, I repeat: what safeguards are necessary and feasible to assure that the dominant group exercises its control in a disinterested manner? Did I understand you to say that enlightened self-interest is the safeguard?

Mr. VAN DEN HAAG: I cannot think of any legal safeguards that would be very helpful. In this connection, may I point out that the Constitution of the United States has not been changed since the Fourteenth Amendment was passed, but that it is now interpreted in a way that would eliminate segregation, whereas previously it was not so interpreted. This may illustrate my contention that any law that you would

pass would not automatically be a safeguard—it all depends on how it is being used. The same Fourteenth Amendment, in other words, was used 50 years ago in one way and is now used another way.

Mr. GROSS: That is so. Would you wish the Court to understand that you do not assign safeguarding values to the Constitution of the United States?

Mr. VAN DEN HAAG: Not in the respect that you refer to.

Mr. GROSS: Thank you, sir. Now, your definition of discrimination refers to disadvantage not warranted by any relevant element in the situation—I quote the words "disadvantage", "warranted" and "element" in that definition. I am referring to the verbatim record of 23 June, page 150, *supra,* Mr. President. Do the words "warranted" and "relevant" in this context involve value judgments?

Mr. VAN DEN HAAG: I think the word "warranted" is a value judgment which assumes the value of "relevant"; but the relevance itself is a factual matter.

Mr. GROSS: I am not sure I understood you, sir. You said that the word "warranted" assumes a value judgment?

Mr. VAN DEN HAAG: Yes, sir. It assumes that relevance is of value; and so "warranted" is a value judgment about the necessity of the distinction being "relevant" to the situation.

Mr. GROSS: So what is "warranted" in a particular context or situation depends upon the eyes of the beholder? Is it on the judgment of the person who is making the decision as to what is warranted and what is not?

Mr. VAN DEN HAAG: Well, I do not think that value judgments are quite so arbitrary.

Mr. GROSS: They can't be good or bad, sir, would you agree?

Mr. VAN DEN HAAG: Certainly they are hard to prove.

Mr. GROSS: I am not trying to qualify a particular value judgment—I am asking you as a social expert, as I think you have described yourself, sir—whether in this context of your own definition of the word, the word "warranted" is interpreted in a particular context on any basis other than a subjective evaluation of the person making the judgment? May I put my question in that way, sir?

Mr. VAN DEN HAAG: Yes, sir, I think I grasped your question, but perhaps I was not as clear in my answer as I should have been.

You see, as I said when I proposed this originally, I think in each situation specific criteria are relevant. In a scholastic situation, for instance, scholastic performance is relevant and not, say, religion or sex. In a religious situation religious belief is relevant and if, say, you are selecting girls for a chorus line, aesthetic and erotic appeal may be relevant. So, when I speak of "warranted" I mean simply the value judgment that relevance is of importance to the situation and that judgment could be, if you wish, regarded as a value judgment.

Mr. GROSS: Do you regard this type of value judgment, with respect to what is warranted and what is not warranted in a particular context, to be an attribute or specialty of the science of sociology?

Mr. VAN DEN HAAG: No, sir.

Mr. GROSS: May I ask you, sir: is the word "discrimination" a word or concept which is commonly used by sociologists in what may fairly be called a pejorative sense?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Does the word "discrimination" have a connotation of hostile or adversary relationship between groups in a society?

Mr. VAN DEN HAAG: As it is now used in a political context we usually speak of "discrimination against" which is synonymous with "placing at a disadvantage for irrelevant purposes".

Mr. GROSS: Is there an element of hostility or adverse relationship implicit in such a situation of discrimination?

Mr. VAN DEN HAAG: Not necessarily, no.

Mr. GROSS: One can discriminate against another, in this sense of the word, with benevolent motives?

Mr. VAN DEN HAAG: Well, that doesn't follow. You asked whether there was hostility. Now, it may simply involve a preference for those for whom the discrimination is in favour.

Mr. GROSS: A preference by those who do the discriminating, you mean?

Mr. VAN DEN HAAG: Yes.

Mr. GROSS: Would that be reasonably regarded by the victims of the discrimination as a hostile or adverse preference?

Mr. VAN DEN HAAG: Perhaps we disagree on the use of the word hostile. They may not feel that they are being discriminated against because they are hated, they may simply feel that the discriminator prefers another person or group. In other words, if I grade my students unfairly, making an unwarranted discrimination, preferring, say, all the prettier girls and giving them "A's" and giving bad grades to all the less attractive girls, I do not think that the less attractive girls will necessarily feel that I am hostile to them, they will merely feel that I am friendly to the more attractive ones.

Mr. GROSS: Would that, sir, as a psychologist, make them feel very much better?

Mr. VAN DEN HAAG: It makes them feel that I am weak, and my weakness leads me to be unfair, but not that they are being persecuted.

Mr. GROSS: So that perhaps you would prefer the word "unfair" to "hostile"?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Would it be compatible with the objective of promoting well-being and social progress in any society if a government by official action fosters such an unfair or, if I may say, adversary, relationship between groups?

Mr. VAN DEN HAAG: I should certainly think that any government that deliberately places a group at a disadvantage does something, and this is a value judgment, that I would regard as unjust.

Mr. GROSS: If a law is passed, would that be a deliberate action of the government, normally speaking?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Or if regulations are issued, are they normally deliberately issued?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Now I would like to quote from the testimony of Professor Bruwer, a professor and social anthropologist of renown who was a member of the Odendaal Commission, and who testified on 6 July (in the verbatim record at p. 310, *supra*)—and I quote from my cross-examination of him—I asked: "The decisions (parenthetically, Dr. van den Haag, this refers to the imposition of limits on freedom upon persons by reason of their race—this was understood between the witness and myself, I

believe it is fair to state) are made by administration, which then is controlled by one group. That is correct?" Answer: "That is correct, Mr. President." And I asked: "And it is controlled by the group whose happiness is, in your terms, determined to a large extent by the limitations imposed on the freedoms of the other group. Is that correct?" Answer: "That is correct." Did you understand this exchange?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: In your opinion, as a sociologist, would you describe such a situation as the one which I have read to you in this colloquy as one in which discrimination may be said to exist?

The PRESIDENT: Mr. Gross, is the quotation you are making from Professor Bruwer in relation to the southern sector only, or in respect to South West Africa in general?

Mr. GROSS: For the purpose of my question, Mr. President, I would say it applies generally to South West Africa.

The PRESIDENT: What is the page of the reference?

Mr. GROSS: Page 310, *supra*, of the verbatim record. I would say also, Mr. President, that it applies as well to the southern sector. May I continue, sir, or would you want further elucidations? Thank you.

Would you, sir, respond to my question, or would you like me to repeat it?

Mr. VAN DEN HAAG: I should say, as I tried to say before, if there is a limitation imposed, be it economic, be it on freedom, and so on, and that limitation is imposed unilaterally on one group without being imposed in a manner that is more or less symmetrical on the other group, I would regard this as discrimination. However, if the limitation is imposed on one group, supposing for instance that you were to say members of a certain tribe or group cannot become lawyers in a certain city, but they can become lawyers in a different city or in a different group, whereas members of another group cannot become lawyers there, then I would not regard it as discrimination; that is, discrimination involves a unilateral imposition of a disadvantage not compensated for by any advantage to be achieved elsewhere.

Mr. GROSS: Would you elucidate for the possible interest of the Court what you mean by "here" and "there" in that context—I am talking about one place, and I was addressing my question to that.

Mr. VAN DEN HAAG: I am not, as you know, familiar with Africa, but if I may give an illustration in the United States—if you were to say to a lawyer born in Cleveland, Ohio, that he cannot become a lawyer in New York but only in Cleveland and some other places, perhaps, and at the same time to say to lawyers born in New York that they cannot become lawyers in Cleveland, and so on, then I would not regard it as discrimination; but if, on the other hand, you were to say to the Cleveland lawyer "You cannot become a lawyer in New York", and say to the New York lawyer "You can be a lawyer both in New York and Cleveland", then I would regard it as discrimination, assuming that the qualifications are equal in both cases.

Mr. GROSS: So that the key to your answer, if I understand you correctly, sir, is a proper definition of the area within which the asserted discrimination takes place?

Mr. VAN DEN HAAG: No, sir—I perhaps was not as clear as I wished; the key to my answer is that bilaterality, that is that the limitations, be imposed equally on both groups.

Mr. GROSS: Now may I come back, sir, to my question, in terms of my question to Mr. Bruwer and his answer—this is still at page 310, *supra*:

> "And it is controlled by the group whose happiness is, in your terms, determined to a large extent by the limitations imposed on the freedoms of the other group. Is that correct?"

His answer: "That is correct." Now I ask you, sir, in your opinion as a sociologist, would you describe such a situation as one in which discrimination may be said to exist?

Mr. VAN DEN HAAG: Sir, let me try again; you are now referring to happiness, a term that I prefer not to use because it is rather hard to . . .

Mr. GROSS: Do you know it, sir, in the Constitution of the United States, the Declaration of Independence?

Mr. VAN DEN HAAG: Yes, sir, I am rather familiar with them, but I still think it is a very hard term to define and to measure; but at any rate, I would say if you were to say that the happiness of one group is determined or depends on the limitations of another, if this is wholly unilateral—that is, if you could not say that the happiness of the other group depends on the limitations of the first—then you may speak of discrimination; if it is bilateral you may not.

Mr. GROSS: Yes, sir. And are you familiar with any diversified or integrated economic society within which this principle operates—an exchange of deprivation of freedoms within the same economy by official action?

Mr. VAN DEN HAAG: I understand that that is the case in South Africa, but you ask me whether I am familiar with it—certainly not.

Mr. GROSS: Are you familiar with it anywhere, sir?

Mr. VAN DEN HAAG: Not out of first-hand experience.

Mr. GROSS: You never heard of such a situation?

Mr. VAN DEN HAAG: I have heard of it—I am trying to convey that—but I am not familiar with it.

Mr. GROSS: Have you heard of such a situation existing anywhere else than what you heard about South Africa and South West Africa?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Would you name one or two illustrations?

Mr. VAN DEN HAAG: History has quite a number.

Mr. GROSS: The current, contemporary world, sir?

Mr. VAN DEN HAAG: No, I cannot off-hand tell you.

Mr. GROSS: Now may I read from your work *The Fabric of Society*, the well-known text, properly esteemed, published in 1957 and, I believe, co-authored, if I am not mistaken, with Ralph Ross. At page 161 of the work to which you referred in your testimony—that is, you referred to the work—I do not think you referred to this quotation, but I read, if I may, sir:

> "Prejudices are the ideological links in the historical chain that keeps the disdained group bound to its low status. When the low status of the slighted group is used to inflict material disadvantages on its members, they are 'discriminated against'. Their common characteristic, such as skin colour or nationality, is regarded as sufficient *per se* to deny them the parity of advantages or opportunities they seek, though it be without relevance, or the common characteristic is taken to indicate incapacities, for instance stupidity,

> which, were they present, would be truly disqualifying. This last implies that the irrelevant common characteristic of the group ought not to serve as a basis for discrimination against it, unless indicative of relevant incapacitating traits, which stands to reason."

Do you still consider at the present time these to be correct views, as they were in 1957?

Mr. VAN DEN HAAG: These are, I think, correct views, and they are consistent with what I have tried to testify to here.

Mr. GROSS: That, of course, the Court will have to decide.

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Now these references specifically to "material disadvantages" would relate, would they, sir, to economic disadvantages?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Would they relate to the imposition of ceilings upon economic advancement based solely on race, without regard to individual qualities?

Mr. VAN DEN HAAG: Provided that these ceilings are imposed only on one group in a specific situation, and not on the other.

Mr. GROSS: Yes, sir, that is what I am referring to. The specific situation, however, to which I invite your attention is one, let us say hypothetically, in which you have a large number of different races, classified as such, working and, to a large extent, living in the same economic and geographical area—would this correspond to the context or situation that you have in mind in answering my question?

Mr. VAN DEN HAAG: I have not understood this fully, sir.

Mr. GROSS: I see, sir. I think I can state it in a sentence: in a situation in which, let us say, two different races live and work together in the same economic environment, would that be a context or situation to which your response referred? You used the phrase "in a situation"—would that be a situation as you used the term?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Thank you. I would like to refer to page 150, *supra*, in which you testified as follows:

> ". . . in our memory very clearly I suppose is that [this is one case you cited] of the Jews in Germany, who were certainly slaughtered (discrimination is not enough) [I take it that you probably meant 'was not enough', but it appears in the verbatim record as 'is not enough']; yet there was no segregation of any length preceding this slaughter . . .".

This was *à propos* of your views expressed in the testimony regarding segregation and its implications. Can you tell the Court, sir, *à propos* of the question of length of time "preceding the slaughter", as you referred to it, when was the requirement introduced in Germany that all persons classified as Jews must wear a Star of David badge in public?

Mr. VAN DEN HAAG: I do not know the exact time sequence, but my opinion was, and is, that to the extent to which segregation was introduced in Germany, it was introduced as an effect of the planned slaughter or discrimination and not as a cause; and the point I wished to make, and perhaps did not succeed in making as clearly as I wanted, is that segregation is not necessary as an instrument for discrimination, though it can be so used, and that discrimination and even slaughter can be planned without prior segregation; but of course then in the act of

slaughter, or in the time most proximate to it, you will necessarily have to impose some segregation to undertake it.

Mr. GROSS: Could you explain to the Court, sir, why, as a sociologist, or any other field of expertise you cared to identify yourself with, segregation was a relevant prelude or preliminary to slaughter?

Mr. VAN DEN HAAG: Yes, sir, because if you wanted to select Jews for slaughter, you had to select them; the act of segregation was simply part of the act of selection. They had to be distinguished from non-Jewish Germans so as to be selected and sent into concentration camps, which were filled with them; so here the separation was simply incident to the slaughter, as it was incidentally also in countries such as Poland and Holland and many others, where the Germans did not even have time to introduce a preliminary period of segregation of any length, but directly selected them out; but of course this selection, transportation and so on involved segregation as a prelude to death.

Mr. GROSS: We are not referring to that, sir. Are you familiar with any limitations that were imposed upon the freedom of Jews prior to their slaughter?

Mr. VAN DEN HAAG: Again as an instrument to keep them, so to speak, ready for the slaughter that was done, yes—all kinds of limitations.

Mr. GROSS: And when the sign appeared on a park bench saying no Jews were allowed—this was an incident to preparing them for slaughter?

Mr. VAN DEN HAAG: No, sir, this was just an expression of general spite and hatefulness, I would think.

Mr. GROSS: So that this is an element of segregation, or separation, if you use the terms synonymously?

Mr. VAN DEN HAAG: I do not think that even at that time in Germany there was anything that I would seriously call segregation. It was done to some extent in certain other countries in which it was geographically more easy—for instance, in Warsaw, where the Jews were confined to a ghetto—but it was really not done in most of Germany at least before the start; they were simply selected and sent to concentration camps, which is an act of segregation. Now there were a number of special rules that applied to them, to Jews, before, such as making them wear distinctive garb or signs—things like that—but all these seemed to me to be part of a deliberate plan on the part of the Government to make them objects of hate.

Mr. GROSS: And that, therefore, was an element of the plan which was perhaps relevant to slaughter, perhaps not, depending on the intention of an administrator—is that what you would say, sir?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: The limitations of freedom upon them by reason of their race, you are telling the Court, was merely a part of the plan for their slaughter. Now were there other limitations of freedom imposed by Nazi Germany upon other than Jews, for example, those who expressed political opinions addressed to the regime?

Mr. VAN DEN HAAG: Well yes, under somewhat different laws. In the case of the Jews these were imposed merely because these people were Jews; in the case of political and so on it was introduced by more normal individual legal proceedings—I think in many cases at least—for the administration of justice in Nazi Germany certainly is a doubtful proposition to begin with but there were also other races, as I think you suggest,

who were being oppressed and slaughtered by the Nazis—the Jews were not alone—the gypsies and others were involved but of course the main harshness and cruelty of the Nazis did fall on the Jews.

Mr. GROSS: Would you say, sir, that the Jews under Hitler were discriminated against?

Mr. VAN DEN HAAG: Certainly.

Mr. GROSS: Now with reference to page 151, *supra*, where you were asked for a general comment on possibilities of comparing, and I quote from the question—"the American Negroes" with "indigenous inhabitants of Africa" and you answered—"the American Negroes originally came from Africa but I think there are very major differences. One is a purely biological one" and then I skip . . . "It is generally said that African Negroes, on the whole, are purer Negroes whereas it is generally accepted that there is about a 30 per cent. admixture of non-Negro genes, or blood, in the American Negro". Do you recall that testimony?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Do you wish to qualify it in any way before I ask you questions about it?

Mr. VAN DEN HAAG: No, sir.

Mr. GROSS: I have not seen the revised verbatim. In this response to the question of comparing the "American Negroes" with the "indigenous inhabitants of Africa", did you intend to refer to *all* American Negroes? Would you answer that "yes" or "no"?

Mr. VAN DEN HAAG: Well it is a little difficult for the reason that I . . .

Mr. GROSS: But you used the phrase . . . I just was trying to get for the Court the benefit of the use of the phrase. Did that phrase refer to all American Negroes?

Mr. VAN DEN HAAG: Let me explain, sir, that these are statistical matters. When I speak of a 30 per cent. admixture, for instance, I do not mean that I can state or that I do believe, that every American Negro has a 30 per cent. admixture of genes—what I do mean is that I am informed by genetecists, of which I am not one, that on the average one may speak of such an admixture. I do not think that there are any scientific statements that are made in modern science that are other than statistical in this sense.

Mr. GROSS: So that your answer is with respect to a statistical base in which you are dealing with averages rather than concepts of a race, is that correct?

Mr. VAN DEN HAAG: The concept of a race is a concept of an average, sir. The members of a race are not all identical in any particular respect; on the average certain types in a race are more frequent than they are in another race and that gives us a distinction. It is a frequency statement, never a statement referring to all members.

Mr. GROSS: I see. So that phrase "such as the American Negroes" means the average American Negroes?

Mr. VAN DEN HAAG: Right.

Mr. GROSS: Would you undertake to define to the Court a description of an average American Negro?

Mr. VAN DEN HAAG: I would not, sir. I am not competent to do so.

Mr. GROSS: But it is a concept which you have in mind in using the phrase?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: But you could not explain to the Court what it is.

Mr. VAN DEN HAAG: I accept this as we always do in science from a related science, namely in this case, the biologists. Now you see to give a biologically correct description of American Negroes, I would have to have greater competence in biology than I have or than I need to be a sociologist. As a sociologist I am only interested in the social perception of the Negroes not in their biological substance.

Mr. GROSS: Your reference to the purely biological difference, then, in your response to Mr. de Villiers' question, was irrelevant to your . . .

Mr. VAN DEN HAAG: It is fairly irrelevant and if you wish I will withdraw it.

Mr. GROSS: Not at all; that is entirely up to you. Now do you regard, on the basis of your discussions with geneticists or scientists in fields other than your own, that there is a distinction between genes and blood —you use both?

Mr. VAN DEN HAAG: I used them synonymously. I think blood is a colloquial expression for genetic differences.

Mr. GROSS: So that you did not mean blood literally?

Mr. VAN DEN HAAG: No, sir. There are, incidentally, I happen to know, differences in the blood composition, but I could not tell you exactly what they are—I understand there is a difference in the time of coagulation.

Mr. GROSS: You mean between the average Negro and the average White?

Mr. VAN DEN HAAG: Yes, surgeons tell me that they have to pay attention to that.

Mr. GROSS: And are there differences within each race as well? Have you consulted surgeons on that question?

Mr. VAN DEN HAAG: Certainly, there are differences regarding . . .

The PRESIDENT: I do not know what relevance the last two questions have, Mr. Gross.

Mr. GROSS: Sir, the relevance, with all respect, is to the witness's expert testimony, if it is expert testimony, about a 30 per cent. admixture of non-Negro genes or blood in the American Negro, and I am trying to, with all respect, get from the witness clarification as to words and phrases he uses here which are so wide as his expertise, as I understand it.

The PRESIDENT: Very well.

Mr. GROSS: Now would you say, sir, as a sociologist that the term "American Negro" in this context is a stereotype?

Mr. VAN DEN HAAG: I would not say so, sir. It can be so used but you can certainly speak of the American Negro, you can speak of the German type or the Italian type and so on. It may be used as a stereotype if it is used to mean every single German or every single Negro is such and such—that would be a stereotype but if it refers to a frequency distribution of types, be they physical or psychological, it is a perfectly legitimate and scientific description.

Mr. GROSS: Now is there a scientific description that covers the category of an off-spring of a mixed Negro-White marriage?

Mr. VAN DEN HAAG: In certain countries there usually . . .

Mr. GROSS: As a scientific matter, sir.

Mr. VAN DEN HAAG: As among geneticists, is that what you mean?

Mr. GROSS: In any capacity which you represent as an expert . . .

Mr. VAN DEN HAAG: Well, I am not a geneticist so I would not be able to respond to your question if it was meant to be genetical, but if

it is meant to be social, we do not make such a distinction except to say that some Negroes are more white, more light or something like that and others are less so.

Mr. GROSS: Purely visual, sir?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: So that as far as you know there are no scientific or genetic criteria which are applicable to the mixed off-spring of a mixed marriage?

Mr. VAN DEN HAAG: I cannot commit myself on that, as I said, I do not know enough about it.

Mr. GROSS: I see. At page 151, *supra*, of your testimony, you said—

> ". . . the American Negro does have American culture, an American Negro sub-culture if you wish—a sub-culture just as that of say longshoremen may be called a sub-culture owing to specific circumstances of their life".

Does the American Negro here in this context refer to the average, as you have used the term, the "average American Negro"?

Mr. VAN DEN HAAG: Yes, sir. Now I am fully aware, if I may expand a little on this, that of course there are lower-class, middle-class and upper-class Negroes and that they partake in part of Negro culture and part of middle class, or upper class as the case may be, culture that if they are longshoremen they partake in part of the sub-culture of longshoremen and part of that of Negroes. But this is very common and would apply to everybody—that is we are all usually members of more than one sub-culture.

Mr. GROSS: You use the terms "American Negro sub-culture": were you referring to a statistical base in that . . .?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: That you were referring to "sub-culture" as a common feeling among the average American Negro—I am not trying to put words into your mouth, I am trying to elucidate your meaning.

Mr. VAN DEN HAAG: I think this would be correct and I would for instance make this clear if you refer to linguistic habits which are certainly part of a sub-culture, you would find that certain expressions, modulations of phrase, terms and so on are more often used by Negroes say than by non-Negroes. Of course, there is individual variation in this, nonetheless you can characterize a group in these terms.

Mr. GROSS: So that by education and environment you change the sub-culture pattern in your terms?

Mr. VAN DEN HAAG: To some extent, yes.

Mr. GROSS: To some extent—to what extent is it? Is it perpetual and frozen?

Mr. VAN DEN HAAG: I think it is fairly ultimately ineradicable, that is education has the effect of making people acquainted with other sub-cultures and acquainted with the culture at large but it does not usually extinguish the feeling of belonging or deriving from a sub-culture.

Mr. GROSS: I would like to invite your attention now to another area of inquiry. At page 132, *supra*, you say that—"in principle, wherever there is a Native culture that has any sort of strength . . . I would make every effort I could to maintain it" and if it was necessary "to bring about a change, I certainly would want to do it in the slowest and the most supervised way". And then on page 153 you say—"there are cases when the change occurs suddenly and without regulation by superior

authority". I should like to ask you, sir, whether this change to which you refer relates to rapid or other social change?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Now is a social change, rapid or otherwise, a concomitant of economic development?

Mr. VAN DEN HAAG: It can be. Social change can occur independently of economic development; it can also be an effect of it; it can also be a cause of it.

Mr. GROSS: If you as a sociologist or observer would be confronted with the situation of a diversified economy in which you had persons who might perhaps be regarded as less educated, less favoured—would their social change be a concomitant of the economic condition in a sociological sense?

Mr. VAN DEN HAAG: I do not think that can be said generally one way or the other. It depends on numerous factors. We have circumstances in which the social change has taken place without any visible economic cause and has had economic effect sometimes and sometimes not. We have other circumstances where it can be clearly shown that the social change is an effect of an economic change.

Mr. GROSS: So that you would not be prepared to say that economic development is normally a cause of social change?

Mr. VAN DEN HAAG: It can also be an effect.

Mr. GROSS: It can be either one or the other?

Mr. VAN DEN HAAG: In fact, if I may point out, the last 20 years or so there has been a considerable change of view on this matter. Many people in the United States felt that the best way to help the undeveloped countries was by direct economic help, largely investments and industrialization, and that that would help their economic advancement. Now, however, and this has occurred perhaps in the last five years, many social scientists in the United States are of the opinion that social change ought to and must precede the economic change as that economic change would become as effect. So there is a relationship, but it can be viewed in different ways.

Mr. GROSS: Economic development does have some effect upon social change?

Mr. VAN DEN HAAG: Oh yes. Some effect certainly.

Mr. GROSS: And if it is, say, an economic environment in which you have different races, in which both races are absorbed in the economy—this could have normally, and would have, a social effect on that community?

Mr. VAN DEN HAAG: I would like to be able to give you a clear answer but unfortunately the facts do not permit it for if you look at the Jews in Germany, which we have just discussed, we did have a case here that both groups at least were equally participant in the economic activity without hindrance and so on, and the total ultimate effect so far, has been one that we are all so fully aware of. Other cases have had a more happy outcome. I do not believe that one can say, generally speaking, that economic integration leads to the social change that is desirable, that is, some sort of peaceful relationship between the two groups, it may lead to the opposite.

Mr. GROSS: One question with respect to clarification of the case you just cited. Do I understand you correctly, sir, to say that what happened, as you put it, in Germany, was due to the fact that the Jews were in-

volved in an economic situation with non-Jews? I am not sure I understood your answer.

Mr. VAN DEN HAAG: I am sorry if I was not clear. No, I did not say that it was caused by the economic situation. I merely wished to say that the economic situation or integration, did not prevent it. That is, that economic integration, co-operation, equality and so on, do not serve to prevent racial or ethnic hostility and so on.

Mr. GROSS: Now, I am going to invite your attention, with the honourable President's permission, to your testimony, at page 154, *supra*, of the verbatim record of 22 June 1965, in which you referred, in response to a line of questions by distinguished counsel for the Respondent, to the *Brown* v. *Board of Education* case; I shall try to keep my questions brief, with a view to terminating our interview this morning. The testimony is that:

> ". . . 'modern authority' has demonstrated that segregation is 'inherently unequal' so what the Court said was in fact, that social scientists who were prominent in the lower courts in these cases, have demonstrated that even when facilities are altogether equal, the mere fact of segregation inflicts an injury on at least one of the segregated groups, and is therefore inherently unequal".

This is your characterization of the *Brown* decision?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Now I will return, Mr. President, if I may, to the verbatim of 23 June. I refer to page 154, *supra*: you were asked by Mr. de Villiers "That proposition of the infliction of injury, did it relate in the particular case to the situation of Negro school-children attending segregated schools?" "Yes, sir", was your answer. Now, proceeding from that, I would like to ask you, sir, whether you regard it as a correct statement that psychological injury is inflicted by segregation—would that statement be generally accepted in your branches of social science in the United States?

Mr. VAN DEN HAAG: I do not regard it as a valid statement at all. I do feel that there is no evidence whatsoever for it and I do not think that sociologists today would be ready to seriously report that such evidence is available although, as I tried to point out, they would be quite reluctant, for reasons of policy or fashion, to state this.

Mr. GROSS: Now, I believe you testified to that, sir—that their desire not to express their views would be unconnected with their scientific or objective judgment?

Mr. VAN DEN HAAG: That is correct, sir.

Mr. GROSS: For reasons which you indicated, I believe you said "not fashionable"?

Mr. VAN DEN HAAG: That is correct, sir.

Mr. GROSS: Yes, I see. Now, you referred, at page 155 of the verbatim of 23 June, to the fact that "a brief *amicus curiae* was signed by a number of social scientists"—this was in the *Brown* case.

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: A brief appended to the Applicants' briefs. Are you familiar with the number and identity of the scientists who signed that brief?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Then you would take it as correct, that there were 35 such scientists, from 13 States?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Of the United States. Are you familiar, sir, with the terms of their concurrence in the brief?

Mr. VAN DEN HAAG: Yes, I have read the brief *amicus curiae*, in fact I have it here.

Mr. GROSS: So that you do know, as a fact, that they all did concur in the conclusions and opinions expressed in the brief, with the reservation that there were some differences of opinion concerning the conclusiveness of certain items of evidence?

Mr. VAN DEN HAAG: Yes, sir. May I point out, sir, that since that time, I have written . . .

Mr. GROSS: I have not quite finished my question, sir. I wanted to make sure that the Court understood the terms of the reservation of the scientists. I want to make further reference to this, concerning the conclusiveness of certain items of evidence and concerning the particular choice of words and placement of emphasis in the preceding statement, that is, the brief itself: "We are nonetheless in agreement that this statement is substantially correct and justified by the evidence and the differences among us, if any, are of a relatively minor order and would not materially influence the preceding conclusions". I quote from page 177. Now, do you have any basis for an opinion, sir, as to what weight was given by the Supreme Court or any justices thereof, to the concurrence of these authorities in this brief?

Mr. VAN DEN HAAG: Yes, sir, I do. I think that considerable weight was given to them. I believe I quoted to you last time an opinion by Professor Kurland, a Professor of Law at the University of Chicago, which indicated as much, and if I may add to it, let me here quote a paper by Dr. Alfred Kelly . . .

Mr. GROSS: Does this represent your opinion, sir? My question was whether you had any evidence to support your opinion.

Mr. VAN DEN HAAG: I fully agree with Professor Kurland and with Professor Kelly on the opinion which I am about to read, that the Supreme Court's decision in *Brown* v. *Board of Education*, was strongly influenced by the evidence presented by the social scientists in the appendix to the decision and quoted in footnote 11. What leads me to this opinion is that the court speaks of "modern authority" and of "contemporary psychological knowledge", references which I believe cannot be but to the evidence presented in this connection. Now I would like to . . .

Mr. GROSS: I would prefer not, Mr. President—in the interests of time, I have asked the witness for his *own* opinion and he proposes to read the opinion of others.

The PRESIDENT: I think that the witness should answer the question.

Mr. GROSS: Then, sir, may I continue? Thank you, sir. As a matter of fact, then, I believe you have testified, have you not, that you do not know of any basis for an opinion as to the weight, if any, given by the justices of the Supreme Court to the scientific authorities who signed this report?

Mr. VAN DEN HAAG: No one, not even the justices . . .

Mr. GROSS: Nobody . . . so you do not purport to have judgment, expert or otherwise on that?

Mr. VAN DEN HAAG: No, but there are references in the judgment to modern authority, which are . . .

Mr. GROSS: Yes, we understood that. Now, in the *amicus curiae* brief,

to which we are referring and about which you testified on 23 June, the brief discusses a report of the so-called mid-century White House Conference on Children and Youth, does it not?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Are you familiar with that *White House* report?

Mr. VAN DEN HAAG: It was prepared by Professor Kenneth Clark and I have reviewed its contents in the article which I submitted to the Court.

Mr. GROSS: It was prepared by Kenneth Clark; it was discussed and signed by numerous scientists, was it, sir?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: Now, are you familiar with the conclusion of the report? —as follows, on page 168 of the brief:

> "The Report brought together the available social science and psychological studies which were related to the problem of how racial and religious prejudice influenced the development of a healthy personality. It high-lighted the fact that segregation, prejudices and discriminations . . ."

The PRESIDENT: Mr. Gross, I think if you are cross-examining a witness, you cannot ask a witness in relation to a factual situation, as to how a report, with which he had nothing to do, came into being. You can ask him whether he agrees with a conclusion or opinion expressed. You cannot quote, for the purpose of putting on the record as evidence, the factual details in respect of the matter.

Mr. GROSS: Mr. President, with respect, sir, I will attempt to make clear the purpose of this quotation. I had planned to ask the witness for his concurrence or non-concurrence with the conclusion of this report . . .

The PRESIDENT: A conclusion you may put to the witness, but not how the report came into existence.

Mr. GROSS: All right, sir; thank you, sir. I will, with the President's permission, ask the Court to ignore the question and the witness to ignore the question, and ask you whether you agree with the following characterization of the report, which I read from page 168:

> "The Report indicates that as minority group children learn the inferior status to which they are assigned, as they observe the fact that they are almost always segregated and kept apart from others who are treated with more respect by the society as a whole, they often react with feelings of inferiority and a sense of personal humiliation. Many of them become confused about their own personal worth."

Do you agree with that, as a fair characterization of what the report indicates? You testified that you were familiar with the report. Do you regard this as a fair characterization of what the report indicates?

Mr. VAN DEN HAAG: You mean, do I . . .

Mr. GROSS: I have just read to you . . .

Mr. VAN DEN HAAG: Yes, I understand. Do I regard this as the opinion that the report expresses?

Mr. GROSS: Yes, sir.

Mr. VAN DEN HAAG: Certainly, that is the opinion that the report expresses.

Mr. GROSS: Now, I would like to turn to the question which was addressed to you, by Mr. de Villiers . . .

Mr. DE VILLIERS: Mr. President, I am sorry to interpose . . .

The PRESIDENT: Yes, Mr. de Villiers.

Mr. DE VILLIERS: My learned friend has had his election not to call evidence. If he wishes to put a conclusion to the witness and ask him whether he agrees with that, that is perfectly permissible, but to build a record by reading portions from a report, and just asking the witness whether he agrees that that is what the report says—that, I submit, is not permissible.

The PRESIDENT: It does not make what is said in the report evidence at all; if experts are being cross-examined, as I have already indicated, cross-examining counsel may put to the witness whether he agrees with an expert conclusion. You ask him whether, in point of fact, that was a fair statement of what the report indicated. That makes it no evidence, Mr. Gross, of any fact.

Mr. GROSS: Sir, with respect, I had intended and hoped that it would make it perhaps relevant to the testimony of the witness that this report, if I understood you correctly, the *White House* report, which is what we are referring to, was the work of Professor Clark, is that . . .

Mr. VAN DEN HAAG: Largely so.

Mr. GROSS: Largely so. This conclusion I have quoted is a description by the signers of this brief as to the nature and character of the report. Now I was leading to another question, sir, with which I would like to connect up.

The PRESIDENT: Very well.

Mr. GROSS: The question I have just asked—with all respect, I think that the interposition of distinguished counsel was somewhat premature, because this is part of the line of questions in which I would like, with the Court's permission, to come to the second related part, and then ask the witness for his opinion.

The PRESIDENT: Whether he agrees with a scientific opinion?

Mr. GROSS: That is right, sir. Now then, the *amicus* brief then goes on to say, at page 171:

> "Conclusions similar to those reached by the mid-century *White House Conference Report* have been stated by other social scientists who have concerned themselves with this problem. The following are some examples of these conclusions."

There are three of them, and I should like, with the Court's permission, to read each one of the three and ask whether you agree or disagree with them. The first is the conclusion "that segregation imposes upon individuals a distorted sense of social reality". Do you agree with that or not, sir?

Mr. VAN DEN HAAG: No, sir.

Mr. GROSS: The second is "that segregation leads to a blockage in the communications and inter-action between the two groups. Such blockages tend to increase mutual suspicion, distrust and hostility." Do you agree with that, sir?

Mr. VAN DEN HAAG: No, sir.

Mr. GROSS: And thirdly, "segregation not only perpetuates rigid stereotypes and reinforces negative attitudes towards members of the other group, but also leads to the development of a social climate within which violent outbreaks of racial tensions are likely to occur". Do you agree with that, sir?

Mr. VAN DEN HAAG: No, sir. Let me add that I am aware that not

only is there no evidence for the contentions you have just mentioned, but whatever evidence appears in the body of the report that you have just mentioned, has been largely faked.

Mr. GROSS: Has been largely what, sir?

Mr. VAN DEN HAAG: Faked.

Mr. GROSS: Faked? F.A.K.E.D.?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: By whom, sir?

Mr. VAN DEN HAAG: By Professor Kenneth Clark.

Mr. GROSS: Are you finished, sir?

Mr. VAN DEN HAAG: Yes, sir.

Mr. GROSS: On page 162, *supra*, of the verbatim of 23 June, Mr. de Villiers asked you the following question: "Did you find anything inherently improbable in the description as contained in Book III **(II)** of the Counter-Memorial?" This referred to the different population groups in South West Africa. I should like to ask you, sir, have you read the Reply of the Applicants in these proceedings?

Mr. VAN DEN HAAG: I went through all the documents, but rather superficially, so I would not wish to vouch that I will remember any details.

Mr. GROSS: You testified, I think, sir, with respect to the question asked you with regard to Book III you did not find anything inherently improbable?

Mr. VAN DEN HAAG: Yes, I studied this at the instance of Mr. de Villiers somewhat more carefully, and came to the conclusion that you just quoted me as making.

Mr. GROSS: But you did not study the Applicants' pleadings with the same degree of care?

Mr. VAN DEN HAAG: I did not read all the volumes with equal care, that is true.

Mr. GROSS: Can you say, in the same sense in which the question was addressed to you, whether you find anything inherently improbable in the Applicants' pleadings?

Mr. VAN DEN HAAG: If you would be good enough to refresh my memory, I could answer that.

Mr. GROSS: Well, I just wanted to know whether you could answer it in the same terms that you did the Book III question.

Mr. VAN DEN HAAG: Three weeks ago my memory was fresher than it is now.

Mr. GROSS: I see, sir, so that when you answered the question that there was nothing inherently improbable in that book of the Respondent's pleadings, you did not have in mind what was in or might be in the Applicants' pleadings—is that correct?

Mr. DE VILLIERS: I am so sorry, that is not put in correctly. I put to the witness a particular description contained in Book III, I did not put a whole book to the witness. I am sorry that I have to interfere.

Mr. GROSS: Mr. President, I think the record will show . . .

The PRESIDENT: Mr. Gross, before you pursue this question, you had better refer to the record.

Mr. GROSS: Yes, I was just going to, sir. I thought I had read it, sir, but apologize for not having done so. *Quote, page 162, supra:*

> ". . . [do] you find anything inherently improbable in the description as contained in Book III of the Counter-Memorial?"

The PRESIDENT: What was the answer to that?

Mr. GROSS: The answer was: "I am aware, as any sociologist is . . ." —it is a rather long one, Mr. President, it is a paragraph in the middle of page 162, but the witness attempts to respond to that question put in that form, sir.

The PRESIDENT: Did he say in that that there was nothing in Book III which was inherently improbable?

Mr. GROSS: I took that to be the whole purport of his answer, sir, in that respect.

The PRESIDENT: But where in his answer?

Mr. GROSS: It is the middle of page 162, *supra*.

Mr. DE VILLIERS: Mr. President, perhaps I can help; it started at page 160, there was an interposition and discussion and it all related back to the question in the middle of page 161, *supra*.

> "Mr. van den Haag, particularly in our Book III of the Counter-Memorial, we gave detailed descriptions of the various population groups existing in South West Africa and I asked you whether you had read that."

That was the description referred to.

The PRESIDENT: Further in the page there, the question is also put by Mr. de Villiers to the witness as:

> "I merely asked you to indicate whether, in the light of your general knowledge of human relationships over the world, you find anything inherently improbable in those descriptions."

Mr. GROSS: Yes, sir, and my whole point solely, now, is to pursue the line no further, but I wish to say for clarification that my question was directed at precisely the same area which is covered by the Respondent's question. I asked the witness whether he had read the Reply covering the same points, and I was asking whether he had found anything inherently improbable in those sections.

The PRESIDENT: I think not, Mr. Gross, you have put a question to the witness at large in respect of Book III of the Counter-Memorial and the Applicants' Pleadings.

Mr. GROSS: All right, sir, I apologise, and I would like to continue.

The PRESIDENT: Please do.

Mr. GROSS: At page 164, you were asked (assuming this was *à propos* of Book VII of the Counter-Memorial and referred to the educational policy), and I will read the question:

> ". . . assuming the correctness of that proposition about the aims and the nature of the Bantu education system, would you, in the context of such an educational system, expect that the mere fact of separation of children into different schools must inevitably inflict psychological harm?"

And in the course of your reply, you said, *inter alia*, at the end of your response:

> ". . . an attempted homogenization would certainly be harmful to both, as well as unsuccessful".

Would you explain to the Court what the significance of the word "homogenization" is in this context?

Mr. VAN DEN HAAG: Yes, sir, I think it will refer to an educational policy which treats different groups, having different cultures or sub-

cultures, and, perhaps as a result of genetic differences, different attitudes and endowments, homogenization would treat these groups, educationally as though they were the same, and, for instance, instruct them in the same language although they have different native languages, instruct them in the same activities although they are likely to go through different activities, familiarize them with the same stock of ideas, although in their different cultures, different ideas prevail, and so on. The effect of that is that you are likely to alienate the groups from their own culture and establish, and badly, a sort of common homogenized culture instead, which I think does a damage educationally and psychologically.

Mr. GROSS: Would you describe the term "homogenization" or "homogenized" as scientific terms—terms as applied to anything other than milk?

Mr. VAN DEN HAAG: Well we speak of heterogeneous groups and homogenous groups, and of course if there is heterogenous and homogenous, then you can homogenize, you can transform one into the other, or try to.

Mr. GROSS: And a "homogenous group" would be, what, sir?

Mr. VAN DEN HAAG: A group of the same kind. It depends in what respect you want to speak of homogenous, you can speak of homogenous with respect to tallness, hair-colour or weight, or anything else.

Mr. GROSS: And in the sense you use the term "homogenized" in your response to Mr. de Villiers' question, what were you referring to: height or what other characteristic?

Mr. VAN DEN HAAG: I was referring to sub-cultures.

Mr. GROSS: To "sub-cultures"?

Mr. VAN DEN HAAG: Or cultures.

Mr. GROSS: Not races?

Mr. VAN DEN HAAG: These too if you wish, but races cannot be homogenized physically, in a school at least.

Mr. GROSS: So that what you were talking about was homogenization of cultures, is that right?

Mr. VAN DEN HAAG: That is right, sir.

Mr. GROSS: I would conclude, Mr. President, if I may, sir, with one or two questions. On page 174, *supra*, of the verbatim, you were asked: "What happens when there are attempts at assimilation of one group with another, . . ." and your answer on page 174, was as follows:

> "There are circumstances when this can be successfully accomplished, when it is carefully regulated, . . . the attempt to do so by coercion is not likely to be successful . . ."

May I ask you, sir, whether you would regard attempts to separate groups by coercion as likely to be successful in the sense which you have used the term?

Mr. VAN DEN HAAG: There are in some cases, I think indicated, when you have a case where there is one very highly developed culture, using this word vaguely, but I think we understand what it means, and another that is more primitive. What is likely to happen is that the highly developed culture exercises a great attraction on the group that has a primitive culture. They may be attracted to this culture and to participation in it, even though such participation or attempted participation in it may be their own undoing, particularly when the participation happens

as rapidly as their attraction to the developed culture may lead to. In this case, I think it is not only useful but, I could say, almost necessary for a governmental authority to either avoid or retard this process by measures, which in this case, will have to be compulsory. May I give an instance—American Indians, as you certainly will know, were very attracted to the culture of the colonists and particularly, among other things, attracted to alcoholic beverages, which ended up being in large part, as they themselves complained, their own undoing. In some places, though quite belatedly, Indians were therefore excluded from places where alcoholic beverages were purchasable and it was prohibited by law to sell them to them: as I said, it was too late. But here you have an instance where a somewhat more advanced culture both attracted the less advanced culture and resulted in the undoing of those who were so attracted and not prevented from indulging in this somewhat suicidal attraction by superior authority. Thus in some cases I should think that compulsion is not only justified but necessary to keep cultures apart.

Mr. GROSS: Now would that go so far as total separation of races?

Mr. VAN DEN HAAG: I think that if we had engaged in that with respect to Indians, the Indians would still be alive today, and would probably be happier than their remnants are.

Mr. GROSS: Have the Indians been absorbed into the economy of the United States?

Mr. VAN DEN HAAG: Well, if you consider killing an absorption, they have.

Mr. GROSS: Do you consider killing an absorption into the economy?

Mr. VAN DEN HAAG: No I do not.

Mr. GROSS: My question was, have the Indians been absorbed into the economy of the United States?

Mr. VAN DEN HAAG: They have largely died.

Mr. GROSS: Had they ever been absorbed into the economy?

Mr. VAN DEN HAAG: Yes, sir. Those that have remained have been absorbed.

Mr. GROSS: Those that have survived.

Mr. VAN DEN HAAG: Yes, sir. The process of attempted absorption led to a very reduced survival.

Mr. GROSS: That is right, sir, and I think it was deplorable—may we talk about the contemporary conditions? In a diversified modern economy, let us say hypothetically dependent for its existence or success upon labour of one group, can you as a sociologist envisage a successful governmental coercion which prevents assimilation, in the sense in which you used the term?

Mr. VAN DEN HAAG: I can, sir.

Mr. GROSS: Would you define then again what you mean by "assimilation" in that context? You refer to Indians drinking—that is not assimilation, I take it in the context here is it, sir? Please state it in your own way if you will.

Mr. VAN DEN HAAG: It was in the context of the Indian life at the time. With reference to your question, may I assume that I have it clear: you want me to state what I mean by assimilation, or . . .

Mr. GROSS: Whether your term "assimilation", taking that as the predicate of my question—whether you can visualize that governmental coercion against assimilation is likely to be successful?

Mr. VAN DEN HAAG: I would say that it could be successful. If the

work of the people involved in industry would be temporary rather than permanent, if their residences are with their own tribe or race rather than mixed in with others, and if provisions are made to make it possible or even necessary for them ultimately to transfer back to tribal areas, then I would say that what would happen, probably, is that they would acquire some of the elements of the culture that is foreign to them, but they would certainly not fully assimilate, or the assimilation would be greatly retarded.

Mr. GROSS: One final question if I may, Mr. President. Dr. van den Haag, in the conclusion of the 35 scientists who subscribed to the *amicus curiae* brief in the *Brown* case, the following sentence appears: "The problem with which we have here attempted to deal is admittedly on the frontiers of scientific knowledge." Would you agree, sir, with this characterization of the problem of race relations in modern society?

Mr. VAN DEN HAAG: I would think that their statements were at the *frontiers of scientific knowledge, meaning by this that they were not,* contrary to the impression they give, established by any sort of evidence.

Mr. GROSS: I am sure that you did not mean to evade my question, but do you agree with the statement that the problem of race relations is "admittedly on the frontiers of scientific knowledge"?

Mr. VAN DEN HAAG: I do not find your statement, Mr. Gross, sufficiently intelligible to either agree or disagree. There are specific aspects of that problem that have been well settled for a long time, there are others that have not been so settled; that is true for almost all problems I know of.

Mr. GROSS: So that you find this conclusion of these 35 scientists as unintelligible, sir?

Mr. VAN DEN HAAG: No, I find it a literary conclusion, to which I would not give much weight.

Mr. GROSS: Thank you, sir. That is all, Mr. President. Thank you, sir.

The PRESIDENT: Professor van den Haag will return at three o'clock this afternoon, to which time the Court will now adjourn.

* * *

The PRESIDENT: I understand, Mr. Gross, that you have completed your cross-examination?

Mr. GROSS: That is right, Mr. President.

The PRESIDENT: Certain Members of the Court desire to ask some questions of Professor van den Haag but before they do so, there are certain questions I would like to put to him in relation to his evidence this morning. You referred to a certain report, Professor van den Haag, as having been faked. So that I may understand precisely, to identify the document, is that the document which is shown as an annex in the Supreme Court case of *Brown* v. *The Board of Education*?

Mr. VAN DEN HAAG: Sir, the annex *amicus curiae* is based on . . .

The PRESIDENT: No, firstly is that the document?

Mr. VAN DEN HAAG: No, sir.

The PRESIDENT: Which document were you speaking about?

Mr. VAN DEN HAAG: The document on which it is based.

The PRESIDENT: What document is that?

Mr. VAN DEN HAAG: This is the report to the White House Conference on children and youths, which is referred to in the annex which you have just mentioned, Mr. President. At the recent—I am reading from *Prejudice and Your Child,* a book that I have put in the record . . .

The PRESIDENT: Just identify the document, that is all I want.

Mr. VAN DEN HAAG: At the recent mid-century White House Conference on children and youths, a fact-finding report on the effects of prejudice, discrimination and segregation on the personality and development of children was prepared as a basis for some of the deliberations. In footnote 2 it is made clear that this is the report called "Effects of prejudice, and discrimination on personality development—Fact-finding Report Mid-century White House Conference" by Kenneth B. Clark. When I spoke of "faked" I meant that document.

The PRESIDENT: I want to ask you a few questions about that. When you use the word "faked" do I understand you to mean that it was a doctored report so as to convey a false or misleading impression?

Mr. VAN DEN HAAG: Yes, sir.

The PRESIDENT: Of course that is a fairly serious charge to make against a confrère in the field of study in which you are engaged.

Mr. VAN DEN HAAG: Yes, sir.

The PRESIDENT: On what grounds do you express the view, stating them precisely, that it was a fake document?

Mr. VAN DEN HAAG: Professor Clark stated in the report mentioned, and in various other places which I mentioned in my examination before, that he had made observations by presenting dolls to Negro children in segregated schools and had found that these Negro children, although Negro children, think of themselves as identical with the White dolls.

The PRESIDENT: You have already dealt with this in your evidence before so there is no need to go on . . .

Mr. VAN DEN HAAG: And now, Professor Clark indicated that this shows the damages brought about by segregation, discrimination and prejudice, particularly by segregation. However, he withheld from the courts and did not, in the document which I have just quoted, call attention to the fact that in previous observations on Negro children in non-segregated schools he had found that more Negro children in these non-segregated schools identify with the White doll and thus indicate confusion of personality, damage and so on. Now it is very clear to my mind that what Professor Clark's observations seemed to show, if they show anything, is that desegregation or integration is damaging and segregation is, comparatively speaking, healthful. However, Professor Clark indicated the opposite conclusion and this was what I had in mind when I said "faked".

The PRESIDENT: The fact that he did not produce or reveal this previous observation, is sufficient to justify, you are saying, that his report was doctored for the purposes of giving a false impression. Is that correct?

Mr. VAN DEN HAAG: I thought and I previously used the expression "misleading" which is perhaps somewhat more correct, he did not only not produce it on this occasion or refer to it, but also in prior court testimony in the lower courts he did not refer to it and at one point, in one of the courts, he did refer to experiments undertaken with 300 children but gave, I must assume deliberately, the impression that these experiments with these 300 children, which can only be the ones I have just referred to, led to the same conclusion as the experiment with the 16 children, whereas in fact they led to quite the opposite conclusion. I indicated as much in my article in the *Villanova Law Review* which is also in the record of this Court.

The PRESIDENT: You did not then use the word "fake" did you?

Mr. VAN DEN HAAG: I used the word "misleading".

The PRESIDENT: The word "fake" does not convey merely misleading, it is preparing a document to convey a misleading impression and preparing a document to convey that impression deliberately . . .

Mr. VAN DEN HAAG: I would . . .

The PRESIDENT: No, first answer the question please. Is that what the word "fake" means?

Mr. VAN DEN HAAG: I think so. I have certainly . . .

The PRESIDENT: I understand then that it is the fact that he did not produce to the court or inform the court in the *Brown* case of this other experiment that you say justifies you in using the word "fake".

Mr. VAN DEN HAAG: Yes, sir. That is the way I used it in this occasion but I would like to refer to my conclusion in the *Villanova Law Review* article which is as follows . . .

The PRESIDENT: Before you do that I just want to finish my question, sir. The fact that he did not produce the results of his previous experiment you say is not capable of any other interpretation except that he had done it deliberately to mislead the court?

Mr. VAN DEN HAAG: If I gave that impression I wish to withdraw it and refer rather to the conclusion that I would like to offer.

The PRESIDENT: Well that is the impression that you intended to convey to the Court, is it not?

Mr. VAN DEN HAAG: No, sir. I had not as carefully thought about the meaning of the word "faked" in the sense of deliberate intent to deceive as you have now clarified it. I am not sure about the deliberateness of Professor Clark—I have no means of ascertaining whether he gave this misleading impression out of, shall we say, innocent incompetence or out of sophisticated malice.

The PRESIDENT: Then it was an unfortunate word to use.

Mr. VAN DEN HAAG: I am sorry and I will withdraw it. May I . . .

The PRESIDENT: Did you want to add something to your explanation?

Mr. VAN DEN HAAG: Yes, I wish to point out that I was not intentionally trying to convey this impression. In my article I wrote as follows, in conclusion:

> "From Professor Clark's experiments, his testimony and finally his essay, to which I am referring, the best conclusion that can be drawn is that he did not know what he was doing; and the worst that he did."

I am not sure whether the "worst" applies, in which case the word "fake" would be justified, or the "best", in which case the word "incompetent" would be better.

The PRESIDENT: You chose the word "fake" however. That is all I wanted to ask you.

Mr. GROSS: May I be permitted to address a question *à propos* of the exchange?

The PRESIDENT: Well I think not, Mr. Gross, unless you think it is important to your case. We have concluded your cross-examination but the Court will give you permission to do so.

Mr. GROSS: This will be very brief. I should like to refer to the testimony of the witness, page 157, *supra*, of the verbatim record of 23 June, in which the witness, and I quote . . .

The PRESIDENT: What transcript is it and what . . .

Mr. GROSS: 23 June, Mr. President, page 157.

The PRESIDENT: Yes.

Mr. GROSS: The witness said: "As a matter of fact, in prior experiments which he"—referring to Professor Clark—"forgot to mention to the courts." May I address one question to the witness as to the significance of that comment, as bearing on possible bias as an expert, sir? Upon what information do you base your statement, Dr. van den Haag, that Professor Clark's memory failed him in this respect?

Mr. VAN DEN HAAG: The word "forgot" was meant ironically. I was not sure whether Professor Clark actually forgot his own experiment or whether he deliberately failed to inform the court of it, as I have just indicated to the honourable President. I can only repeat I prefer to assume the best hypothesis, namely that he forgot.

Mr. GROSS: Thank you, Mr. President.

The PRESIDENT: Certain Members of the Court desire to ask the witness certain questions. I call upon Judge Koretsky.

Judge KORETSKY: Professor van den Haag, my questions are due to the fact that this is, as far as I know, the first occasion on which questions of social philosophy and sociology have been raised in this Court. Unfortunately I did not have the advantage of being acquainted with all your theoretical books. I did not find them in our library, except one booklet written in the polemic with Professor Clark where you make many references to differences with him, and the book that you produced with Professor Ralph Ross—*Passion and Social Constraint*. At the same time I see that you have led, or tried to lead, the Court through the jungle of literary opinions. But did you carry out your researches on the basis of your own factual observations, of your own data which you obtained from the great mass of facts and under a special programme, as modern sociologists do with recourse even to the help of computers? I had an opportunity during my small illness, to look through your, may I say frankly, rather paradoxical book . . .

The PRESIDENT: Will you put the question, Judge Koretsky?

Judge KORETSKY: With respect, Mr. President, will you permit me this short introduction? Many of the conclusions made by our expert do not refer to the many facts and I do not understand how he comes to his conclusions even in his books. I find on page 187 references to suicide and so on, pages 210, 222 and so on, but I ask him, do you consider it is sufficient to refer merely to individual observations made by certain research workers? Did you consider it necessary to verify the facts upon which you, or the authorities which you have referred to, have based your or their statements?

Mr. VAN DEN HAAG: Your honour, sociology, as in all the social sciences, involves both theory and empirical research. I am not myself an empirical researcher. I am a theorist. The task of the theorist consists of interpreting, in the light of theories, the data collected by empirical observers to find out whether they support one hypothesis or the other, one theory or the other. This is my task.

As for the verification of individual researches, I have no opportunity of doing these. All researches in this field are undertaken by individuals. Computers, unfortunately, merely reflect the data that are put into them and the reliability of these data, of course, depends on the reliability of the individuals involved. Now, let me point out that generally in the sciences reliance is put on the observations of others, if this were not so

we would each have to start from the beginning. In the physical sciences it is sometimes possible, of course, to repeat an experiment and when we have experiments in the social sciences we, too, can repeat them or can ask ourselves whether appropriate conditions for controlling and so on are present. But may I point out that even though I felt, and stated, that Professor Clark's conclusions and the evidence presented before the Court were highly misleading, I at no time doubted his actual data, that is, the statistics that he gave I have accepted and I would accept the statistics that any scientist of good standing gives, unless I have special reasons to believe that he was wrong or incompetent.

When I spoke wrongly of fake and, more correctly of misleading, I referred to Professor Clark's unwillingness to present his data or his unwillingness to interpret them in the light of reasonable scientific criteria. I at no time doubted his data or, for that matter, anyone else's data.

Judge KORETSKY: You considered many facts at the same time. You have made reference to some facts in Brazil, and so on. You made this statement in Court. Did you yourself try to inquire whether these facts were there or not?

Mr. VAN DEN HAAG: *Ars longa, vita brevis.* If I were to go Brazil to attempt to verify the researches made there, and then to go to Hawaii and so on, I would not be able to do many of the things I want to do. When an article appears in a professional journal, such as the two articles on Brazil that I quoted, which appeared in the two leading American professional journals, and I know of no research throwing doubts on the result of these articles, I will, as everyone else, accept them.

Judge KORETSKY: Yes, I understand that you cannot go to the barber's shop to see if it is correct that the owner refused to serve one Negro as referred to in your statement. But you had other facts to check. Did you present here the statements of many writers and scientists and scholars? Did you give an exhaustive picture of the trend, of the literature even in the United States on social subjects?

Mr. VAN DEN HAAG: No, sir, I did not. In the first place, I have only one subject to deal with and, in the second place, I cited only those views that I felt I can endorse, aware in fact, not of contrary data, but of different conclusions and views, but since I do not endorse them I saw no reason to cite them. I am certainly aware that not everyone would agree with all of my conclusions.

In direct examination I think I was asked which of my conclusions I thought would meet a consensus of my colleagues and which would not and I tried, to the best of my knowledge, to answer these questions.

Judge KORETSKY: Yes, but at the same time you continued the polemic with your colleague Professor Clark. This may be a one-sided statement. In your book *Passion and Social Constraint,* page 102, you wrote:

> "Scientists too form groups and then sometimes wilfully delight in distinctive terminologies. There is competition and even 'imperialism' among the learned specialists."

I understand that there is a difference of mind, and for me as a Judge it is very interesting to know the position of others. But what is interesting for me now is did you come across, in the scientific literature, a tendentious selection of facts or even slanderous statements which you have repeated here in your statement? How do you sort out the pure grain of facts from the noxious weeds?

Mr. VAN DEN HAAG: I wish, your honour, that there were a general formula, but there is not. It is entirely true, as you have just suggested, that scientists are fallible and certainly I am fallible. I can only do what I have tried to do—to give you my view, I hope instructed by what scientific competence I can claim, to the best of my knowledge. I certainly am capable of making mistakes, so are all of my colleagues. If you look at the history of science you will find that between 50 and 100 years ago almost every social scientist in America was willing to prove to you that Negroes can be shown to be biologically inferior. This is a view that, as I indicated, I do not hold and for which I think there was never any evidence. Nonetheless, it was, 50 years ago, the consensus of American scientists. It is now the consensus of American scientists that it can be shown that Negroes are exactly the same as Whites in all psychological respects. My own view is, and has been, that neither of these two contentions has been shown so far and that science is subject to fashions, which can be quite misleading.

I am afraid I have no general formula to tell you when to recognize truth and when not. You have to go into the particular case, judge the competence of the observations and interpretations according to general criteria of scientific methodology, which is what I have tried to do.

Judge KORETSKY: It is very difficult to have a polemic in this stage of our Court. Is it not known that in their laws, constitutions, decrees and practice of courts, different governments combat prejudices, particularly racial prejudices, with different degrees of insistence? Did you know that some governments regard them with indifference or even sometimes pursue a policy based on prejudices? You mentioned some countries in passing. How do these different policies influence the spread or the attenuation or slackening of prejudices?

Mr. VAN DEN HAAG: That is a very difficult question.

Judge KORETSKY: I understand that you have read the constitutions, laws and decrees directed against racial prejudices of the countries you mentioned here in Court.

Mr. VAN DEN HAAG: I am not altogether sure what laws and decrees you have in mind.

Judge KORETSKY: If you mention Brazil, perhaps. You know the Constitution?

Mr. VAN DEN HAAG: No, sir, I have not read the Constitution of Brazil.

Judge KORETSKY: You do not know the Constitution of Brazil?

Mr. VAN DEN HAAG: No, sir. May I point out that when I referred to Brazil I did not refer to any laws at all. I referred to the factual behaviour of people in Brazil, not to the behaviour that is prescribed by law, but the behaviour that actually takes place in Brazil.

Judge KORETSKY: But did you differentiate between the practice of States and acts of certain individuals? I mentioned the barber shop owner in Brazil, or certain groups within a given State or States. I am more interested in the attitude of the government itself.

Mr. VAN DEN HAAG: Well, it depends on what you are interested in. At the moment when I discussed Brazil, I tried to point out that Brazil is often regarded as one of the few countries where there is no racial prejudice, not because of laws but perhaps because of history and other factors. I pointed out that this impression is not confirmed by the data collected by the two scientists that I quoted. I did not indicate that this practice was approved by the Brazilian Government, or corresponded

to its laws or was contrary to its laws. I did not undertake any research in that direction.

Judge KORETSKY: But I return to my first question: how do the different policies of the governments influence the spread or the attenuation or slackening of prejudices?

Mr. VAN DEN HAAG: Well, that really depends on the situation. In the case of Germany, there you had a Government quite malevolently leading the German people and trying to exacerbate the perhaps pre-existing slight prejudice; that Government, under special conditions, succeeded fairly well even though, we are told, the major injury to and slaughter of the Jewish people was undertaken in such a way that most of the Germans were unaware of just what the German Government was doing.

Now, in other cases, in the United States, for instance, in the north we have had numerous laws, of which the Civil Rights Act that Mr. Gross cited is only the last. In the state of New York, in which I live, for instance, for more than 20 years there have been all kinds of laws on the books to prevent discrimination in employment, to prevent discrimination in housing, to compel landlords to sell or rent their houses regardless of race, religion and other factors. It is more or less the consensus of all concerned that this has not so far improved the situation of the minorities that were meant to be protected by these laws to any significant degree.

Such a conclusion, of course, is somewhat speculative. Perhaps without these laws the minority would be even worse off. What we can say is that it is not much better off than it was before these laws. This is the view of the leaders of the Negro community. So that I would say the effect of laws meant to protect minorities in integrated or non-segregated conditions is very hard to judge and possibly it leads to more formal than substantial fulfilment of the demands of the minorities.

Judge KORETSKY: Did you study yourself this question more profoundly?

Mr. VAN DEN HAAG: Did I study this question more profoundly?

Judge KORETSKY: Yes.

Mr. VAN DEN HAAG: Well, I would hate to say that I am more profound than others—I have certainly paid a great deal of attention to it, and my own conclusion is that in certain situations when the prejudice that you mention is largely based on ignorance, then appropriate legal and educational provisions can be of considerable help. On the other hand, if the prejudice is not based altogether on ignorance but on deeper-rooted emotional dispositions of the prejudiced persons, then I feel that laws or cognitive means of any kind are fairly useless.

Judge KORETSKY: Useless?

Mr. VAN DEN HAAG: Useless.

Judge KORETSKY: Useless! You mentioned just now about a minority —may I put to you this question: you have in your statement confirmed that you were occupied with a subject called "minority problems", and you have also taught on this subject in your courses, and you explained what you have in mind on the straight question of Mr. de Villiers—that was in the verbatim at page 135, *supra*. He asked you: "What does that subject comprise?"—the minority problems—and you answered: "In effect, although conceptually, it of course applies to all minorities, that is to all groups other than the dominant one in any given society"; I

understand that you know that there are some societies where the minorities are not under the domination of the majority?

Mr. VAN DEN HAAG: Yes.

Judge KORETSKY: I understand your statement to apply to a situation where the minority is under the dominance of another group, which is a majority one. I should be interested to know whether you have carried out research into a situation where the dominant ethnic group is quantitatively a minority group, and not a majority group—what socio-political consequences might one expect in such a case?

Mr. VAN DEN HAAG: I must say that I have not carried out this research; it is a question that I have posed to myself and that has always intrigued me—the situation that you mention, your honour, occurs in Abyssinia (or Ethiopia)—it occurs in a number of other countries in which a numerical minority sets the tone of the culture, and in some cases even monopolizes political life, and it would be indeed very interesting to find out what the situation is—my own researches on this matter have not gone far enough to give any answer.

Judge KORETSKY: Thank you, Mr. President. I thank you for your patience.

The PRESIDENT: Judge Forster.

Judge FORSTER: Monsieur van den Haag, j'ai moi aussi, dans votre déposition figurant au procès-verbal du 22 juin (*Supra*, p. 149), relevé la précision suivante touchant les termes de *discrimination* et de *ségrégation*, je cite:

> "Je crois qu'une distinction s'impose entre ségrégation et discrimination, bien que, d'après le dictionnaire, ces deux termes aient à peu près le même sens; je préfère employer le mot de ségrégation au sens de 'séparation', laquelle bien entendu n'implique nullement des mesures d'oppression ou n'est nullement liée nécessairement à des mesures d'oppression; elle peut jouer le même rôle qu'un couteau, qui peut être utilisé soit pour couper de la viande soit pour assassiner. Il n'est pas de la nature du couteau d'être utilisé à des fins illégitimes et il n'est pas, je crois, de la nature de la ségrégation d'aboutir à discriminer, nous voulons dire, comme je propose de le faire, désavantager une personne ou un groupe d'une manière qui n'est pas justifiée par les éléments pertinents qui caractérisent la situation dans laquelle se trouve la personne ou le groupe.
>
> Je m'explique. Dans mon enseignement, je classe les élèves selon les résultats obtenus. C'est une forme de distinction et on peut l'appeler discrimination. Ceux qui ont de bonnes notes ont certains avantages et ceux qui en ont de mauvaises subissent certains inconvénients. Mais ceci sera considéré comme légitime parce que j'ai appliqué en l'espèce, et j'espère toujours le faire, un critère pertinent. Si je devais noter non pas d'après les résultats scolaires mais, disons, d'après le sexe, la religion, le charme, la taille, ou tout autre critère sans pertinence, je crois que l'on pourrait parler de discrimination."

Monsieur van den Haag, compte tenu de cette terminologie, je voudrais vous poser deux questions seulement.

Première question: pouvez-vous me dire si, en tant qu'expert en sociologie, vous estimez que la discrimination raciale (celle qui comporte désavantage), érigée en doctrine, légalement instituée par tel gouvernement et systématiquement appliquée par lui depuis des décades à une

population africaine, est de nature à accroître le bien-être matériel et moral, ainsi que le progrès social de ladite population?

Mr. VAN DEN HAAG: Would you like me to answer this first question first? I understand that you are asking whether material discrimination deliberately imposed by a government against a racial group would interfere with the welfare of that racial group—do I have your question correctly, sir? The answer is yes, if it is discrimination in the sense in which I have defined this term, and which you were good enough to quote—then, indeed, such discrimination, whether imposed by the government or any other authority, would interfere with and impair the welfare of the group discriminated against. However, if it is merely segregation, then I would not think, whether it is imposed by the government or by another authority, that it necessarily interferes with the welfare of either or both of the segregated groups, but on the contrary it could be of help and increase the welfare of the groups involved.

Judge FORSTER: Je vous remercie, mais je faisais état de la discrimination en opposition à la ségrégation tel que cela est défini dans le passage que j'ai lu de votre déposition.

Et maintenant, voici ma deuxième question: sous quelle rubrique (discrimination ou ségrégation) classez-vous par exemple le fait, dans tel territoire, de fixer les droits et devoirs des habitants d'après la race, la couleur, l'origine nationale ou tribale de l'habitant (ceci est ma première question de ma seconde question)?

Mr. VAN DEN HAAG: Yes, sir. I would call this discrimination if it imposes unilaterally a disadvantage on one of the groups. If its purpose, however, is merely to separate the two groups by race or any other criterion without imposing disadvantages on one group that are not imposed on the other, then I would call it segregation and would not regard it as necessarily disadvantageous.

Judge FORSTER: Je vous remercie. Sous quelle rubrique (discrimination ou ségrégation) classez-vous par exemple l'interdiction faite à l'indigène, *en raison de sa race, de pratiquer certaines professions telles que*: prospecteur en minéraux précieux, négociant en métaux précieux non travaillés, administrateur, administrateur adjoint, administrateur de section ou de sous-sol, chef de brigade, surveillant des chaudières et machines dans les mines appartenant à des personnes d'ascendance "européenne"?

Mr. VAN DEN HAAG: This would entirely depend—if people, because of their race, are prevented from holding the jobs you have just listed, and are not offered elsewhere similar opportunities to hold jobs of similar status, so that the whole purpose is to deprive them of a higher status they may otherwise have achieved, then I would call it discrimination. If, on the other hand, these people, because of their race, are prevented from holding the jobs you listed in a given place under given circumstances, but are permitted elsewhere to hold jobs of a similar kind, whether they be exactly the same jobs or not—jobs, however, that would give a similar social status—if they are so permitted elsewhere, then I think this would be part of segregation and not of discrimination. Now I may, if you will be good enough to allow me, add that such a measure may always have some disadvantages for some individuals who would have liked to practise law in a given place where they are not allowed to, or to be inspector of mines in a given place where they are not allowed to, but such individual disadvantages I would not call discrimination unless

the whole group is placed at a disadvantage in the manner I have just indicated. The reason why I think so is that I cannot think of any social measure meant and perhaps effective in enhancing the welfare of one or two groups which would not, at times, place some individuals at some disadvantage.

The PRESIDENT: Any other questions, Judge Forster?

Judge FORSTER: Je vous remercie. Enfin, sous quelle rubrique (discrimination ou ségrégation) classez-vous par exemple les restrictions au droit d'habiter dans une zone urbaine, restrictions dictées par des considérations de race ou de couleur?

Mr. VAN DEN HAAG: My answer is analogous to the one I just gave. If this means that people are deprived of advantageous locations without being offered other locations equally advantageous or similar in advantages, then I would call it discrimination because they would be deprived irrelevantly of opportunities to which, in my opinion, they are entitled. If, on the other hand, they are prevented from locating themselves in one place but allowed and able to locate themselves in another place about equally advantageous, then I would say this falls within the rubric of segregation.

Judge FORSTER: Je vous remercie. Et pour terminer, sous quelle rubrique (discrimination ou ségrégation) classez-vous par exemple le fait de refuser à l'indigène en raison de sa race ou de sa couleur, l'égalité de chances avec le Blanc quant aux possibilités d'atteindre tel but dans la vie?

Mr. VAN DEN HAAG: I must apologize—I did not understand the last phrase—would you be good enough to repeat it?

Judge FORSTER: Je m'excuse d'avoir une mauvaise diction. Voici ce que je voulais dire: sous quelle rubrique (discrimination ou ségrégation) classez-vous par exemple le fait de refuser à l'indigène en raison de sa race ou de sa couleur, l'égalité de chances avec le Blanc quant aux possibilités d'atteindre tel but dans la vie?

Mr. VAN DEN HAAG: I do not understand "tel but"—such an aim in life, I would translate it, but I have not understood what aim.

The PRESIDENT: Particular goal in life.

Mr. VAN DEN HAAG: Yes, that is what I understood, but it is not entirely . . .

The PRESIDENT: What particular goal in life is it, Judge Forster, that you have in mind?

Judge FORSTER: Sous une autre formule: j'ai étudié pour devenir ingénieur un jour; j'arrive dans un tel pays et vous me dites: "Vous avez toutes les capacités pour être ingénieur, mais vous ne pourrez pas exercer ici", alors qu'un autre, Blanc, qui est dans les mêmes conditions que moi et fait les mêmes études, a passé les mêmes examens pourrait s'installer et exercer la profession d'ingénieur.

Mr. VAN DEN HAAG: Thank you. I have now understood. My answer is that if the engineer is prevented because of his race from practising his profession in one place and not allowed to practise it in any other place, I would regard this as discrimination. If the engineer is prevented from practising his profession because of his race in one place and a White engineer would be permitted to practise his profession in any place, then too I would regard this as discrimination. If, however, the engineer because of his race is prevented from practising his profession in a given place, and a White engineer is also prevented from practising his pro-

fession in a given other place, then I would regard this as merely incident to segregation and not to discrimination.

Judge FORSTER: Et si dans la zone où vous permettez à cet indigène d'exercer la fonction d'ingénieur, il n'y a pas de travaux d'ingénieur?

Mr. VAN DEN HAAG: I am not able to handle . . .

Judge FORSTER: Je m'excuse, je manie une langue qui n'est pas ma langue maternelle. Vous m'avez répondu. Sur la base de votre réponse je vous dis ceci: si l'Etat permet à cet ingénieur indigène d'exercer sa profession d'ingénieur dans une zone ou dans une réserve où il n'existe point de travaux d'ingénieur, est-ce que cela sera de la discrimination ou simplement de la ségrégation. Autrement dit, vous donnez une autorisation à quelqu'un d'exercer un métier qui n'a point son emploi dans telle zone. Est-ce que cela est de la discrimination ou de la ségrégation?

Mr. VAN DEN HAAG: I may point out that the linguistic difficulty was mine and not yours. I should certainly say that if he is permitted to carry out his profession in an area where there are no material possibilities to carry out his profession then in effect he is not permitted to carry it out, and I would then call it discrimination and not segregation. However, I would say that if there is a reasonable chance that he can carry out his profession, although perhaps not immediately, but if arrangements are being made along those lines, I would have to mitigate my statement accordingly.

The PRESIDENT: Any other questions, Judge Forster? Does any other Member of the Court desire to ask a question? Mr. de Villiers, you desire to re-examine? I beg your pardon, Sir Louis.

Judge Sir Louis MBANEFO: One leading off from the questions you have just been asked. Let us take South West Africa, that is a territory which has, one might put it, whether a mandated territory or not, a government that runs its affairs, and in a democratic society, there is tremendous power in a government and power is captured through the ballot-box. If you are denied the right to vote in a society in which your interest is involved, would you consider that by itself a discriminatory act?

Mr. VAN DEN HAAG: There are two points which I wish to mention —perhaps just one. The word "democracy" is subject to many interpretations; I like to define it to mean a governmental system where at least a substantial group of the citizens are able to elect and oust their government by legitimate means. However, if I come to define that substantial group, I have never been able to find a clear-cut formula and I would like to indicate why that is the case. I am not sure whether this must include people between the ages of 18 and 21 or over 21.

Judge Sir Louis MBANEFO: I am sorry to interrupt you. Perhaps you would put it simply—having a voice and determining your own affairs as a people.

The PRESIDENT: I think the witness has started to respond—he spoke about a democracy. I think the witness is entitled to explain in what sense he understands the term. Will you continue.

Mr. VAN DEN HAAG: I am trying to answer the question as I understand it. There are other countries, such as Switzerland, which are generally referred to as democracies and where women, who are at least half the population, are not allowed to vote and I am aware of this being interpreted to mean that Switzerland is not a democracy. The very term "de-

mocracy" was invented in Athens at a time when the vote was limited to males who were free, that is, not slaves.

The PRESIDENT: Bring us up-to-date, witness.

Mr. VAN DEN HAAG: I conclude from this that what is essential to democracy is certainly that there be freedom of speech and of political activity, but that one may speak of a more or less extended democracy in that we may distinguish various countries according to the degree to which democracy has been extended. Now if your contention is that in some parts of Africa the vote is not given to some of the citizens, I should certainly say that democracy has not been extended to these citizens. However, I would also compare such a country with other countries in which the vote is given to every citizen but no opportunity is given to them to vote for an opposition ticket. This seems to me considerably worse, in respect to the freedom of the inhabitants.

Judge Sir Louis MBANEFO: That does not answer my question. My question is do you consider a denial of right to vote, the right for instance either to have a voice or to control whoever has a voice in determining your affairs, a denial of that right on the grounds of colour—do you regard that as by itself discriminatory?

Mr. VAN DEN HAAG: No, sir, I do not.

The PRESIDENT: The real question was "why you do not".

Mr. VAN DEN HAAG: I am sorry. For the reasons I tried to indicate before, namely that I find that in many States, for a variety of reasons other than placing people at a disadvantage, some of the citizens are not allowed to vote. I am convinced that the Swiss Government has no particular intention of placing women at a disadvantage in denying them the right to vote and I am not sure whether the circumstances to which you allude might or might not be similar to those. I could imagine, of course, their deprivation of the right to vote is used, as you suggest, for purposes of discrimination and I would not assent to any statement that indicates that it must always be so used because we have numerous instances to the contrary.

Judge Sir Louis MBANEFO: My comment to the questions you have been asked by Judge Forster—you talk about if a person was allowed to practise in one place and not in another place—who allows him?

Mr. VAN DEN HAAG: I think it must be the government.

Judge Sir Louis MBANEFO: And if he has no voice in that government?

Mr. VAN DEN HAAG: That would still be the same as, I am sorry to have to refer to it once more, laws about marriage, child-bearing or special occupations undertaken by the Swiss Government about women, even though women have no right to vote for or against it. I still would not regard that as discrimination.

Judge Sir Louis MBANEFO: Now at page 148, *supra*, of your evidence on 22 June, you said—"Perhaps, the most important, or at least the most numerous, of such groups was the Universal Association for Negro Improvement formed by Marcus Garvy and which flourished very much in the 1920s, etc." Do you accept that the reason behind the movement to return to Africa was to escape from racial discrimination practised in the United States which the Negroes regarded as oppressive?

Mr. VAN DEN HAAG: I do not think so. It was not quite that simple. As you certainly are aware, Marcus Garvy himself felt that regardless of circumstances even where they are not in the least disturbed Negroes would be better off having their own country. He went so far, towards

the end of his life, as to support the Ku Klux Klan, insisting that the Ku Klux Klan's principle of separation was correct even though he did not agree with all the means. So my view of the ideas of Marcus Garvy is that he thought that separation was desirable in principle regardless of the circumstances in the United States. As you certainly know, he was himself born in the West Indies and I think for him that was a political matter rather than a matter of escaping from oppression, although I would certainly say that at that time in particular there was plenty of oppression in the United States.

Judge Sir Louis MBANEFO: What political motivation would you say was behind the movement?

Mr. VAN DEN HAAG: I think it was a feeling of national or racial identity. I think it was that Negroes did wish to have, or thought they wished to have, a separate national entity of their own. If I may suggest this, I think many Jews went to Israel largely because of being oppressed and mistreated in other countries but, I think, a number of Jews went to Israel from countries in which they were not in the least oppressed, merely because they preferred to live and share a national community with people with whom they felt ethnically identified, and I think this may have been a motivation of many Negroes too.

Judge Sir Louis MBANEFO: I do not want to go into argument, but would you tell me from which book on the Universal Association for Negro Improvement, where you got the material you have just given the Court?

Mr. VAN DEN HAAG: Yes, I can, in fact it is in the record. I offered it . . . I thought I had it here in duplicate, but I cannot find it. The book is in the record. I offered it in the record the last time I was here and I think we will easily find the title.

The PRESIDENT: Perhaps it can be identified by Mr. de Villiers later on.

Mr. VAN DEN HAAG: I think it will be very easy. I have another copy of the book with me, but for some reason I do not have it on my table here.

The PRESIDENT: Does any other Member of the Court desire to ask a question? If not, Mr. de Villiers, do you desire to re-examine?

Mr. DE VILLIERS: I have no re-examination, Mr. President. I would like to express our appreciation to the Court for the special session this afternoon at some inconvenience to itself, so as to be able to continue the examination of this witness. May the witness be excused, Mr. President?

The PRESIDENT: If no Member of the Court desires him, he can be excused. I assume that there is no objection, Mr. Gross?

Mr. GROSS: No, Mr. President.

The PRESIDENT: Very well, you may stand down, Professor. Professor Logan will now be called to the stand. Is Professor Logan here?

Mr. DE VILLIERS: No, Mr. President, we have not got Professor Logan here. We understood the arrangement this afternoon to be that we would only finish Professor van den Haag's evidence. Professor Logan will be available tomorrow morning.

The PRESIDENT: There must have been some misunderstanding then, Mr. de Villiers, because it was assumed that we would dispose completely of both witnesses during the course of today.

Mr. DE VILLIERS: I am sorry, Mr. President.

The PRESIDENT: If he is not here, there is nothing we can do about it.

Mr. DE VILLIERS: I am sorry, that was not conveyed to us, as far as I know.

The PRESIDENT: Then could you indicate to the Court, Mr. de Villiers, that apart from Professor Logan, of whom certain Members of the Court desire to ask questions you have another witness.

Mr. DE VILLIERS: Yes, Mr. President.

The PRESIDENT: Will he be a short or a long witness?

Mr. DE VILLIERS: I have Mr. Cillie, whose evidence-in-chief should take less than the rest of tomorrow morning's session, which would leave a full day on Wednesday, for cross-examination and questioning by the Court.

The PRESIDENT: Mr. Gross, the Court does not seek to tie you at all in any way, but do you think that if the examination of the witness to be called concludes tomorrow, that you can deal with the witness in cross-examination Wednesday morning. You do not know, of course, what he is going to say.

Mr. GROSS: On Wednesday, sir?

The PRESIDENT: Yes.

Mr. GROSS: If he does not take all morning to answer one question, sir.

The PRESIDENT: It depends on how long the question is.

Mr. GROSS: I will undertake to conclude without fail, sir.

[Public hearing of 13 July 1965]

The PRESIDENT: The hearing is resumed. Professor Logan will you come to the podium? Mr. Muller?

Mr. MULLER: Mr. President, before the witness proceeds may I mention that he was asked on Friday to obtain, if possible, certain information for the Court. He has such information available if the Court will permit him to furnish it now.

The PRESIDENT: It related to the number of the non-Whites in the southern sector, excluding the Reserves. Is that correct?

Mr. MULLER: Yes, Mr. President, the Natives on the farms in the southern sector.

The PRESIDENT: Well, perhaps, Mr. Gross, it would be convenient for the witness to state it now.

Mr. GROSS: May I proceed with cross-examination, sir?

The PRESIDENT: There are certain facts which were requested by me in the course of the cross-examination of Professor Logan. Perhaps he should give them now before you finish your cross-examination. Professor Logan, would you just give the details of those figures?

Prof. LOGAN: Yes, Mr. President. The total population of South West Africa according to the 1960 Census was 526,004. This is taken from the Odendaal Commission report, page 37, table XVI. The population domiciled in the northern sector, outside of the Police Zone, was 286,485, constituting 54.5 per cent. of the population. This figure is obtained from the Odendaal Commission report, page 39, table XVIII. The population domiciled in the southern sector, within the Police Zone, totals 239,519, or 45.5 per cent. of the total population of the Territory.

Taking only the southern sector, the composition of the population domiciled there is as follows: European 73,464; Non-European 166,055;

totalling to the 239,519. Now, of the non-European portion of that, that is of the composition of non-Europeans domiciled in the southern sector, and this information is taken from the Odendaal Commission report, page 41, table XIX, on the Reserves, or home areas, 38,648; outside of the Reserves in the urban areas, 59,073, and outside the Reserves in the rural areas, 68,334.

Of this latter group 4,020 are Coloured persons and Rehoboth Basters and the Native group consists of 64,314.

This figure of 64,314, representing the Native persons domiciled on the farms outside the Reserves in the Police Zone, includes men, women and children. In lieu of absolute figures for this, it is estimated that 25 per cent. of this figure would be adult males. The position would then be as follows: adult male Natives—16,078, women and children—48,234. These figures do not include either northern or extra-territorial Natives contracted from outside the Police Zone under temporary contracts. If information is desired on this, it is in the Counter-Memorial, Book V, **II,** at page 74, but this was outside the framework of the question asked.

The total Natives working on European farms in 1960, that is, including the contract Natives recruited from outside the Police Zone, was 25,087. This is taken from the Counter-Memorial, Book V, **II,** page 74.

Mr. President, I trust this will cover the information desired.

The PRESIDENT: Thank you. Mr. Gross, will you continue your cross-examination?

Mr. GROSS: Thank you, Mr. President. I should like to address one or two questions to you with respect to the statement just made. You referred to temporary contracts. You testified, I believe, did you not, that you did not have information concerning the average length of time which these labourers from outside the sector spend in the southern sector?

Prof. LOGAN: That is correct. I do not have specific information.

Mr. GROSS: Do you have information concerning the average number of contracts which are made with any class, any group, of the Natives who come to the sector for work?

Prof. LOGAN: No, I do not.

Mr. GROSS: You do not know, therefore, whether any of these individuals, or how many of them, spend a substantial portion of their working lives in the sector?

Prof. LOGAN: As I said the other day, there are a large number of them who renew their contracts after their period of return to Ovamboland and come back, but as to percentages or total figures, I do not have the information.

Mr. GROSS: Do you know, sir, what definition or significance the word "domiciled" has in this connection?

Prof. LOGAN: Yes, in working this up yesterday, I proposed putting the term "domiciled" in. It was not in the original statement as we worked it up. It is a reference to whether or not their permanent place of residence is within one zone or the other: the place where the family is located, where the place of recognized residence is. This works in both directions because there are the few White administrators in the north who we also eliminated from this picture.

Mr. GROSS: Could it be, sir, that you have excluded from the category, of those you term "domiciled", individuals from the north who perhaps spend a good part of their working lives in the sector?

Prof. LOGAN: I don't think so, no. I don't think so because the detribalized Ovambos would be included in here.

Mr. GROSS: But you don't know how many of the Natives from outside do spend a substantial portion of their working lives in the sector?

Prof. LOGAN: No, I said that I did not have that information.

Mr. GROSS: I see. Then I will continue with other questions, Professor Logan.

The reference I shall make, Mr. President, is to the verbatim record of 9 July, and I should like to call your attention, sir, to page 400, *supra*, of that verbatim record, in which you stated as follows, in response to a question I had addressed to you: I asked you whether we were talking about the southern sector outside the Reserves and you replied as follows:

> "I am sorry. But you see each of the individuals that is within the southern sector is still affiliated with a Reserve or homeland that is not within the White area of the southern sector and the thing cannot be dissected . . ."

I should like to ask you if you would, please, explain to the Court what meaning you wish the Court to attribute to the word "affiliated" in that reply?

Prof. LOGAN: That there is a feeling on the part of the individual, and an acceptance by the group involved, that this individual is a part and parcel of that particular group, that particular group being a group basically domiciled, resident upon a Reserve.

Mr. GROSS: Is there any standard or objective criterion which you would apply to determine whether a specific individual is "affiliated" in this sense of the term?

Prof. LOGAN: I would not know how to determine such a thing precisely, no. The individual feels in his own mind, the community accepts him outwardly, openly, and therefore he is a member of that community. I don't know any way of measuring it other than to ask him and also to ask his community, which means his Headman of his local area, as to whether or not he is a member of that community. The communities are strong bodies within themselves and they have a strong social organization and an outsider is distinctly an outsider, or one of the in-group is distinctly one of the in-group, and I think there is very little marginal room here.

Mr. GROSS: Are you talking, sir, about the groups within the southern sector outside the Reserves—the communities that is?

Prof. LOGAN: Yes, I am.

Mr. GROSS: Now, I just want to remind you once more. Your statement was that each of the individuals, that is within the southern sector, is still affiliated with a Reserve or homeland and I would like to ask you whether, in your use of the term "affiliated" in that testimony, an individual who was born and lived all his life in the urban area of Windhoek, let us say, and works there and has never been in a Reserve or homeland physically, is still "affiliated" with a Reserve or homeland in your sense of the word?

Prof. LOGAN: Well, I believe that if you refer to other parts of that same testimony you will recall that we had a considerable discussion on the fact that the Native normally returns to his homeland during a period of his youth, and so I believe that the number of individuals who had never been to a Reserve would be very tiny indeed.

Mr. GROSS: Well, for example, sir, would this apply to the detribalized Ovambos who live in the southern sector outside the Reserves?

Prof. LOGAN: The detribalized Ovambos would perhaps be different but most, I believe, of the detribalized Ovambos still return to Ovamboland on occasion.

Mr. GROSS: And that constitutes "affiliation" with their homeland, in your sense of the term?

Prof. LOGAN: Yes, I think so—yes.

Mr. GROSS: Are there any consequences with respect to individual freedoms, or group status, or any other consequences, economic or social, which arise from the concept of "affiliation" of each individual with a Reserve or homeland?

Prof. LOGAN: Yes, I think it gives them a whole body of tradition and culture to which they can adhere, and results in a stability in the community which would be non-existent were you to remove it, were it not there. The most pitiful situation anywhere in the world, I think, is the person who does not belong to any group, and to separate such groups from their parent community would, I think, be a disastrous event.

Mr. GROSS: Would you apply the term "affiliation", sir, to a White person in the sector in relation to the White group?

Prof. LOGAN: Yes, the White group feels affiliated with other members of its own national group, its own language group—the German with the German group, the Afrikaaner with the Afrikaans group, and so on.

Mr. GROSS: So that "affiliation" in this sense would not be—or would it be—a scientific or technical term?

Prof. LOGAN: No, I think it is a term in common, ordinary English.

Mr. GROSS: Would you say that scientific and technical terms are not ordinary English?

Prof. LOGAN: Well, I think there is a scientific nomenclature, a scientific language, which uses certain terminology which does not ordinarily show up in the ordinary vernacular speech, and also sometimes terms from the vernacular speech are somewhat warped or confined in scientific language, and I did not mean this in any such terminology here—I have no separate and special meaning for the term "affiliated".

Mr. GROSS: So you are not using this term in any expert sense or technical sense?

Prof. LOGAN: Well, not in any highly specialized sense, no.

Mr. GROSS: Very well. I would like now to refer to the verbatim record of 8 July, at page 371, *supra*. In response to Mr. Muller's request to state your opinion as to whether the different population groups in South West Africa can be treated uniformly for purposes of economic development and administration, you responded that it is necessary to recognize the "profound difference between the European and the non-European", as well as the marked differences "within the non-European group"; and in your response you stated further:

> "... it is quite necessary to tailor the attempts to advance each of the individual groups to the immediate needs of that particular group, rather than to try to spread one type of blanket development over all of the groups".

Would you explain to the Court in what respects, if any, your statement applies, let us say, to the half of the Herero who are "absorbed in the diversified economy of the southern sector", in the words of the Odendaal Commission report?

Prof. LOGAN: The Herero are absorbed as workers on farms operated by Europeans; they are absorbed as employees in the businesses and industries operated by the Europeans. Now, to submit them to the same requirements of education, for example, and of training to which you would submit a Bushman group who have never been exposed in any way to anything mechanized or anything urban would be, I think, an insult to the Herero people, because the Herero people are at a much higher level than this; but at the same time, to expose the Herero people to the possible exploitation of them by Europeans within the area of the Native townships where they have already set up businesses, the shrewder, more experienced European might very well put them out of business in very short order—this is a protective device in the second case, it is an educational device in the first. These are quite different peoples, and I feel that to try to apply the same set of regulations, or the same proposals for advancement, to the three different groups, meaning the Bushman, the Herero and the European, to take three radically different, separate entities here, would be extremely impractical, it would be dangerous and in some cases it would be insulting to an already well-developed culture.

Mr. GROSS: I would like to direct your attention to the Herero group that you mentioned. You said, if I understood you, that half—you confirmed, did you, the Odendaal Commission statement—the Herero are "absorbed in the diversified economy"?

Prof. LOGAN: Yes.

Mr. GROSS: Now would you say, sir, that the (to use your phrase) education and training of the half of the Herero who are "absorbed in" the "White economy" should be the same as, or should it be different from, the education and training of the other half of the Herero who are not "absorbed" in the economy?

Prof. LOGAN: Yes, I think that there should be a difference between the different members of the community, the different groups in the community.

Mr. GROSS: Yes—the different members within a group . . .?

Prof. LOGAN: Within the Herero community, in the different portions of the Herero community.

Mr. GROSS: So that you would think that it would be sound to differentiate within a group as well as between groups, would you, sir?

Prof. LOGAN: Yes, definitely.

Mr. GROSS: Confining ourselves for a moment to the differentiation within a group, forgetting for the moment the group concept as such—if we can think about individuals for a change—what is the reason why there should be separate consideration given to the education and training of these individuals who comprise the half of the Herero "absorbed in" the "White economy"?

Prof. LOGAN: Some of the Herero are at a considerably higher stage and standard than other Herero. Now there should be a possibility for such people to go further ahead, in order to advance the remainder of the Herero community. It is for this reason that bursaries are available to the different groups to go as far as university in the Republic, and this has been accepted from time to time by Hereros who have done this; and the hope is, then, that they will return to the home community and aid in the elevation of that community. The unfortunate thing is that some of them do not, but it is hoped that they will return and raise the

standard of the entire group. To have them raise the group from within is infinitely better than to have an outside group, such as the European, come in and try to raise the group, because they understand one another better than outsiders understand them.

Mr. GROSS: You say that it is hoped that—if I understand you correctly—please correct me if I am wrong—the educated Herero will return to his Reserve . . .

Prof. LOGAN: Or to Windhoek, yes, or somewhere.

Mr. GROSS: Or to Windhoek?

Prof. LOGAN: Yes.

Mr. GROSS: Suppose that he is an educated Herero who resides in Windhoek—is it hoped that he would remain there? I do not understand your comment, sir.

Prof. LOGAN: No, I said if he was sent under a bursary to the Republic of South Africa, then it would be hoped that he would return to Windhoek, to the Herero community at Windhoek, or to the Reserves—if he were a doctor, say, perhaps to the Reserves, if he were in other fields, perhaps only to Windhoek—to try to elevate his own community in that area.

Mr. GROSS: By Windhoek—perhaps the source of our misunderstanding, sir, is your use of the word "Windhoek"—do you mean the city of Windhoek?

Prof. LOGAN: Yes.

Mr. GROSS: To live in the city of Windhoek?

Prof. LOGAN: Yes.

Mr. GROSS: It is hoped that the educated Herero will live in the city of Windhoek?

Prof. LOGAN: Yes, that is correct.

Mr. GROSS: Not in the township . . .

Prof. LOGAN: Well, he would live in the portion of Windhoek which is the township of Katutura.

Mr. GROSS: Therefore by Windhoek you mean Katutura in this respect?

Prof. LOGAN: Yes, because the city of Windhoek is divided into various parts, one of which is the Native township of Katutura, and so he would live in Katutura.

Mr. GROSS: May I rephrase my question, then? When you refer to "it is hoped that" (I shall ask you in a moment who is hoping) the educated Herero will live in Katutura, in the case of Windhoek, or live in a Reserve or homeland—that is your testimony, sir?

Prof. LOGAN: Yes, that is right.

Mr. GROSS: In other words, would it be fair to say that it is hoped that the educated Herero will not be part of the so-called "White" economic community?

Prof. LOGAN: I did not say that I hoped that he would not be a part of the White community—it is just in the nature of things, in the law, in the general practice of the area, that the Herero would not be a part of the European community, and I would not expect him to be; the laws are set up in such a way that he would not be a part of it, and the whole social system is set up in that way.

Mr. GROSS: So that when you say "it is hoped", are you referring, sir, to the legislative and administrative policy or practice?

Prof. LOGAN: When I say "it is hoped" I am meaning that the Government hopes, the Administration hopes; I am sure that most of the people

of Windhoek in any community, White or Herero or any other, hope, and I hope, and I hope everyone else here hopes, that he will become a member of that community and raise the standards of that community, because the effort is to try to raise the standards of the community and especially from within as well as from without.

Mr. GROSS: The effort is to raise the standards of the community—that is conceded. What effort is there to raise his standards in the "White economy" in which he is absorbed, if he wishes to remain there?

Prof. LOGAN: To raise his level in the White economy?

Mr. GROSS: We had agreed, sir, I thought, to speak about individuals for the time being—I am talking about Herero individuals who are absorbed in the "White economy"; what efforts, if any, are made to enable him to be absorbed in the economic community, the White community? Are there any, sir?

Prof. LOGAN: Yes, I think there are rather a great many: there is, for example, a number of adult evening courses that are run specifically for Natives by the Education Department of the Administration in teaching a large number of subjects which are of basic assistance to the Native in acquiring a higher status economically within the White economy.

Mr. GROSS: We will come back in a few moments, with the President's permission, to the question of education—I will take that in another context. The next reference I would make, Professor Logan, is to page 371, *supra*, the same verbatim record—this is just by way of clarification of what may or may not be a typographical error in the verbatim record, sir. Referring to the United States you stated that—

> "The Negro and the American speak the same English in America —slight differences in dialect, but basically the same thing—we are certainly able to communicate with one another."

Prof. LOGAN: I do not like the way I phrase that first part "the Negro and the American" because I consider the Negro an American, if this is the way I understand the . . .

Mr. GROSS: I had not really asked my question, I thought you wanted to say something; I thought you might wish to correct that—how would you prefer it to stand, sir?

Prof. LOGAN: I would say the Negro and the White speak the same language or whatever . . .

Mr. GROSS: ". . . speak the same English in America"?

Prof. LOGAN: Yes.

Mr. GROSS: And do all Negroes speak the same English in this sense?

Prof. LOGAN: Well I believe I said other than slight dialect differences they speak the same English.

Mr. GROSS: And there are slight differences in dialect on the part of the White English-speaking person?

Prof. LOGAN: Well, the White person or the Negro person have dialect differences but basically they can understand each other.

Mr. GROSS: I primarily wanted to give you an opportunity to correct that in the record. You do not wish the Court to draw any inference from the statement in any aspect relevant to this case, or do you, sir?

The PRESIDENT: What does that question mean, Mr. Gross?

Mr. GROSS: The witness made this comment about the Negro and the American speaking the same English in America which has now been

corrected. In the context—I will find it in a moment, sir—on page 371, *supra*, in which the witness was discussing "profound difference" between the European and the non-European, and he went on on the same page to refer to differences between the situation in the United States and South West Africa, in the course of which he used the expression "the Negro and the American speak the same English in America", and I had meant to ask the witness by my question, Mr. President, what significance if any, he considered that remark to bear in respect of any issue in this case . . .

Prof. LOGAN: That was a slip of the tongue and I would like the word "American" removed and "White" or some other term put in and I do not know why I made the slip. I consider the Negro as much an American as I am.

The PRESIDENT: I understand.

Mr. GROSS: Now at page 372, *supra*, of the same verbatim, in response to Mr. Muller's question whether the various groups in South West Africa identified themselves as separate groups, you responded in part as follows:

> ". . . each one [that is group] represents and considers himself to be a member of a distinct group, a separate group.
>
> This is sometimes a friendly difference, as between the Nama and the Damara; sometimes it is quite an antagonistic difference, the groups do not get along well together; if they are mixed thoroughly, then all kinds of friction may develop."

Do you recall that testimony?

Prof. LOGAN: Yes.

Mr. GROSS: Would you regard the difference, if any, in this context, between the White group and the non-White group as a friendly or antagonistic difference in the sense in which you have used the terms in response to Mr. Muller?

Prof. LOGAN: I am not positive, hearing this come at me now, whether this was in reference to only the Native groups or the non-White groups or whether it was in reference to the European group and the others. I will say here though that the reference, as I intended to make it there, was aimed only at the non-White group but there is much more friction, far more friction between the various non-White groups than there is at all between the White and any fragment of the non-White group. There is generally a friendly relationship existing everywhere in South West Africa between the European group and any part of the non-White group.

Mr. GROSS: It does not quite clarify it for me, it might for the Court, sir; I would like if I may to pursue the question one or two notches further. You refer in your answer to my question, I think repeatedly, to the word "group"—would you say, sir, that it would be an observable phenomenon in South West Africa that some members of the White group have prejudice or feeling of hostility against members of non-White groups, in the sense in which you have used the word?

Prof. LOGAN: I think there is very little, and I repeat, very little, hostile feeling on the part of Whites toward the Native community and I think there is equally little hostile feeling on the part of the Native element towards the White community, or if you wish I will say non-White because I am not intentionally omitting any coloured groups here. There are amicable relations existing almost entirely between the Euro-

pean group and the other group; there are always individuals, as we keep repeating here, who do not conform to the norm and there are White individuals who do not conform to what I just said but these are rare. The abuse of a Native or the bad feeling towards a Native is not any greater than and probably not as great as the abuse of a child by his own parents in a good many White communities that I am acquainted with and yet we generally say we like our children and get along in a friendly manner with them. I think that basically there is an amicable relationship between the groups.

Mr. GROSS: Would you regard it as a normal or legitimate purpose of government to protect individuals against the unusual, exceptional or whatever phrase you want to use, prejudice of members of one group against another?

Prof. LOGAN: Yes, I think that is an element of government.

Mr. GROSS: Now, therefore, the fact that it may be exceptional in your terms—is that fact, if it is a fact, relevant to the question of whether or not the government in South West Africa ought to protect members of one group from the consequences and prejudices of members of another group?

Prof. LOGAN: Yes, I think this is an important item in any community —in South West Africa too.

Mr. GROSS: I shall come back to that also in connection with another question addressed by Mr. Muller to you. To what extent, if any, are group differences—hostile, friendly or antagonistic—to what extent, if any, are such differences (in the sense in which you used the word) attributable to environmental or educational factors?

Prof. LOGAN: I am afraid I do not quite understand the question.

Mr. GROSS: May I repeat the question? I will shorten it because I wanted to make sure we were using the same words. To what extent, if any, are group differences—antagonism, friendship or whatever you wish to say—attributable to environmental or educational factors?

Prof. LOGAN: I do not think to any extent attributable to environmental factors, whether it be social or physical environment. I do not think to any extent to educational factors. Perhaps the lack of education over a long period of time enhances problems between the various Native groups and perhaps proper education over generations would obliterate this but I do not think that these are attributable to environmental or educational differences.

Mr. GROSS: But you think that education may be relevant to the elimination of antagonism?

Prof. LOGAN: Yes, I think so.

Mr. GROSS: Would communication between groups be relevant?

Prof. LOGAN: Of course, very much so.

Mr. GROSS: Now, as an expert in geography, whose study involves the relationship between man and land and the sociological aspects thereof, would you then say that some at least of the differences, in terms of antagonism or hostility, are the result of lack of communication between the groups?

Prof. LOGAN: Yes, the lack of communication and with it lack of understanding which goes with communication.

Mr. GROSS: What do you mean, sir, when you use the phrase "if they are mixed thoroughly" as you did in your response to Mr. Muller's question? Would you explain that to the Court?

Prof. LOGAN: Yes, if you were to put side by side within a housing area of an urban community, a Damara, a Nama, a Herero, Ovambo, mixing them thoroughly, house by house down the street, then I am afraid there would be considerable difficulty between them, whereas if you have one area which is purely Herero and another area which is purely Damara, then the hostility is not so likely to occur.

Mr. GROSS: So that by the phrase "mixed thoroughly" in this context you wish the Court to understand that you are referring to residential location, sir?

Prof. LOGAN: Well, yes. The same thing would be true if you mixed in a collective gathering of individuals standing together in an open space. There might be some difficulty between them.

Mr. GROSS: Who would "them" be, sir?

Prof. LOGAN: Between the different groups that I just named—between the individuals of these groups.

Mr. GROSS: Would you say, sir, that congregating in the street is a form of mixing which you fear would arouse . . .?

Prof. LOGAN: Yes, but congregating in the street is under somewhat of a controlled circumstance. However, when they congregate somewhere else under other circumstances there may be difficulty, as there often is; on a Saturday night when a number of them have had a bit to drink and different groups run into one another there may be a fight, and this occurs sometimes in Windhoek specifically.

Mr. GROSS: So that you were not using the term, or were you using the term, "mixed thoroughly", in a technical or scientific sense?

Prof. LOGAN: No, there was no scientific or technical terminology implied.

Mr. GROSS: The purpose of these questions, Mr. President, is simply to demonstrate, and to clarify whether these phrases are used by this expert witness in a technical or scientific sense. You understand that, sir, the purpose of my questions?

The PRESIDENT: The phrase "mixed thoroughly" does not sound scientific.

Mr. GROSS: Pardon me, sir?

The PRESIDENT: It does not sound scientific, Mr. Gross.

Prof. LOGAN: I did not intend to use it scientifically, sir.

Mr. GROSS: In your testimony would you say that you have used that term as a personal value judgment?

Prof. LOGAN: A personal value term.

Mr. GROSS: Yes, sir. If it is not scientific, what is it? You are here as an expert witness.

Prof. LOGAN: Well, I do not think that every noun or verb that I use in my testimony is scientific and I think we have ordinary language which is used in addressing a body like this; we address parts of it in ordinary language to make it comprehensible to the group and it is the normal language that I use. I am sorry that it is not all scientific.

Mr. GROSS: That is no reason for regret, sir; it is a question of clarification. By "mixing thoroughly" then, you do not mean the terms to be taken in a literal sense either, do you?

Prof. LOGAN: I do not use the terms in a literal sense?

Mr. GROSS: Do you intend this term to be taken by the Court in a literal sense?

The PRESIDENT: I suppose in a descriptive sense, Mr. Gross. I think

that every Member of the Court would understand what was meant by that.

Mr. GROSS: Yes, sir. Well, if that is the case, of course, I shall now turn to pages 373, *supra*, of the verbatim record and I would quote your testimony in the following respect. You said among other things:

> "To permit total equal opportunity for all groups to do everything that they wished would result in exposing many of the groups to very unequal competition. This competition would come, of course from the more advanced groups. This might be competition from the European."

Now, applying this statement to the southern sector outside the Reserves, does it suggest to you that the European group should be denied what you referred to as "total equal opportunity" in order to protect the non-White group from their unequal competition?

Prof. LOGAN: Definitely, yes.

Mr. GROSS: Are you aware of any measures which, by law or administration or any policies, in this sector outside the Reserves, deny the European group "total equal opportunity", in order to protect the non-Whites from unequal competition?

Prof. LOGAN: Yes, sir. I think we have been through this before. The European is not permitted to operate a shop or a store or any kind of business within a Native area and, consequently, since he cannot do this, he is denied a right. This is to protect the Native within that Native area.

Mr. GROSS: Now I am talking, sir, about the situation prevailing in the southern sector outside the Reserves.

Prof. LOGAN: So am I.

Mr. GROSS: I had not quite finished my question, sir. That is perhaps why we are at loggerheads. I now am referring to the situation, I repeat, in the southern sector outside the Reserves, and for the purpose of my question am *not* referring to Native locations. I am referring to areas in which non-Whites spend their working day.

Prof. LOGAN: No, in that case he is not restricted in any way.

Mr. GROSS: In that case, my question to you, sir, is, in that context are there any laws or regulations or practices, of which you are aware, which deny to the European group in that area, "total equal opportunity" —your phrase—in order to protect the non-White in that situation, from "unequal competition"—in your phrase?

Prof. LOGAN: No, not in the European zone.

Mr. GROSS: Now, I call your attention to page 373, *supra*, and specifically to Mr. Muller's question—"Do you consider that measures of differentiation to protect the various groups are necessary?" And I direct attention also, to your response, which ranges from page 373 to page 375. Now, Professor Logan, I should like to ask several specific questions concerning certain of your statements, impressions, or opinion as expert, as the case may be, as to which the Court perhaps may benefit from clarification. Several questions which I shall ask you will be primarily within the context of your earlier testimony, on 7 July, in the verbatim, at pages 338-339, *supra*, in which you stated that in 1961, you studied—and I quote from your testimony at page 339 of this verbatim—"the contrasting utilization of similar areas by different economies and by different population groups", and that this study in-

cluded "the southern half of the territory at that time, the area inhabited . . . by the Whites of the Police Zone" (p. 339). My questions will relate specifically to this area, the southern sector outside of the Reserves, and I suggest, if I may, with the permission of the Court, that you confine your responses to this area. Do you understand, sir?

Prof. LOGAN: Yes.

Mr. GROSS: Now, did your studies include utilization of the areas of the southern sector outside the Reserves?

Prof. LOGAN: Yes.

Mr. GROSS: Did your studies include rural areas?

Prof. LOGAN: Yes.

Mr. GROSS: And did they include urban areas?

Prof. LOGAN: Yes.

Mr. GROSS: The Odendaal Commission report, which you have testified you studied, contains the following findings, among others. I will cite three, one of which I have already referred to. At page 31, paragraph 113:

> "Large numbers [this refers to Damaras] were absorbed in the economy of the Southern part of the country and displayed exceptional aptitude as employees."
>
> "With the development of a new economy in the southern part of the country, considerable numbers [this refers to the Nama] were employed by White employers." (P. 33, para. 118.)

And finally,

> "Approximately half of the Herero are absorbed in the diversified economy of the Southern Sector of the country . . . Like the other groups in the Southern Sector, they too were strongly influenced by the changes brought [about] by civilization and Christianity." (Para. 127.)

I should like to ask you, sir, are these statements which I have just quoted from the Odendaal Commission report confirmed by our own studies?

Prof. LOGAN: Yes.

Mr. GROSS: Now, on the basis of your analysis of the area which we are discussing, the so-called "White Sector" or "White area"—the southern sector outside the Reserves—have you any opinions concerning the nature and extent to which the absorption—I use the Odendaal Commission report words—of these people into the economy of the southern sector affects their traditional institutions. I may say, parenthetically, that you used the phrase "traditional institutions" at page 374, *supra*, of the verbatim, as you may recall. The question therefore is, do you have any judgments or impressions, based upon your study of the area, as to the extent, if any, to which the absorption of these people into the economy has affected or does affect their "traditional institutions", in your sense of that latter phrase?

Prof. LOGAN: Inasmuch as many of these people are herdsmen and such, on European farms, or as we in America would call them, ranches, these people still are carrying on, in part, their traditional way of life, which is that of herding, and consequently many of their institutions which revolve about herding, still remain. Many of them have at least a veneer of Christian religion so the former religions have, in part, been lost and been supplanted by Christianity. They have taken on the

wearing of European garb and things of this sort, which has changed their traditional way of life. And they are fixed in one place, not nomadically moving from season to season and from year to year, and this has changed their traditional position. They receive a regular wage and a regular food ration, and so on, which affects the very unreliable marginal position in which they were in nomadic times, in pre-White times. I think to this degree, in these manners perhaps I should say, their traditional pattern has been changed.

Mr. GROSS: Now, sir, would you address yourself to the non-Whites in the urban areas of this Sector?

Prof. LOGAN: Yes, there, there has been much more change, because in the urban areas they are no longer grazing to the same extent. Normally, they still have some flocks of sheep and goats which they rely upon for a portion of their food supply, which are grazed on the townlands. But they are no longer following their traditional pattern of grazing as they did earlier, and they are more shifted into the European style of culture.

Mr. GROSS: Is the Court to understand from your response that the answer to my question is yes, that the absorption into the so-called "White economy" does have an effect upon the traditional institutions of these people?

Prof. LOGAN: Yes, it does.

Mr. GROSS: It does. And your reference to grazing and sheep and goats, that is, is it not, irrelevant to, for example, the several thousand non-Whites who live and work in Windhoek in domestic service?

Prof. LOGAN: Yes, except that most of these people—you see, this is where I have difficulty when I am forced to talk only about the one area of the European zone—still have, as I have been saying again and again here, their connections back to the Reserve and on the Reserve they frequently still maintain their herd or their flock of domesticated animals, looked after by a member of the family, a direct member or an indirect member, a cousin or perhaps a daughter or son.

Mr. GROSS: But is it your testimony that the several thousand—I believe this appears from your testimony in the record—non-Whites, male and female, who reside in homes in the city of Windhoek as domestic servants, maintain flocks of sheep or herds of goats or other animals outside the city, is that what the Court is to understand?

Prof. LOGAN: No, not outside the city. On the Reserve from which they came originally and these are looked after by some other member of the family, perhaps an immediate member, perhaps a fairly remote member, but that they still have the animals on the Reserve from which they came originally to the city of Windhoek, and so there is still this connection.

Mr. GROSS: Do they get milk, cheese, from their animals?

Prof. LOGAN: No. The milk and cheese is either eaten by the relatives or the milk, transformed into cream, is sold to the creameries and they receive cash, but you see the important thing is that they are not interested in the milk and the cheese, they are interested in the number of heads of animals, because their traditional wealth has always been reckoned in heads of animals, and so a man is wealthy if he has a number of heads of animals, not a bank account in the local bank.

Mr. GROSS: Have you, in your studies, encountered non-Whites who were serving as domestic servants in the homes of Whites?

Prof. LOGAN: Yes, many.

Mr. GROSS: Could you advise the Court how many, on the average, heads of cattle, if any, a domestic servant in that situation has? Is that a question you understand, sir?

Prof. LOGAN: Yes, I understand.

Mr. GROSS: Would you answer it?

Prof. LOGAN: I have not made any census survey of it and I am sure this is not in any census figures, but a man with whom the domestic servant—I suppose you mean a female domestic servant—the man would . . .

Mr. GROSS: I was taking two categories—non-White females and non-White males . . .

The PRESIDENT: We do not want all the details surely, Mr. Gross. It is getting far away from the issues in this case to be talking about female employees working in domestic service and whether they have so many cattle and whether the male domestic servants have so many cattle. Surely questions can be put in the broad sense and some information be got with which the Court will be sufficiently satisfied, without going into all this detail. This case will never finish if we proceed upon this basis.

Mr. GROSS: Yes, Mr. President. With deference, then, I shall turn to another question.

You, in your testimony, at page 375, *supra*, in the verbatim, referred to education within the framework of—I will read the exact language—in response to Mr. Muller's question whether measures of differentiation to protect the various groups are necessary, which I have read, did you take into account the extent, if any, to which social change has been brought about by economic development in the area in question, and I am referring specifically now to the economy in the urban areas?

Prof. LOGAN: Yes, I did.

Mr. GROSS: Now I call your attention to page 375 of the same verbatim record, in which you stated as follows:

> "Now perhaps the better thing to do is to permit the original traditional institutions to remain and then to develop, within the framework of the traditional institution, something in the way of a better way of life from the practical point of view, from the very materialistic point of view, to give them better food, to give them health services, to educate them, but to educate them still within the framework of their old traditional society . . ."

Do you recall that testimony, sir?

Prof. LOGAN: Yes, that is right.

Mr. GROSS: Was your testimony that I have just quoted intended to apply to the non-White "absorbed in" the economy of the urban area of the White sector?

Prof. LOGAN: Yes.

Mr. GROSS: And in that context would you be good enough to clarify the meaning of the phrase you used, ". . . to educate them still within the framework of their old traditional society"?

Prof. LOGAN: Yes, to break down their social systems as they recognize them, to change their thinking in regard to their ancestors, in regard to their chieftainships, in regard to their marriage customs, in regard to all of the things that constitute their basic traditional patterns,

just in order to teach them better to read and write and keep books would, to my mind, be a sad situation. These people all have a proud heritage of their own culture and within that culture system they are basically happy. Now to remove them from this culture system or to remove this culture system from them and try to superimpose another one upon it is what I think would be a bad thing and I think it is much better to try to do this within the framework of their own, still recognized, tribal or cultural system. I am not trying to advocate the perpetuation of tribalism in the worst senses of that term but to try to raise the group, still within the framework that they recognize.

Mr. GROSS: Are you finished, sir?

Prof. LOGAN: Yes.

Mr. GROSS: In your view should such education—to which you referred in respect of persons who are absorbed in the so-called "White economy" —should such education equip them to compete more effectively within that economy?

Prof. LOGAN: Yes, naturally.

Mr. GROSS: Is it your impression, sir, on the basis of your analysis, that the educational practices are designed to enable them to compete more effectively within the "White economy"?

Prof. LOGAN: Yes, it is.

Mr. GROSS: Could you then reconcile that, if indeed you can see that it is inconsistent, with the imposition by government regulation and law of ceilings upon the improvement of their economic levels above certain forms of labour?

Prof. LOGAN: We go back to the same thing again, that there is a ceiling if they wish to remain in the White territory.

Mr. GROSS: I think you did not understand my question, sir?

Prof. LOGAN: I am sorry then.

Mr. GROSS: I think, if I may say so without a disputation but just to clarify, your mind seems to be; perhaps, focused on areas outside the area of our discussion. Now I am confining, or attempting to confine, my remarks to a non-White person "absorbed in" the White economy, in the terms of the Odendaal Commission report, who is being educated or who has been educated in that same area, who is absorbed in the economy and who, by preference, or economic necessity or reasons of health or any other factor, wishes and intends to remain where he is. Now I am taking that person and I am asking you, sir, whether you can say whether or not he is being educated in order to compete more effectively in that economy where he is?

Prof. LOGAN: No, he is not being educated to compete more effectively in that economy where he is, if he refuses to leave that area and go elsewhere to seek a better job.

Mr. GROSS: And if he is precluded by health or by economic circumstance or merely by reason of his human desire not to move himself and his family, are you saying, sir, that if he remains where he is, it is at the price of not receiving an education requisite to his advancement in accordance with his capabilities?

Prof. LOGAN: No, he will receive the education alright but he will be limited on how high he can go, yes.

Mr. GROSS: Would you regard, sir, on the basis of your analysis that it is sound public policy, moral policy or even social policy to educate a person to a level of accomplishment which the law prohibits him from

achieving if he remains where he is? Would you answer that question, sir?

Prof. LOGAN: But the law does not prohibit him from returning to, or going to, an area where he can practise it and so . . .

Mr. GROSS: You judge that as responsive to my question, sir? You have finished your response?

Prof. LOGAN: Yes, I have.

Mr. GROSS: You cannot then answer it in the terms, or do not wish to answer it in the terms in which I asked it—whether or not, if he is educated to a level which he is prohibited by law from achieving in the economic context in which he is absorbed, that is sound, social, economic or moral policy?

Prof. LOGAN: But again you are trying to separate the whole position which is a unit; and to separate this, to excise it—as you said earlier—is illogical and impractical. We are talking about a man moving 1 mile, we are not talking about a man moving to the ends of the earth and therefore I see nothing wrong with the situation as it stands. No.

Mr. GROSS: Professor Logan, I will not ask you a question of a legal nature or implication, but as a geographer—as a scientist who has studied sociology—are you or do you consider yourself, familiar, shall we say, with the phrase or the concept "strenuous conditions of the modern world"?

Prof. LOGAN: Yes.

Mr. GROSS: Are you aware, for example, that in the Covenant of the League of Nations, Article 1, paragraph 1, the stated principle is that the government here is under duty to help the individuals inhabiting the Territory; "to stand by themselves under the strenuous conditions of the modern world"? Now, in your opinion, are all the "measures of differentiation", in Mr. Muller's phrase which I quoted earlier, now applied in the southern sector (and he did not qualify) appropriate to the end of helping the individuals of whom I have just been speaking "to stand by themselves under the strenuous conditions of the modern world"?

Prof. LOGAN: I do not know about all the conditions. I would say that by and large most of the differentiations are essential.

Mr. GROSS: Would you include job reservation in that category?

Prof. LOGAN: This is perhaps the only place where I would differ from the basic pattern as established generally.

Mr. GROSS: And why would you differ, sir?

Prof. LOGAN: Because there are exceptional cases, the individual that you want to bring out, from time to time, who perhaps would be able to conform and be able to work to the best of his ability within the European area. The moment, however, a door is opened to a situation of this sort, then the entire attempt at a development, a parallel elevation of groups, a whole concept, begins to break down. And consequently, as we came back to earlier here, in this same Court, it is my feeling that in some cases it is necessary to jeopardise the absolute happiness, perhaps, of a certain very small proportion—if it becomes a large proportion then the whole thing is changed, but as yet, in South West Africa it is a small proportion of the group—in order that the set of circumstances, the set of conditions and the set of plans be allowed to operate.

Mr. GROSS: Would you apply the judgment you expressed, with respect to job reservation, to the general principle or policy of setting

ceilings of accomplishment upon a person because of his race in that community?

Prof. LOGAN: It is not because of his race; it is because of his whole culture group, but yes.

Mr. GROSS: You would express—yes, what, sir? I want the record to be clear, in justice to you.

Prof. LOGAN: Will you ask the first part of the question again? I am not trying to be obstructionist.

Mr. GROSS: I just want to be sure the record is clear for the sake of your testimony. I intended to ask whether the judgment you expressed, with respect to the Job Reservation Act (in regard to which I understand you expressed your disagreement for prevailing policy on that point, subject to the qualifications you made) would be the same with respect to the general policy of imposing by law a ceiling upon economic accomplishment?

Prof. LOGAN: Well I do not think there is a ceiling imposed upon economic accomplishment, no.

Mr. GROSS: We have, I think, brought out in the earlier record, have we not, references made by high officials of the Government—specifically Prime Minister Verwoerd which is quoted in the Pleadings of Respondent —that in the White area there is "no place for"—I think he used the word "Bantu"—above the level of certain forms of labour. Do you recall that?

Prof. LOGAN: That is right.

Mr. GROSS: Ignoring the implication of the word "Bantu", I am asking you whether you would care to express a judgment concerning the policy which is implicit in that statement, that there is no place for the, shall we say non-White, in the "White area", above the level of certain forms of labour?

Prof. LOGAN: And of course the important thing here is "in the White area".

Mr. GROSS: That is the important thing. From what standpoint is it important?

Prof. LOGAN: Because he is permitted this development in the other area.

Mr. GROSS: I see, sir. Now, you concluded your testimony on direct with the statement, and I quote from page 375, *supra*, of the verbatim I have cited that:

> ". . . if all controls were to be abolished [this is the language of Mr. Muller's question] in the area and all differentiation between groups ignored, I am afraid a rather chaotic situation would develop".

That was your answer, sir?

Prof. LOGAN: That is right.

Mr. GROSS: Have you ever heard, sir, of any suggestions being made soberly or responsively by anybody in South West Africa or elsewhere that "all controls" be abolished?

Prof. LOGAN: Not in South West Africa, no, I think that is a general feeling in other places though, is it not?

Mr. GROSS: I would not wish to express an opinion about it—I think the Court would be more interested in yours—and I just want to pursue that, to ask what other areas—where, in what context—have you heard

a suggestion, if you have, that all controls (the phrase you used) "be abolished".

Prof. LOGAN: All the controls we have just been describing?

Mr. GROSS: Yes.

Prof. LOGAN: This was a hypothetical question which was asked me, which is frequently stated, that there is too much control in South West Africa, and then what would happen if this control were removed; this is a hypothetical question which I think is quite frequently put. And I was answering a hypothetical question, and so, if all controls were removed, then I would assume that there would be a chaotic situation.

Mr. GROSS: Would that be true in any social situation, sir?

Prof. LOGAN: Yes, it would be true in any social situation, but it would be much more true where you had great differences in cultural levels.

Mr. GROSS: It would be less true in the United States, let us say?

Prof. LOGAN: If all controls were removed.

Mr. GROSS: Were abolished?

Prof. LOGAN: All right, abolished.

Mr. GROSS: Now, just to pursue this one or two questions further: with regard to your phrase "all differentiation between groups ignored", have you heard it responsibly suggested, sir, that it is either desirable or possible to ignore all differentiation between groups?

Prof. LOGAN: Again, this is in answer to a hypothetical question.

Mr. GROSS: This is my final question, Mr. President, with respect and with your permission. Are the true and only alternatives represented by the extremes—I shall quote from the Odendaal Commission report and give the citations in a moment—of, on the one hand, in the language of the Odendaal Commission report, "wiping out the differences between the groups", and, on the other hand, "complete socio-economic integration"—the language is used in the Odendaal Commission report at page 427, at paragraph 1434. Do you regard those as true and/or only alternatives? Wiping out the differences between the groups, on the one hand, and complete social and economic integration, on the other?

Prof. LOGAN: Well it seems to me those are nearly the same thing, are they not?

Mr. GROSS: I do not know what they are, sir. You stated at an earlier phase of your testimony that you did not agree with everything in the Odendaal Commission report, did you not, sir?

Prof. LOGAN: Yes, that is correct, sir.

Mr. GROSS: Now, the Odendaal Commission report language I have just cited—this is not my language, sir—states these as extremes, or as the alternatives, not as the same thing.

Mr. MULLER: Mr. President, may I ask my learned friend, Mr. Gross, to indicate where the Odendaal Commission deals with these two matters as being alternatives.

Mr. GROSS: I am about to read from the Odendaal Commission report.

The PRESIDENT: Would you identify the page, Mr. Gross.

Mr. GROSS: Yes, sir. This is page 427, paragraph 1434. I shall read several sentences; I would invite your comment Professor Logan, to a series of questions.

> "Where there are no significant differences between co-existing groups or nations, it might be sound and desirable to apply a policy calculated to wipe out the differences between the groups, i.e., a policy of assimilation or complete socio-economic integration.

> However, where, owing to fundamental differences in socio-cultural orientation, stages of general development and ethnic classification, the differences between the groups concerned are of so profound a nature that they cannot be wiped out, a policy of integration is unrealistic, unsound, and undesirable, and cannot but result in continual social discrimination, discontent and frustration, friction and violence—a climate in which no socio-economic progress can be expected to take place."

Now, sir, I should like to clarify exactly what I meant by stating these as extremes. They are two extreme forms of stating the same point, as I understand this quotation. Can the problem, in your judgment, be validly and justifiably stated in terms of such extreme formulations as a policy calculated to wipe out the differences between the groups, or, stating it in another extreme form, complete socio-economic integration?

Mr. GROSS: Mr. President. Professor Logan, I would like to start afresh with you, not requesting the Court to ignore the question previously asked, but to clarify it and start afresh with you in that respect.

I intend to ask you, sir, with respect to the phrases used in paragraph 1434 of the Odendaal Commission report, whether what I took as the extreme or polarized forms of expression of the phrase "to wipe out the differences between groups" on the one hand, and the phrase "complete socio-economic integration" on the other—whether those extreme forms of expression, in your view, were the only alternative to the absence thereof, or to some other policy which was not based upon that, such as the policy of separation or *apartheid*?

Prof. LOGAN: The two situations, as given in the paragraph referred to, which I have had the opportunity of reading, apply to two totally different types of situation. The first, a relatively homogeneous society in which there are no sharp group differences, as stated quite clearly, I think, in the opening phrase, which slipped me when it was read to me earlier, and the second in which there are extreme differences between groups. In the first case it is quite reasonable to wipe out such differences as do exist, they being minor differences because we are dealing with a relatively homogeneous society as proposed. And, secondly, in the latter case, the one of great group differences, there the groups, it says, and I agree with it, should be developed separately one from the other, in order to develop each of them as well as possible, as rapidly as possible and as far as possible, but because of the different requirements of the different groups a different approach is necessary. That is how I interpret the paragraph and as I personally believe to be the situation.

Mr. GROSS: Thank you. Now, would the testimony you just gave in response to my question apply without qualification to the situation in which the non-White is "absorbed in" the economy of the White in the southern sector, in the urban area, let us say?

Prof. LOGAN: Yes.

Mr. GROSS: It would?

Prof. LOGAN: The first would apply, or . . .

Mr. GROSS: Does your response to my question apply, without qualification, to the situation of the non-White who is absorbed in the White economic community in the southern sector outside the Reserves?

Prof. LOGAN: Yes, my reply does, because the individual is still a member of a group.

Mr. GROSS: Now, what do you mean by separate development in that

context—separate from whom, and development to what end? What do the two words mean?

Prof. LOGAN: Separate from the other peoples not of his group around him as, for example, separate from the European group for whom he is working and towards the end of raising the entire level of his group, of the particular individual Native's group.

Mr. GROSS: Rather than the level of the economy in which he is absorbed?

Prof. LOGAN: The aim is to develop the various groups. This would perhaps partly raise the level of the economy of the White sector, but the main emphasis in this report, and the main emphasis as I see the group development pattern in South West Africa, is to develop the groups, each of them. Therefore it is to develop the Native group as well as to develop the White economy, not basically to develop the White economy, no.

Mr. GROSS: The individual Native who is absorbed in the White economy—are we talking about him?

Prof. LOGAN: Yes.

Mr. GROSS: In what respect is he developed in the context of advancement in that economy under the prevailing system as you understand it, sir?

Prof. LOGAN: As I explained a bit ago, there are programmes for attempting to give him a better education, to do better things for himself within the area, subject, of course, to the fact that there is a ceiling placed upon his economic attainment.

Mr. GROSS: I think perhaps in this context it would help to clarify matters, if you would say what you perceive, as I believe you said you did, to be difficulties or objections to the imposition of ceilings such as the Job Reservation Act? Will you explain your previous response to my question? You differed with the Government policy in that respect?

Prof. LOGAN: I said that I differed with the Government policy because it does prevent certain individuals from reaching higher than they might do otherwise, but that I still felt that it was necessary and while I don't necessarily approve whole-heartedly of such measures, it is necessary in order to carry out the full development of the programme as envisioned. I believe I said that in the earlier testimony.

Mr. GROSS: It is necessary, sir, to impose limitations upon his economic advancement?

Prof. LOGAN: That is correct.

Mr. GROSS: In order to serve what objectives?

Prof. LOGAN: In order to prevent the breaking-down of the entire programme that is being developed because then if one exception was made, in the case of this particular individual we have in mind, then there would immediately be another one of less validity, and then another one, and eventually the system would break down because of a tremendous number of exceptions being made endlessly. Of course if exceptions are made in one direction then they should be made in the other direction.

Mr. GROSS: And the "other direction" being, in this context, exceptions in respect of the White in the White area?

Prof. LOGAN: No, the exception of the White being allowed to develop things in the Native area then.

Mr. GROSS: So would you say, sir, that you see this or you discuss it, and your testimony to the Court is entirely or basically, within the con-

cept of development of the White economy and society in one area and the development of the non-White society or economy in the other area?

Prof. LOGAN: That is correct.

Mr. GROSS: This is the basic premise of your testimony?

Prof. LOGAN: That is correct, yes.

Mr. GROSS: Thank you, sir. No further questions.

The PRESIDENT: Certain Members of the Court desire to put questions to Professor Logan. I call upon Sir Gerald Fitzmaurice.

Judge Sir Gerald FITZMAURICE: Professor Logan, in spite of all the ground we have travelled over, I do not think it is yet entirely clear what is the basis of the various distinctions made in South West Africa between different groups, and between the Whites as a group and the non-Whites, and I want to put a series of points to you with a view to clarifying that; and to save time, when you agree with what I say, will you just say "yes" or "correct", or something like that? Of course, if you do not agree, then give your reasons.

Now, in your evidence the other day you were very emphatic that colour as such was not the basis of these distinctions. I take just one passage from the verbatim of 9 July on page 403, *supra*, in which, in answer to a question addressed to you by Mr. Gross, you said: "Do I think it is a valid basis to use colour as the basis for allotting rights and burdens?—no, I do not." That is correct, I think, is it not?

Prof. LOGAN: Correct, yes.

Judge Sir Gerald FITZMAURICE: Well then, you say that colour is not the basis of these distinctions, and the general picture you painted was something like this, of South West Africa as a territory which is really, as it were, split up into a number of semi-self-contained areas and localities, and in each of these areas or localities one group has full political and civil rights; but in the same area or locality members of other groups would or might have lesser rights or restricted rights of some kind; and you gave us an example, if I remember rightly, an obvious example —you said that in the White sector outside the reserved areas the non-Whites did not have any voting rights, but in their own homelands they would have voting rights, and that similarly in the White sector (I will call it) the non-Whites were subject to certain restrictions, for instance as to what jobs they could take on, but in their own reserved areas or homelands they would not be so subject—that is a correct general picture, I think?

Prof. LOGAN: Yes.

Judge Sir Gerald FITZMAURICE: Well, now, do you see, Professor Logan, any resemblance between that situation and the situation which might obtain in a federal State? For instance—I am not thinking specially of the United States of America, but of any federation—in a federal State you have got a conglomeration of separate states, and in any one state the residents or the persons who are admitted to the register of voters would have full voting rights as regards local elections and state elections, but in another state they would not have; and similarly, in their own state, they would be subject to no restrictions as regards place of residence or conditions of work and so on, whereas in another state of the federation conceivably they might be, and if there was such a situation none of that would have any specific reference to colour, for instance. Do you agree that there is some resemblance between the two situations?

Prof. LOGAN: There is some resemblance, yes.

Judge Sir Gerald FITZMAURICE: I do not want to push the analogy too far, of course—there are differences, too. Well now, if that is so, then would it be correct to say that in your view the various distinctions which exist in South West Africa are based on a mixture of group and locality—that is to say, on membership of a group, be it a White or a non-White group, the members of which belong or are deemed to belong to a particular area or locality?

Prof. LOGAN: That is correct—that is exactly right.

Judge Sir Gerald FITZMAURICE: And according to the theory, if I may so call it, even a non-White born in the White sector, and working there, and having lived there all his life—he is regarded not as being, so to speak, a member of the White sector but as being a member of his racial group, and only in the homelands of that group would he have full rights.

Prof. LOGAN: That is correct.

Judge Sir Gerald FITZMAURICE: Would you admit, Professor Logan, that that is carrying the theory about as far as it will go, this last case?

Prof. LOGAN: Yes, I think so.

Judge Sir Gerald FITZMAURICE: Now I want to test the matter just a little further and consider what I might call the reciprocity aspect. The logic of the theory, of course, requires that in the non-White areas White persons should be subject to restrictions broadly corresponding to restrictions which non-Whites are subject to in the White area. I wonder how far that is actually the case; for instance, to take an obvious example, in Ovamboland would White persons be subject to the same restrictions as regards the work they could do, the jobs they could take, that an Ovambo worker would be in the White sector?

Prof. LOGAN: Yes, if they were coming in as independent individuals. To begin with, they could not come in as independent individuals into the area, and therefore they could not hold jobs within the Ovambo area. Now the exception, of course, is the obvious one: the administrators, the medical people, the missionaries and the educators who are in the area are employed beyond any conceivable job classification, but this is in order to attempt to raise the level of the Ovambo people generally; they are there temporarily from outside of the area. But a private entrepreneur cannot go into the area and operate without running immediately foul of the regulations and laws. There have in the past been the licensed traders within the area. These are being gradually closed out in place of the Ovambo traders within the area; eventually they will be closed out completely.

Judge Sir Gerald FITZMAURICE: Yes, I see. Well then, would it be broadly right to say that the sort of job which an Ovambo cannot do in the White sector, a White person would not be able to do in Ovamboland?

Prof. LOGAN: This is the theory, and this will be the situation as the development proceeds, yes.

Judge Sir Gerald FITZMAURICE: Thank you. Well now, let us come to the actual disabilities which are imposed upon the non-Whites in the White sector. The theory, I think, leads us to this conclusion: that on the basis of it the imposition of some disabilities are or may be justified, but clearly it cannot lead to the conclusion that any disability you could think of would be justified merely because a similar disability might be imposed upon a White in a non-White area; for instance, to take a ludicrous but not absolutely impossible example, if there was a law by which, although Whites in the White sector were entitled to wear their normal

footgear the non-Whites had to go barefoot, I think one would say that that was clearly unjustified and discriminatory—you would agree with that, would you?

Prof. LOGAN: I would agree.

Judge Sir Gerald FITZMAURICE: At any rate it would be unjustified and discriminatory unless there were some really compelling reason for it, if one can think of one. So that broadly to justify disability, particular disability, and to make it non-discriminatory one has to have some good reason for it other than simply colour as such. That I think you will agree with too. Now I just want to consider in relation to this question of job reservation in particular, what are the reasons why, in the White sector, non-Whites are prohibited by law from undertaking certain work, and I want to recall to you the evidence you gave on that point the other day, it has not been referred to this morning but it is to be found on page 405, *supra*, and I should like to read to you just two short passages, which you answer in reply to a question by Mr. Gross. The first—

> "At the present time none of the Bantu groups, whether it be Herero or Damara or what, is technologically, education-wise, culturally in any way, as a group capable of carrying on activities above the level just mentioned, above the level of labour."

And then coming to the question of the "exceptional individual" which was put to you by Mr. Gross you said—

> "In the case of the exceptional individual, sometimes the regulations bear heavily upon him—I think there is no question of this. There are in every one of the communities, every one of the Native groups, I am sure, in South West Africa an, or some, or sometimes a reasonable number of people who have the ability to have privileges at a higher level than is accorded to the group. This is true in any society, and one has to aim at the best for the greatest number of people."

And then you went on to point out in other parts of the same record that of course the skilled individual was not permitted to exercise his special skills in the White sector, but could always do so if he went to the homelands or to the Native towns, and so on the basis of that evidence, Professor Logan, there emerges a picture which is something like this and I shall just put it to you whether you agree with it, namely that these restrictions in respect of the work that can be done are not imposed on the non-Whites because of colour but because it so happens that at the present stage of their development, the non-Whites considered as a group, well to put it like that, do not have what it takes to do work above a certain level.

Certain (perhaps a number of) individuals may have that skill, but their interest must give way to the general interest, would that be roughly a correct picture of what you say?

Prof. LOGAN: Yes, it would.

Judge Sir Gerald FITZMAURICE: Well, now I had been going to ask Professor Logan how the general interest was served by the interest of the individual having to give way in this respect, but I think that question has in effect been put to you this morning by Mr. Gross and you have answered it. But I would like to pursue it just a little further because this question of a skilled individual non-White is clearly a key question

in this case and I am not satisfied we have got completely to the bottom of it. To begin with, one thing which has puzzled me in this case and perhaps you can help me on it, Professor Logan, is why if the reason which you give for having these restrictions on jobs is the correct one, why is it necessary to have laws which prohibit people from taking certain jobs? If the great mass of the non-Whites concerned are not capable of working above a certain level, then clearly even in the absence of laws they would not get the jobs or if they did get the jobs they would not hold them for very long; no employer would employ them. Therefore, one would think that it was quite unnecessary to have an elaborate set of restrictions as to the particular jobs that can be done. Now what I really want to put to you is this. I want to get your views generally, and more specifically I want to ask you whether in that situation it does not begin to look a little as if these laws are aimed precisely at preventing the man who would be able to do the job from doing it?

Prof. LOGAN: Yes, I think that the basic aim is to try to force this man to do that job elsewhere than in the White community, to force him to do it in his home community, so that it will aid in the raising of the level of his home community, and that would be my explanation of it. If I were going to work it out I would have done it for that reason; if I had passed such a law it would have been for that reason. Actually, I think that there is very little hardship as a result of this at the present time and I think, knowing how things have changed in the nine years that I have known South West Africa myself, I think that in the event that the situation changes, the law will be changed; maybe not the entire law, but the categories within it would be changed—that is, if there were a large number of Native or non-White peoples who were able to do a certain type of work, and this type of work was totally unnecessary on the Reserve and there was a demand for a number of positions opened for them within the White community, then I think the law would be amended because the whole situation has been a situation of flux, that is these things are rigidly stated but they do change. There has been a great deal of change in South West Africa from the social point of view in the period of years that I have known it. I am not acquainted with the laws and so I do not know what has been done in the legal framework but I think that there is sufficient flexibility and adaptability on the part of the Administration, the Government, to bring about such a change. This is my sincere belief.

Judge Sir Gerald FITZMAURICE: So, Professor Logan, you would agree then that these laws are not made exclusively because the great mass of the non-Whites are not up to doing certain jobs, they are made at least partly in the interests of the policy of separate development.

Prof. LOGAN: I think it is made largely in the interest of the policy of separate development.

Judge Sir Gerald FITZMAURICE: Yes, but at the same time you say that it is also dependent upon the factual situation, that at present there are a comparatively small number of persons amongst the non-Whites who would have the capacity to do jobs above a certain level but that if that situation were to change then probably, in your opinion at any rate, the policy would be changed.

Prof. LOGAN: That is correct.

Judge Sir Gerald FITZMAURICE: Thank you. That is all, Mr. President.

The PRESIDENT: Are there any other Members of the Court who desire

to ask any questions? I only want to ask you a few questions, Professor Logan. The first is: in your visits to South West Africa, on the two occasions you were there for research purposes, were you free to move where you wanted to and obtain such information as you thought necessary or was what you did in the form of what might be called a "conducted tour"?

Prof. LOGAN: First, I have been there three rather than two times, and there has never been any attempt in any way made to restrict my movements or to conduct my movements. I have been free to travel anywhere I wished at any time. This started with the day I arrived, when I was virtually unknown in the Territory and I was able to go anywhere I wanted. I have been on the Reserves with and without the conduct of the superintendent or any other European or non-European employee of the Bantu Affairs Department. I have always had open to me the assistance of the Bantu affairs people on the Reserves but sometimes I have, without any protest whatever, been on a Reserve for upwards of a week without notifying the superintendent of the fact and then eventually made a courtesy call upon him as I left explaining that I had been here or there. I have not been followed by the police in Windhoek . . . as a matter of fact the number of police are far too few to look after a person like myself or any other person travelling about the Territory. There has been the offer very frequently of a say "conducted tour" but much of my work has been done entirely by myself, that is travelling with my wife, my two daughters, one or several of others, in our own vehicle. We have had various vehicles, one imported from the States, others purchased locally, which we have used as a camping base; we have been away from the city for long periods at a time. I am sorry to have prolonged that so long.

The PRESIDENT: Another question I wanted to ask you about is the use of the term "subsistence level". Sometimes the words "subsistence level" is adorned by another word so that it becomes "bare subsistence level". You spoke about the area to the north being that of a subsistence economy, would you just elaborate what you mean by "subsistence level"? Does it in particular indicate that it is a poverty level?

Prof. LOGAN: No, it does not. Subsistence means that there is no cash and usually no barter involved, that the people produce everything that they need and furthermore they need everything that they produce and so that they do not produce a surplus for sale nor do they purchase from outside. But from the standards of health and nutrition this may be very adequate, in fact it may be very good in some cases, and we must realize some of the idyllic examples of the primitive world as the South Sea Islands and such.

The PRESIDENT: We will keep to South West Africa.

Prof. LOGAN: I am sorry, sir. Now if the word "bare" should be inserted before it, or we said it was a marginal subsistence economy, then we would bring in the matter of impoverishment or malnutrition, etc.

The PRESIDENT: Did you see any signs of impoverishment or malnutrition in all your visits to South West Africa?

Prof. LOGAN: The only examples are on some of the extreme southern Reserves in which the conditions are very poor because of the climatic situation existing. This is the homeland of the people, but some of these people have a bare subsistence economy. These people are now at the present time being moved from such areas to the areas farther north

which have been purchased under the Odendaal plan, as part of the Nama Homelands, and these Reserve areas will be within, I think, the next year or two, totally abandoned.

The PRESIDENT: In the areas to which they are being moved, have they previously been occupied by the White sector of the community?

Prof. LOGAN: Yes, they were previously occupied by White karakul sheep farmers.

The PRESIDENT: And I think you spoke about that before in your testimony.

Prof. LOGAN: That is correct.

The PRESIDENT: The other question I want to ask you is in relation to the White sector, southern area, excluding the Reserve areas. Can you describe the general conditions in which the non-White people live in that area? First away from the farms, in the urban area of Windhoek for example.

Prof. LOGAN: Do you want the . . .

The PRESIDENT: The general conditions, I do not want the details. The general conditions—are they poor, good or indifferent—that is what I want to know.

Prof. LOGAN: In 1956 they were deplorable; in 1965 they are moderately good.

The PRESIDENT: Well, you can just develop it a little bit more, would you?

Prof. LOGAN: Yes, they have had a shift from the self-made, very wretched housing, from the very poor sanitation, from the lack of conveniently placed water supplies, etc., to well-built substantial housing, good sanitation conditions, water brought directly to the home and great improvement in matters of transportation to and from work, etc., within the Native townships and this is true, not just in Windhoek but in each of the other urban communities throughout all of the Territory.

The PRESIDENT: And generally, the condition of the non-White people in the urban area, in other words, do they appear to be depressed or otherwise?

Prof. LOGAN: No, they are not depressed. They are dressing well, they are eating well, they have improved very greatly in the nine years that I have known the area. There is considerable cash resulting in considerable purchase of a large number of necessary and luxury items by them. For example, cameras, cigarettes and soft drinks and ice-cream which do not come within the necessity category, there are large purchases of these today by these people, all of the time, in the city of Windhoek and in the other communities like that in the Territory.

The PRESIDENT: Will you give us the picture as to conditions of living on the farms?

Prof. LOGAN: The conditions on the farms are quite variable, depending on the individual farmer, the European farmer. In some cases, he has developed nice, quite presentable houses for them to live in, usually four rooms, cement blocks structures with windows and doors; these are sometimes occupied by the Native, or sometimes he prefers to build his own building alongside the old pondok-style building, as it is referred to, made of sheet-metal, etc. and to live in this, it perhaps is better aerated and this is perhaps part of the reason. Others merely provide building material and the Natives construct their own dwellings. The dwellings are adequate under a mild climate such as exists.

The food, the nutrition, is perfectly adequate. It is monotonous (I would not want to eat it), but it produces a perfectly healthy condition and it is what they desire to eat in most cases. They will refuse articles of food that I would eat, very frequently, their tastes are different and this explains perhaps, the monotony of the diet. But the diet is thoroughly adequate. Furthermore, they are receiving a cash wage which is allowing them gradually to advance in material belongings.

The PRESIDENT: That is all I wanted to ask you, Professor Logan. Mr. Muller, do you desire to re-examine?

Mr. MULLER: Mr. President, no. No questions in re-examination.

The PRESIDENT: I think Professor Logan can now be released from further attendance.

Mr. MULLER: As the Court pleases.

Prof. LOGAN: I would like to thank you for your indulgence.

The PRESIDENT: Mr. Muller, will you . . .

Mr. MULLER: Mr. de Villiers will present the next witness who will be Mr. Cillie.

The PRESIDENT: Mr. de Villiers.

Mr. DE VILLIERS: Mr. President, in our letter of 6 July, we notified the Applicants that Mr. Cillie's evidence, "will also relate to issues arising under Applicants' Submissions 3 and 4. Mr. Cillie is a leading South African journalist of 30 years' standing and editor of *Die Burger* for the last 11 years. *Die Burger* supports the policies of the present Government regarding separate development of the various population groups in South Africa and South West Africa, and has played a leading part in shaping and propagating it." The letter originally stated "drafting" but that was a typing error which has been corrected, Mr. President—leading part in shaping and propagating it. "As political observer and analyst, Mr. Cillie will testify on the political aspects and implication of the policies of differentiation applied in South Africa and South West Africa, and of possible alternatives thereto, with special regard to the feasibility or otherwise of application in practice of a suggested norm and/or standards of a content as contended for by the Applicants."

Mr. President, I have indicated to the Registrar and also to my learned friends, that Mr. Cillie may, in the course of his testimony, refer to the political map of Africa at the back of Book I of our Counter-Memorial, II, so that it may be available to the Court if the Court might wish to refer to it. I would suggest that Mr. Cillie make both the declarations provided for in the Rules.

The PRESIDENT: Is the affirmation before the witness? Would you make both affirmations, Mr. Cillie.

Mr. CILLIE: In my capacity as a witness I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth. In my capacity as an expert I solemnly declare upon my honour and conscience that my statements will be in accordance with my sincere beliefs.

The PRESIDENT: Mr. de Villiers.

Mr. DE VILLIERS: Mr. Cillie, you were born at Stellenbosch?

Mr. CILLIE: Yes.

Mr. DE VILLIERS: Stellenbosch is a university town near to Cape Town?

Mr. CILLIE: Yes, and the second oldest town in South Africa.

Mr. DE VILLIERS: What was your descent?

Mr. CILLIE: Mr. President, I am a South African of mixed Huguenot

and Dutch descent. You can see that from my name. It is a corrupt spelling of the original French Ceillier, and that means that my ancestry in South Africa goes back to the second half of the seventeenth century.

Mr. DE VILLIERS: Your father was a professor at the University?

Mr. CILLIE: Yes, my father was a Professor of Education at Stellenbosch University. He was Dean of the Faculty of Education and a one-time Rector of Stellenbosch University. He was regarded as a sort of elder statesman in the educational field in South Africa, especially on the Afrikaans side.

Mr. DE VILLIERS: You went to school at Stellenbosch?

Mr. CILLIE: I went to school at Stellenbosch and went on to the University and took a degree, rather surprisingly, in mathematics and physics, in 1935.

Mr. DE VILLIERS: And what did you do after that?

Mr. CILLIE: I joined the editorial staff of *Die Burger* immediately afterwards and I have been with the paper ever since. That means it is going on for 30 years now.

The PRESIDENT: I did not catch that, how many years?

Mr. CILLIE: Going on for 30 years, Mr. President.

Mr. DE VILLIERS: Did you become chief sub-editor, also known in some organizations as night editor, in 1939?

Mr. CILLIE: Yes, during the war years I was chief sub until the year 1944.

Mr. DE VILLIERS: What did your duties, in that capacity, involve?

Mr. CILLIE: You had to put the whole paper together at night and you had, in those times, to handle all the war news; we are a morning paper, so that we had to do all this work at night, putting the paper together.

Mr. DE VILLIERS: You say you were there almost right throughout the war? Did you become Foreign Editor of *Die Burger* in 1944?

Mr. CILLIE: Yes, I was appointed Foreign Editor in 1944 and I held that position for about four years until 1948.

Mr. DE VILLIERS: What did your tasks as Foreign Editor involve?

Mr. CILLIE: Handling the foreign news and commenting on international affairs in general. That was during the immediate post-war period.

Mr. DE VILLIERS: And in 1948, what did you then become?

Mr. CILLIE: I was appointed Assistant Editor in 1948 and I held that position until 1954, when I became Editor-in-Chief.

Mr. DE VILLIERS: Mr. Cillie, in order to give the Court an indication of the extent to which your tasks at *Die Burger* have qualified you for the evidence you are about to give, will you explain to the Court, briefly, what *Die Burger* is and generally what role it plays in South African political life.

Mr. CILLIE: Mr. President, *Die Burger* is quite an institution in South Africa. It was started in 1915; that was at the time when the Nationalist Party, the present Government party of South Africa, was founded. The first editor was Dr. D. F. Malan. He held the position of Editor during the formative years of the Paper, together with the position of Cape leader of the Nationalist Party. He was the man who later on became Prime Minister. He first became Cabinet Minister in 1924 and in 1948 he became Prime Minister. *Die Burger* was in at the birth of the

Nationalist Party and it has always had the closest relationship with the leading Nationalist Party circles. Dr. Malan, in a sense, used *Die Burger* to clarify his own thinking on politics, he worked out his ideas in advance. *Die Burger* was, from the beginning, quite frankly an opinion forming paper, not in the sense of a popular paper, expressing existing public opinion, but also looking ahead and forming public opinion, trying to see ahead what public opinion should be, rather than what it was.

We have, right through our existence, had that approach to politics in South Africa. We put emphasis on thinking ahead, trying to take the lead in certain matters, also acting as a forum for all the various Afrikaner groups, especially the Afrikaner groups, because race relations in South Africa is not merely a political matter, it involves the churches, it involves the universities, the intellectual groupings and organizations, organizations like SABRA, the South African Bureau of Racial Affairs. We have acted as a forum and as a clearing-house for ideas in general.

Mr. DE VILLIERS: I think you may be going a little bit fast for the interpreters, will you try to keep that in mind?

Mr. CILLIE: I will.

Mr. DE VILLIERS: How would you generally describe the phase of South African politics at the stage when you joined *Die Burger*?

Mr. CILLIE: I joined *Die Burger* in 1935. That was during what we call in South Africa the Fusion period, the time when Generals Herzog and Smuts, who had been the two main adversaries in South African politics up to that time, when they came together to form the so-called Fusion Government. We were an opposition paper then, supporting at that time a very small Nationalist Party, which had been broken down by this Fusion process to, I think, a representation of about 19 members in the House of Assembly, which is our Second Chamber. I lived through the eventual split between these two Generals on the war issue in 1939. Those were the days when the Nationalist Party was really developing its thinking and its later programmes as an opposition party. I think the basic preparatory thinking for the whole apartheid policy or the whole policy of separate development, was done during those years, from 1933—that was two years before I joined *Die Burger*—up to 1948. In those 15 years the Nationalist Party grew from this small opposition party to the governing party. It took power in 1948. I lived through that whole period and I saw the formulation of policy, the discussions that led to the eventual final enunciations of these policies. And, of course, when the party took over power, as happens in these cases, the perspective broadened, the thinking did not stop. Under the burden of responsibility, they had to adapt certain of their policies, they had to think a bit further than they did in opposition, and we tried, on *Die Burger*, to play also there, a constructive role.

That more or less covers the period up to the time when I took over in 1954.

Mr. DE VILLIERS: And since that time?

Mr. CILLIE: Well, we have tried to be true to that tradition of playing this constructive role in South African thinking, not only as far as the Nationalist Party is concerned, but the whole South African public. We gave great emphasis to thinking ahead and the formulation of policy. We also encouraged public discussion on points of difference. We never tried to dampen down any discussion that could be in any sense constructive.

Mr. DE VILLIERS: Did your views, or the views of *Die Burger*, at all times agree with those of the Nationalist Party Government?

Mr. CILLIE: I hope not, Mr. President. By the very nature of a journalist's position differences in emphasis and differences about priorities are bound to arise, and such differences have indeed arisen from time to time. Our relationship with the Party has sometimes been described as a sort of marriage, in which the partners never really think in terms of divorce but do think, sometimes, in terms of murder.

In that sense, of course, we have differed on applications, on administration, and so on. I don't think we have ever differed to an extent that would have given our persecutors any comfort, because the differences were always directed to the better implementation, the better and wiser implementation of the basic policy, to which we are utterly committed. We did help in building up this policy of separate development, and we have certainly no idea of ever turning against it. We are totally committed to the basic principles of this policy.

Mr. DE VILLIERS: Do you consider that *Die Burger* has taken a leading part in the shaping of the policy?

Mr. CILLIE: Oh yes, I do think so. I do hope so. In fact, I am quite sure that we did often scout ahead and skirmish ahead in these matters. We have a horror, Mr. President, of any sort of stagnation or any sort of complacency in public life, also in these matters, and we do try to scout ahead and skirmish ahead and always to play this key role, which I think we have played up to now.

Mr. DE VILLIERS: Now, could you tell the Court whether you, as Editor of *Die Burger*, come into contact with foreign opinion, foreign criticism of South African policies and so on?

Mr. CILLIE: Indeed I do, Mr. President. It is quite a preoccupation of mine. In my position you have to have these contacts with people. People come to you from the outside world; you yourself go on travels and you meet these criticisms in these places all the time. I think it is not always realized that we are a very open society, that we have in South Africa certainly the freest and most vigorous newspaper Press in the whole of Africa. You have to meet arguments from the opposition all the time; you have to meet foreign criticism and foreign questions, and I have had my share of that. I have also written for overseas papers at their request; I have written for sections of the British Press and sections of the Press in this country. I have also taken part in debates with critics of the South African policy. So I have been in very close touch with all these developments all these years.

Mr. DE VILLIERS: Have you paid any visits overseas yourself, in the course of your duties?

Mr. CILLIE: Yes, several. I paid a visit to the United Nations and I took part in Chatham House Conference in 1954 in Lahore, where the whole theme was the multi-racial Commonwealth. I was a member of the South African delegation there and, of course, at that time we had to meet the beginning of what later became a storm of criticism of South Africa's racial policies.

Mr. DE VILLIERS: Mr. Cillie, I should like you to take for granted that other witnesses like Dr. Eiselen, Professor Bruwer and Professor Logan have given the basic facts to the Court about different population groups in South Africa and in South West Africa—differences between the

groups and so forth—so that you need not deal with the factual field again, apart from any comment you want to base upon that.

I should like you to concentrate on the political aspects and implications of the differences between the various groups—on the forces behind those political aspects in their historical setting, in their present context and as a matter of future prospect. And I should like to begin by asking you, what do you consider as the main determinant of the policies of differentiation as now applied in South Africa and in South West Africa?

Mr. CILLIE: Mr. President, apart from the realities of the South African situation itself, I would say that the main force that shaped these policies has been the experience and the history of the Afrikaner people in South Africa. By the term "Afrikaner" I mean the Afrikaans-speaking population of Western European descent. Their language has become quite a distinctive language. It evolved from the Dutch. We can still understand each other—at least 90 per cent.—and the African traditions of these Afrikaans people go right back to the beginning of the European settlement in 1652. There were various accretions to this central Dutch core—French and German and British, mainly. My own name, as I mentioned, is French. This original settler population developed, as time went by, a sense of its own identity. This apparently happened at quite an early stage, at least among some of the settlers. Although they were ruled from Holland, the great distance and their own distinctive circumstances and interests soon led to the emergence of what I would call a sub-national personality.

As early as the beginning of the eighteenth century, according to the records, some of them were calling themselves Afrikaners, meaning "people of Africa", and they were, even at that time, asserting rights and freedoms against what they regarded as tyrannous and arbitrary acts of the Dutch authorities—more specifically, the Dutch East India Company, because the whole settlement was a commercial undertaking of that Company. In the perspective of today it was the beginnings of what people would nowadays call anti-colonialism or nationalism, if you like. In fact, a distinct people of western European descent, with its own way of life and speaking a more and more divergent form of Dutch, was then being born in Africa.

Its standards and its customs, deriving from Europe, were too different from those of the other peoples of the sub-continent for more than what one would call marginal mixing. These other peoples, the Bushmen and the Hottentots in the west and the various migrant Bantu tribes that were then moving down the eastern side of the sub-continent, had tribal and national identities of their own.

Mr. DE VILLIERS: Was there ever any conscious attempt at welding all these different units into one people, in the modern sense of the term?

Mr. CILLIE: No, that was quite unthinkable. Mr. President, these people were too different altogether for any idea of welding them together into one nation in those days.

Mr. DE VILLIERS: So far you have spoken in general as from the time of the first Dutch settlement. Do you attach any importance to the British take-over of the Cape and its effect?

Mr. CILLIE: Indeed I do, Mr. President. I think that it was a very decisive event indeed in the evolution of this new White nation of Africa —this British take-over during the Napoleonic Wars. The second and final British occupation took place in 1806. It cut off the Cape settlers

from their Dutch homeland physically and finally and left them to their own resources, either to preserve their own emerging identity as a separate people, or to be assimilated to the British way of life. I think it can be described very simply as a choice between integration or assimilation with the British world as it then was, on the one hand, and, on the other hand, their own separate way as a distinct people of Africa. In a way I think they chose both, in the sense that the British impact on the Afrikaner people was quite considerable. They took over many customs and attitudes of life which I would describe as distinctly British.

But more influentially and lastingly this Boer people, this Afrikaner people, chose the way of anti-imperialism or anti-colonialism or nationalism, which all come to the same thing, namely the building up of a separate national identity, involving the refusal to be absorbed into a greater and, to them, largely alien whole—in short, what in the political language of today would be called "the way of separate national development". That was their choice, as far as the majority were concerned.

Mr. DE VILLIERS: How, more particularly, was that choice manifested?

Mr. CILLIE: The Afrikaners, after the British occupation, asserted this will to separate freedom in various ways, but mainly by trying to get away physically from British rule, and by creating their own republics and forms of government to the north of the Cape. It was possible in those days, because South Africa is a very large country. The distance between Cape Town and Johannesburg, is, I think about the distance between this city and Moscow, and parts of the interior then were quite empty of people or very thinly occupied by migrant and warring and sometimes settled Bantu tribes.

In this way various Afrikaner states came into being, some of them ephemeral and some more lasting. But it was the age of expanding Western imperialism and what has been unkindly called "the scramble for Africa", and British power at that time was gradually extending itself northwards from the Cape over the whole of Southern Africa. In the end there came the Anglo-Boer War at the turn of the century, in which the Free State and Transvaal Republics were overwhelmed after three years of struggle. We regard that as actually the first anti-colonial war in Africa of this anti-colonial century. It was a war, from the Boer point of view, from the Afrikaner point of view, against imperialism, against foreign domination and, positively, for national freedom and separate national development. Although it was lost on the battlefield it was, to a large extent, won in the minds and the hearts of people, including the British people.

Eight years afterwards Parliament at Westminster granted complete internal self-rule, not only to the two vanquished republics, but to the whole of South Africa, apart from the protectorates. A State was created—a new State, the Union of South Africa—consisting of four former British colonies—the two Republics, Natal and the Cape—and they in time attained complete independence, first as a member of the Commonwealth and later outside the Commonwealth as the Republic of South Africa. It all happened rather slowly by present-day standards, partly because the times, I think, were more leisurely, and partly because of the presence in South Africa of a fairly big minority of British extraction who quite naturally applied the brakes to the Afrikaner-led drive for independence and republicanism. For very many years this was actually the main preoccupation of South African politics—this building of a bicultural nation

between two very tough strains, Western European strains, both western in outlook, but speaking different languages and maintaining their own institutions in many spheres of life, as they do up to this day. I do think that, considering the weight of a rather bitter past and the vastness of the human problems involved and the depths of the mutual fears, we did rather well in this respect in the time and with the resources at our disposal.

Mr. DE VILLIERS: What respect is it you mean particularly?

Mr. CILLIE: I think that we did succeed to this point, that today English- and Afrikaans-speaking South Africans of European descent are gradually becoming integrated into a single South African nation on the basis of mutual respect for each other's institutions and traditions. I do not think it is an accident that this is happening under the political leadership of the Nationalist Afrikaners, who, after all, do embody the outlook and the tradition of a distinctive South African nationhood. So we now have an established White African nation that has won its freedom in the hard way, and in an often desperately slow way, and a nation, I think, who must in no way be confused with European settler minorities elsewhere.

Mr. DE VILLIERS: What do you consider to be the significance of that distinction?

Mr. CILLIE: The Afrikaners, by being cut off from their original Dutch homeland, ceased to be colonials—colons—more than a century and a half ago, and those European people who came later during the time of British rule are now largely falling in with that view, the basic view that we are there to stay as a White African nation, and in the second place that we are there to stay with full control of our destiny as a nation. By that I mean that colonial minorities tend to hold on as long as possible, and then they abdicate, or they depart under the usual anti-colonial pressures; but a nation cannot do that—by its very nature it cannot do that; a nation has to defend its freedom and its right to self-determination to the very last and, even if beaten down by superior force, it has this inner compulsion to start its struggle for freedom all over again. That, Mr. President, as I see it, is the sort of mentality people from outside are up against when dealing with the White Africans of South Africa. I stress the point because the dangers of misunderstandings and miscalculations in these matters are very great, and I think very real.

The PRESIDENT: Mr. de Villiers, when are we going to be connected up with South West Africa?

Mr. DE VILLIERS: I am coming to that immediately, Mr. President.

The PRESIDENT: Well, please do.

Mr. CILLIE: In many quarters I think we are being, quite wrongly, grouped with the so-called colonialists, the relics of the age of imperialism that have to abdicate, or be forced to do so—but, in fact, the White African nation is largely a child of anti-imperialism and anti-colonialism, with all the inner strength that that background implies. We regard ourselves as one of the free nations of the earth, and we feel ourselves better equipped than most for the role on account of a longer and more thorough apprenticeship.

Mr. GROSS: Mr. President.

The PRESIDENT: Mr. Gross.

Mr. GROSS: I should like to reserve a general objection to this witness propagating a doctrine in this court-room rather than testifying to it

which, in my respectful submission, is what he is doing in these last few minutes, sir.

The PRESIDENT: The last few minutes have been something which seem to me to be very unconnected with the issue which has been placed before the Court, Mr. de Villiers. You said you were going to come to South West Africa—well, please do come to South West Africa.

Mr. DE VILLIERS: Yes, Mr. President, the next question will bring us there, I think.

The PRESIDENT: Please put it.

Mr. DE VILLIERS: Mr. Cillie, I want to ask you whether you think that the factors you have just stressed are of importance as regards policies concerning relations between the various population groups, White and non-White, in Southern Africa—in South Africa and in South West Africa?

Mr. CILLIE: Of course they are—I think they are fundamental. If you subscribe to a credo of nationalism or anti-colonialism, you cannot stop short at championing the freedoms and the rights of those whom you regard as your own group. Within the geographical borders of South Africa, as it was established in 1910, and within the geographical borders of South West Africa, we have this great variety of non-White peoples towards whom we had and we have responsibilities very akin to those of the Western European colonial powers towards their colonial peoples.

Mr. DE VILLIERS: How have these responsibilities been approached in the context of South Africa and South West Africa?

Mr. CILLIE: Well, as happened elsewhere, our relationships with these peoples became more urgent as the tide of anti-colonialism gathered force during this century. As their aspirations and ambitions grew, we, the ruling White Africans in these territories, in South Africa as well as South West Africa, had to see to it that our trusteeship did not degenerate into oppression. There were two obvious lines of thinking in this matter which could be followed, and both have their adherents in South African politics. The one way is to regard the whole of the South African population, or the whole of the South West African population, as potentially one nation, and to try to integrate them all—all these vastly disparate elements—into one all-embracing social and political structure. People of my way of thinking reject this course completely, and I think this rejection has gathered force in South African politics as the position developed during the last 10-20 years. These solutions do open up a prospect of the White Africans in these two countries being politically overwhelmed by the sheer weight of non-White numbers, and the overwhelming involves not only the White Africans, it involves the smaller non-White groups. I think we feel about this whole idea of integrating the whole of the South African and the South West African population into one single nation more or less as the British would have felt about a plan, quite hypothetical, for granting India its freedom, not as a separate grouping of peoples in a separate country, but by integrating India's millions into the British social and political structure—in short, by trying to make one nation out of the 40-50 million Britons and the 400-500 million Indians and Pakistanis. Obviously one can only attempt solutions like these when dealing with fairly small minorities who are in addition not too divergent from the main group. When dealing with majorities, or collections of minorities that could be manipulated as majorities, even the beginnings of such an integration policy raise

such fears among the ruling people that the policy itself never gets off the ground.

Mr. DE VILLIERS: Can you indicate whether the one-nation concept, with or without qualifications, has been advocated in politics in South Africa and in South West Africa?

Mr. CILLIE: It has been done very vehemently, both in South West Africa and in South Africa. It has its full-blooded supporters in South African public life, some of them very prominent and intelligent people; there are also groups who do not go the whole hog, who do not tell the whole story and who do not chart out the whole course—one could call them people who advocate a sort of middle-of-the-way policy. We have, for instance, a party who advocates a general but strictly qualified franchise under which people would attain political rights on the basis of their level of civilization, with no regard to their group affiliations. These and even more watered-down middle-of-the-road solutions are being offered continually to the South African electorate by South Africans.

The PRESIDENT: Mr. de Villiers, I would be very glad if you would indicate to the Court, having regard to the detail and the nature of the witness's evidence so far, to what particular issue in the case you say it is relevant.

Mr. DE VILLIERS: It is relevant, Mr. President, to the issue of a contention as we understand it on the part of the Applicants of the existence of a norm of non-discrimination or non-separation in its particular application to the political sphere.

The PRESIDENT: Well, in what way is it relevant?

Mr. DE VILLIERS: The political sphere in Southern Africa, the norm and the standards of the same context. We wish to indicate by this evidence, as I put to the Court before, that the application of such a norm in the political sphere with or without qualifications in Southern Africa, including in that South Africa, just as any other country in the world may have been relevant, is unviable and quite impossible, that it is not being put into practice in those parts of the world, and if it should be put into practice it would lead to chaos. I understood my learned friend's case to be—he put it specifically that way in his Reply which is before the Court, at **IV**, page 441, which I have quoted to the Court before, and in subsequent elaboration of his case in Oral Proceedings before this Court—that in the political sphere it means the application of norms and standards which require in South West Africa the application of a system of universal adult franchise within one single political unit. The purpose of this evidence is to show how completely impossible that whole concept is when regard is to be had to the well-being and progress of the peoples concerned.

The PRESIDENT: At the moment I do not see that all this detailed evidence is necessary, but the matter will be considered between now and 3 o'clock. Did you want to say something, Mr. Gross, before the Court adjourns?

Mr. GROSS: If I might reserve a moment, if it pleases the honourable President, to respond to the comments of the counsel for the Respondent, but I would be prepared to do so on resumption, subject to your pleasure, Sir.

The PRESIDENT: The hearing is resumed. Mr. Gross, I understand you desire to address the Court?

Mr. GROSS: Yes, if you please, Mr. President. The Applicants would respectfully request the opportunty to indicate points of procedure without trenching on the merits, in the context of the present evidentiary situation and of the remarks of the Respondent's counsel in his interventions, sir.

In four points, Mr. President, these are, briefly stated:

(1) As the honourable President will be aware, the Applicants respectfully have maintained a general objection to any and to all evidence, proffered or led by Respondent, on a foundation such as that laid by the Respondent with respect to this witness. The Applicants refer specifically to the formulation that the witness will testify, and I quote from the letter of the agent of the Respondent, dated 6 July 1965 [1], as follows:

> "Witness will testify with regard to the feasibility or otherwise of application in practice of a suggested norm and/or standards of a content as contended for by Applicants."

The Applicants' general objection to this foundation is reaffirmed on grounds previously stated, sir.

(2) The Respondent's counsel in his last intervention made reference to the Applicants' Reply, **IV**, page 441. The Applicants would respectfully draw to the Court's attention the language employed in the Reply at that page, the context in which it was employed, and the United Nations judgments to which the statements on that page are footnoted.

(3) The witness has been qualified, and has taken declaration, as an expert in the field of journalism and his opinions, in the Applicants' respectful submission, should be confined to that field in his capacity as expert.

(4) In respect of evidence offered or given by the witness as a witness rather than as an expert, it is respectfully submitted that the evidence thus far adduced is immaterial, and at best of tenuous relevance. The Applicants respectfully suggest that evidence regarding, and again I quote from the letter of 6 July 1965 of the agent for the Respondent to the Applicants: "political aspects and implications of the policies of differentiation applied in South Africa and South West Africa" is embodied *in extenso* in the voluminous written pleadings filed by the Respondent. If Respondent desires to cumulate or amplify such evidence the Applicants would have no objections, subject to the wishes of the honourable Court, to the production of supplementary documents in terms of Article 48 of the Rules of Court, reserving the Applicants' right to comment upon such documents, subject to permission granted by the honourable President. Thank you, sir.

The PRESIDENT: Well, Mr. Gross, with regard to the last point that you have raised, the Court has already ruled that the Respondent has the right to call oral evidence and unless the Respondent is prepared to accept the stipulation which you have indicated, the matter must rest there. There is no capacity of the Court, unless such evidence is irrelevant or otherwise inadmissible, to exclude it. That is the right of the Respondent.

So far as your general objection is concerned that is noted, and of course it will be, as I have indicated throughout, for the Court in its final deliberation to determine to what extent any evidence which has been admitted, subject to objection, is relevant to the issues which the Court will decide, and what weight will be placed upon it.

Mr. GROSS: Yes, sir.

[1] See Vol. **XII**, Part IV.

The PRESIDENT: So far as the question of the expert position of the witness is concerned, the Court does not think that that is limited to his expertise as a journalist. Experts may qualify in other fields than that which is their normal qualification, if they reveal a special knowledge which is far in excess of that which is normally held by a lay person and, where a witness so qualifies, it is a question of the weight to be accorded to his opinion, not a question of the admissibility of the expert view which is expressed. That again is a matter which the Court will consider in its deliberations.

So far as your second objection is concerned I am afraid I have not the document before me but that will be noted and regard will be paid to it by the Court.

The question which was raised by me with Mr. de Villiers was the extent to which certain evidence of the witness is relevant to any issue in the case. It seems, Mr. de Villiers, that the evidence is fairly remote from the issue—the question that the Court is concerned with is whether or not the Respondent has discharged its obligation under the terms of the Mandate, paragraph 2 of Article 2. In other words has it promoted to the utmost within the meaning of those words: "the material and moral well-being and the social progress of the people of South West Africa". One of the two grounds which were indicated by you this morning, if I didn't misunderstand them, was that the policy of integration or non-separation if applied in South West Africa would not be viable, and not being viable it would accordingly not be for the social, moral, or material wefare of the people. But so much of the evidence given by the witness has been directed to South Africa itself, and whilst the policy of apartheid is pursued in South Africa as well as in South West Africa, it does not follow that because a policy is or is not viable in South Africa that it is or is not viable in South West Africa. The circumstances are somewhat different. You have a very substantial number of White people in South Africa and only a small proportion of the total population in South West Africa happen to be White. I am sure you will do your utmost to bring the witness to the issues in relation to South West Africa. So far as the second question of evidence of State practice in relation to alleged international custom is concerned, it is difficult at the moment to see why it is necessary or relevant to adduce evidence as to State practice in South Africa, since it is not disputed that that practice does not accord with, but is contrary to, the custom which the Applicants have relied upon under Article 38, paragraph *(b)*, of the Statute. All that one need say at the moment is that a great deal of the evidence which has been given by the witness, whilst it explains the policy of apartheid, is not yet very closely at all linked up with South West Africa. I think that the Court must leave it to counsel to bring the evidence as quickly as possible to the issues which the Court has to deal with.

Mr. DE VILLIERS: Thank you very much, Mr. President. May I offer a very brief word in explanation? I think it may help in the further presentation of the evidence. I may say with respect that I am fully in agreement with the proposition that the Court is concerned with South West Africa and not with South Africa, and I would be the last one to try and enlarge the issues in the case so as to comprise a full survey of whatever policies or practices or laws may be applied in South Africa. But, Mr. President, in the context of deciding what is best in South West Africa, particularly the political implications of what is urged upon us

by the statement of the norm and/or the standards to be applied, as advanced by the Applicants, we find it impossible to isolate the case of South West Africa from Southern Africa generally. There are certain implications which run over the border lines—not only into South Africa but also into other parts of Southern Africa. It is not our idea to enlarge unduly upon those as regards matters of detail, but we thought that it would be relevant to draw the Court's attention to that, and the witness intends to do so, not only because of implications in South Africa itself but in Southern Africa in general, in the two directions, (1) as regards the negative implications of the application of a norm and/or standards as contended for in the political sphere and (2) the positive aspects and positive prospects attached to proceeding upon the basis of differentiation as the South African Government is doing at the moment. I may say that the witness has given almost a third of his evidence-in-chief. We shall not take an undue time about it, I should say about another hour should see the evidence-in-chief through—and this is the only context in which those matters outside of South West Africa are brought into the picture at all.

The PRESIDENT: The Court will, of course, permit you, on your undertaking to connect it up with South West Africa, to proceed, Mr. de Villiers, and the actual relevance of it and the Court's determination thereon will be a matter for subsequent deliberation by it.

Mr. DE VILLIERS: Certainly, Mr. President. Mr. Cillie, you were dealing with the possibility of applying so-called middle-of-the-road policies—policies of moderation, moderating somewhere between an extreme of differentiation and one of integration and as to their actual advocacy in the Southern African scene. I don't think you had completed what you wanted to say upon that subject.

Mr. CILLIE: Yes, I was saying, Mr. President, that the idea of what I call a one-nation concept, the idea of bundling a lot of divergent peoples together, and trying to form one nation out of them, both in South West Africa and in South Africa, has its very vehement propagandists in South Africa, some of them very prominent in public life. I was saying also that we have a party there which advocates for both South Africa and South West Africa the idea of a qualified franchise under which people would attain political rights on a basis of their level of civilization and with no regard to their group affiliations. These policies are propagated in South Africa, they are freely propagated in the Press and through political parties and they are offered continually to the South West Africans as well as to the South Africans. They get full play but they have in actual fact made no headway at all during the last 17 years since 1948, ever since the Nationalist Administration came to power. The advocates of these policies have consistently gone back, not only in the number of their parliamentary seats but also in the aggregate vote, and that goes equally for South West Africa, where they have gone back even further than in South Africa itself. The reason, I think, is fairly simple, because every so-called middle of the road policy, every policy that suggests giving limited rights to these various groups inside one political structure, does raise fears immediately that the end of this policy is a position of one man, one vote, and that once you start, there is no logical, and indeed no practical stopping place short of universal suffrage.

Mr. DE VILLIERS: Now, Mr. Cillie, could you then indicate what you regard as the alternative to a policy either of building one intergrated

nation out of all the constituent elements, or of middle-of-the-road policies. What do you regard as the alternative?

Mr. CILLIE: I think we have chosen in South Africa, through our political processes, what I regard as the only fundamental alternative to this impossible principle of a one-nation concept in either of the two territories. And I do not think that fundamental concept is in conflict with fundamental Western principles. Just as the Western European imperial powers decolonized, not by integrating their various colonial peoples with the ruling people back home, but by separation, by letting them advance separately through their own separate institution, we chose the way of separate development—trying to build up these vastly disparate non-White peoples into self-respecting and self-governing organic entities.

Mr. DE VILLIERS: Do you think this comparison between the cases of relationships within South Africa and South West Africa and the decolonization process by the Western powers is really a valid one?

Mr. CILLIE: Yes. We have been told that this is not valid, because, whereas the Western powers had all their colonial peoples in separate, distant lands which could in time develop into separate independent states, South Africa has her under-developed non-White peoples within her borders and within the borders of South West Africa in two geographical units. Now, our answer to that is, firstly, that, basic psychological facts about the relations between groups do not change by virtue of a mere change in circumstances. To take a parallel, the British people's aversion to being outvoted by an overwhelming majority of Indians, would certainly have been increased rather than decreased if they had had to share the same country with an Indian majority. And, in the second place, there is nothing immutable about national borders or political institutions, especially if one looks at the way many of them came into being. We have, in fact, in pursuance of this policy of separate development, started tentatively to redraw the map of South Africa and South West Africa. We are only at the very beginning of the process of demarcating more clearly the ancestral and future lands of the various Bantu peoples—that is what the political section of the Odendaal report is about—and these areas are to form the basis of Bantu provinces and Bantu states with their own self-governing institutions.

Mr. DE VILLIERS: What is the object of creating these various separate Bantu and non-White political units?

Mr. CILLIE: It is the way we have chosen to meet the urge of self-determination and freedom which is a universal and natural urge, as it emerges among the non-White peoples of South Africa and South West Africa. We are giving them increasing rights and responsibilities in running their own affairs. We are, in effect, doing inside the geographical frontiers of Southern Africa what the Western European imperial powers did, and are doing, about their own colonial peoples: granting them their own separate freedoms without jeopardizing the existing freedom of the—shall we call it the metropolitan people, the ruling people.

Mr. DE VILLIERS: Do you think that in the South African context and in South West Africa there is a greater risk involved in this process?

Mr. CILLIE: Oh yes, very definitely. It is a far more risky process for us, this granting of separate freedoms, for the simple reason that we shall have to live very closely with what we are doing and what we are going to do. By the very nature of our position as a White nation of Africa, we cannot pull out and go back to some safe metropolitan haven.

We have to sit it out, we have to put these Southern African non-White peoples on their feet and we hope to lead them, as best we can, through their adolescence and to maturity; and then we have to recognize the new personalities that have grown up next to us, we have to co-operate with them for all future time, and for the common good, because there is nothing static about this concept of separate development. It is the principle by which we are trying to meet the challenge of change, and as I have tried to show it is nothing alien, as far as we can see. It is rooted in Western European principles of freedom, as we understand them.

Mr. DE VILLIERS: Mr. Cillie, you have now dealt with the alternatives of the process of integration, trying to make one nation, on the one hand, and the process of separate development, the broad nature of which you have sketched, on the other, and then with various suggested middle-of-the-road policies. If I may revert for a moment to the way in which I understand the Applicants to put their case in regard to a norm and/or standards in the political sphere. I understand them to suggest that it may be permissible, under certain circumstances, to have differentiation, but that that ought to be coupled with freedom of choice on the part of the individual, so that where provision has been made for the group to which the individual belongs, the individual would nevertheless have the freedom to say no, I would rather have for myself the provision which is being made for another group. Now if we are to apply that idea to the political context of the various groups in South Africa and in South West Africa, what do you see as the prospects of such a possibility?

Mr. CILLIE: They do not work, and will not work, Mr. President, because in the political sphere, that is a very nice theoretical idea when you are dealing with very small minorities; they can have their own separate institutions and they can still share in the power at the centre. But we have had those situations in South Africa, we have had positions like that, and we have seen the results. I think of the common-roll vote for the Bantu of the Cape Province that we had up till 1936. These people could come on the common roll with the Whites at a certain level of development, and it became such a disrupting influence in, shall we say White politics, that by common consent, or almost unanimous consent in the end, this common-roll vote was removed. As I say, you can deal with these situations when you deal with very small minorities, but we in South Africa are not dealing with small minorities, these are big minorities, these are in fact peoples, and this sort of solution, having separate institutions for these people, and then allowing them on the basis that counsel suggested, to allow them . . .

The PRESIDENT: Mr. Gross . . .

Mr. GROSS: Counsel for the Applicants, or the Applicants, have not suggested anything with respect to South Africa. It is the understanding of the Applicants, respectfully, that the witness is testifying with regard to South Africa. I understand Respondent's question was addressed to South West Africa and I object to these polemics regarding South Africa, which are irrelevant in any event.

The PRESIDENT: Well, Mr. de Villiers, I think, perhaps, unnecessary time is spent in debating the admissibility of evidence, but do please keep the witness's attention directed to South West Africa, the evidence does tend to wander too much at large, in my view.

Mr. DE VILLIERS: May I just indicate that we have had other evidence about other countries and other situations in the world in testing out whether these norms and these standards can be said to be of general application or can be applied to good effect. South Africa provides purely an illustration in this respect.

The PRESIDENT: There is no dispute about South Africa, about the practice in South Africa, Mr. de Villiers, the practice in South Africa is that there there is differentiation, that is conceded, there there is separation, that is conceded; what purpose is there in having further evidence in respect of an undisputed fact?

Mr. DE VILLIERS: With respect, Mr. President, it does not concern the fact of the application of policies of differentiation; it concerns the suggestion with which we are met, that we are to impose an element of rigidity into the situation in South West Africa—an element whereby the different groups are not treated entirely as different groups, but whereby a certain individual choice is to be permitted. That is the suggestion with which the witness is dealing at the moment—he is merely illustrating it, as I understand, in regard to a particular situation, but I shall ask him to deal with it more particularly in regard to South West Africa. Will you please, Mr. Cillie, in dealing with this question, apply it specifically to the South West African situation?

Mr. CILLIE: Yes, I was thinking that we have had these experiences and we are going to have the same experiences . . .

The PRESIDENT: I think it better, Mr. Cillie, if you respond to the question which is put to you by counsel—will you put your question to the witness again, Mr. de Villiers.

Mr. CILLIE: Applying this to South West Africa, I was saying that we have had the situations, we have had experiments in Southern Africa on those lines, and I do believe that it is going to work out the same way in South West Africa. I cannot see it working differently in South West Africa from the experience that we had in South Africa.

Mr. DE VILLIERS: Now, you were dealing with the point that the general policy of separate development is not a static one, that the whole concept of it is not static, but dynamic, and I should like you to indicate to the Court what you consider to be the positive values of an approach of separate development, particularly as applied to South West Africa in the general context?

Mr. CILLIE: Yes, as counsel suggests, there is nothing immutable about this policy of differentiation and demarcation. In fact, the whole Odendaal report is an advance on previous solutions. The whole idea implies differentiations and demarcations, but it is adapted as we go along. Particularly, we foresee that in South West Africa as well as South Africa, as political organs and economic and social institutions develop among the various non-White peoples, there will arise possibilities of contact and consultation between the established White authority and these various new and separate entities. Less and less it is going to be in Southern Africa a matter of unilateral decisions and arrangements. It stands to reason that, as children grow up and develop a will of their own, their wishes have to be taken into account in the affairs of the family, and that is what we are driving at.

Mr. DE VILLIERS: How then do you see the question of ultimate shape, of where this is leading to?

Mr. CILLIE: Well, that is a very large question, Mr. President. I can

only say that it would be futile now to draw up detailed blue-prints for these territories when dealing with such dynamic processes. There are certainly going to be in Southern Africa some black States, and I foresee one in South West Africa itself—at least one. These States in Southern Africa are not only being created by South Africa, it is also being done by the British. They are leading to independence the three so-called Protectorates—Bechuanaland, Basutoland and Swaziland. But certainly not all the non-White peoples of South West Africa and South Africa can look forward to a separate existence in eventually separate States. On the basis of the principle of separate development we shall have to attempt all sorts of varied and flexible solutions. Self-determination, freedom, as I see it, after all do imply freedom to delegate or to share some aspects of that freedom.

Mr. DE VILLIERS: Could you give the Court examples of the type of flexible solutions which you foresee?

Mr. CILLIE: Yes, various models and patterns have been tentatively held up at various times. The Prime Minister of South Africa himself spoke in terms of the concept of a commonwealth of nations in South Africa and South West Africa, as the freely associated grouping that may eventuate from the policy of separate development. On other occasions he has referred to aspects of the European Common Market, which seems to be a combination of economic interdependence and political independence. What we find attractive about these groupings, whatever difficulties they may run into, is that they reject the idea of majority rule and they substitute methods of consensus in getting to common purposes. That is partly why we tend to reject the prospect of a federation as an over-all solution for South West Africa or South Africa, because the concept of federation does seem to retain the principle of majority rule, which we find inappropriate and unacceptable in territories in which all peoples are in fact minorities. So, if you tie yourself down to a federal solution, you do seem to put the whole idea of separate development into a sort of strait-jacket; you work to a preconceived end, and it is an end mainly conceived by the present leading White people. Obviously the form of future co-operation has to be brought about through consultation of the various groups involved, and you are only now building up the other personalities with whom you are eventually going to have a dialogue.

Mr. DE VILLIERS: So I gather from what you have said that you do *not regard separate development as an end in itself?*

Mr. CILLIE: No, certainly not. It is not an end in itself. I think it is generally conceded nowadays, on the international plain, that in the modern world nationalism is not enough. In this sense the mere building up of group identities is not enough; it is our way to better co-operation and a more satisfactory co-existence of the peoples of South Africa and South West Africa. We sincerely believe that, by recognizing and providing for these separate identities and by removing mutual threats to those identities, you can attain a multi-national deal that would be more lasting then any other conceivable order. I think that to break down national frontiers indiscriminately, as a way to international co-operation, is obviously political madness. You have, in the international sphere, to recognize the difference between peoples, you have to respect national frontiers, and only then can you begin transcending them. That is our basic approach in South Africa and South West Africa, and

I submit that it conforms very closely to the very best Western European and indeed international thinking on the question of co-operation between peoples.

Mr. DE VILLIERS: What do you think as to the possibilities of the extent of co-operation between various units in Southern Africa that could come from this approach?

Mr. CILLIE: You are talking about Southern Africa?

Mr. DE VILLIERS: Southern Africa generally.

Mr. CILLIE: Yes, our theoretical thinking goes further than the geographical frontiers of South West Africa and South Africa. I would refer the Court to a map in the end of the Counter-Memorial, II. Politically it is a bit out of date, of course (the date of the map is 1963), and since this map was made, there have emerged two new black States. Northern Rhodesia has become Zambia, a new independent African State, and Nyasaland has become Malawi. This also is embodied in the statements of the South African Prime Minister: we are thinking not only in terms of a commonwealth or a common market for the peoples of South Africa and South West Africa—we include in our future thinking the Protectorates, that are very closely linked to South Africa economically; we include the Portuguese Territories, Southern Rhodesia and possibly Zambia and Malawi. This map is a political map, but if you have a map showing the inter-dependence of these various territories, showing the lines of communication, the bonds of investment and of development, the flowing of technological information, you would realize that this is already a very interdependent collection of territories. We include them in our thinking because South Africa does not want to be thrown into isolation into a corner in Africa, not only on our own behalf, but because we believe that we have a lot to offer to these other peoples and territories of Africa. We have the experience, we have the know-how, we have more resources than some of these others, and our strength could form the basis of a very strong and very fruitful association of States.

Mr. DE VILLIERS: So you see these as realistic possibilities for the future?

Mr. CILLIE: Yes. Granted more-or-less orderly and peaceful evolution, Mr. President, a vast range of possibilities do suggest themselves in Southern Africa.

Mr. DE VILLIERS: What do you mean by that proviso—"granted more-or-less orderly and peaceful evolution"? Did you say that?

Mr. CILLIE: Well, there is the rub. The successful implementation of this promising, but very difficult policy in Southern Africa is utterly dependent upon the sustained will and the capacity of the present leading people, the White people of South Africa, to carry it through. It is dependent on these people's willingness to take the long view and to shoulder the necessary financial and other burdens and to make the needed adaptations. They have to recognize, in short, and they have to keep on realizing, that they have to lead others to self-realization and freedom if they themselves want to remain free in the truest sense of the word. That is the sort of enlightened self-interest, the sort of caring for other groups than your own, that becomes increasingly difficult when you feel yourself threatened. Any sort of generosity, I should say, all wisdom in statesmanship is to some extent a function of a sense of security. Threats to that security, of course, could arise from various sources, in South Africa and South West Africa. I would like to distinguish between two kinds

of threats. The one sort of threat comes through encroachments. If a group encroaches on the preserves of another you get a feeling of fear and you engender bitterness and hostility which make all sorts of positive and constructive action very difficult. That is the one sort of threat that could upset, what I call orderly evolution. You really cannot expect the White South Africans in South Africa and South West Africa to act generously or wisely if they are continually being threatened in their social institutions or in their economic position by encroachments by other groups; it puts their backs up, and instead of co-operation and friendliness you get tension and hostility.

Mr. DE VILLIERS: Do you regard that as a factor which would be harmful to general development?

Mr. CILLIE: Yes, that is the real justification for some of the legislation that has been under attack in this Court and in other forums. Some of these measures may become unnecessary in the light of changing circumstances. Some of it may seem stupid to people who do not understand the situation—I can well imagine that there is almost no country in the world that has not got some legislation that appears stupid to outsiders. I can say that, in so far as such laws stand in the way of the principle of separate development, they will have to be changed or revoked in time. Here again there is nothing immutable about the South African set-up. We do change and we do adapt as we go along.

Mr. DE VILLIERS: Have you any examples in mind?

Mr. CILLIE: I believe there has been some talk in this Court about the training of non-White engineers. I do not know what the exact legal or administrative barriers to such training may be, but I know that if they do exist they will have to be relaxed or removed, because obviously you cannot have economic development in the Bantu areas without engineers, preferably Black engineers. We shall need in South Africa in the future all the engineers we can get, and we shall have to train them as we train non-White doctors and teachers and indeed all sorts of professional people, to serve their own peoples. But then, again, you cannot risk sabotaging this whole constructive outlook on the part of the Whites by allowing a process of encroachment to put economic and social fears into the hearts of the White people.

Mr. DE VILLIERS: You mentioned one type of threat to the possibility of security and orderly development. Have you any other in mind?

Mr. CILLIE: Yes. This I regarded as a threat from the inside, threats arising from the situation itself. But the South African Government has had to try to act generously and decently and wisely during the past 17 years under a mounting threat of coercion and intervention from outside.

The PRESIDENT: I don't think this needs any development, does it? In what way is this going to carry the case any further?

Mr. DE VILLIERS: Mr. President, this brings in the factor of an attempt to impose a norm and/or standard from outside. That is the relevance of the evidence as we see it.

The PRESIDENT: How is that relevant, Mr. de Villiers? Even if there were attempts to impose a norm from outside, if a norm or standard exists does it matter whether it has been sought to be imposed from outside? If on the other hand no norm or standard exists does it matter whether one was or is sought to be imposed?

Mr. DE VILLIERS: Yes, but an attempt to impose standards or so-

called standards which have not attained the force of law, nevertheless by political pressure. That is the context.

The PRESIDENT: It seems to be very remote from the issue which the Court has to determine at the moment. We are not, in this context, concerned with every possibility; we are not concerned with the action of other nations; we are concerned with South Africa's discharge of its obligations in relation to the Territory of South West Africa. It seems to me that the evidence which you are seeking now to open up has little to do with the issues the Court has to decide.

Mr. DE VILLIERS: But it is coming directly to the suggested content of the norm, Mr. President.

The PRESIDENT: How does it come to the content of the norm?

Mr. DE VILLIERS: The content of the norm as applied in the political sphere, namely the content of universal adult suffrage within the framework of a single territorial unit.

The PRESIDENT: Mr. Gross?

Mr. GROSS: Mr. President, with respect, I believe that counsel is making a legal argument and I would not wish to presume on the Court's time to request an opportunity to answer it, but this is a misrepresentation, surely unwitting, of the Applicants' case. With all respect, sir, I just will note an objection on this line of argument by the Respondent's counsel.

The PRESIDENT: The objection is noted, Mr. Gross.

Mr. DE VILLIERS: Mr. President, I am sorry, but this is a fundamental matter to us, and perhaps I don't see it correctly. My learned friend, in his presentation to this Court on 17 May, two days before the final amendment of his submissions, presented to the Court what he described as the *corpus* of fact upon which he relies and he made this statement in that record of 17 May:

> "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." (**IX**, p. 284.)

And that, Mr. President, with respect, links up with the explanation which I have referred to in the Reply at **IV**, page 441, the wording of which I wish to read to the Court, because it is so explicit:

> "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."

The witness is about to address himself to the question of attempts

being made from outside in the political sphere, quite apart from the legal proceedings here, to impose a norm of that nature in the political sphere upon South Africa and upon South West Africa. And it is, in my submission, highly relevant that he should deal with the effects which those attempts have in practice and upon the well-being of the people concerned.

The PRESIDENT: In short, you are saying now that part of the Applicants' case is that the Respondent should have given universal suffrage to the peoples of South West Africa?

Mr. DE VILLIERS: Within the framework of a single territorial unit, Mr. President.

The PRESIDENT: Yes. That is, you state, part of the Applicants' case?

Mr. DE VILLIERS: Yes, Mr. President.

The PRESIDENT: This is the first time I have heard you state that, Mr. de Villiers, but still, if you say that it is part of the Applicants' case then proceed with the evidence.

Mr. DE VILLIERS: That would appear to be the case, as stated here, sir, explicitly. If my learned friend tells me that that is not his case and can tell me in substitution what his case is in the political sphere, then perhaps I could deal with it.

The PRESIDENT: Yes, Mr. Gross?

Mr. GROSS: I hardly know how to proceed, Mr. President. This seems to require legal argument of the sort which I know, with all respect and deference, is not in place here. Just for the sake of the record I should like to read the sentence following the two sentences quoted by Respondent's counsel on **IV**, page 441, of the Reply.

> "For an elaboration of the views of the United Nations which have given rise to this standard, and of compliance by Administering Powers therewith, the Court is referred to Annex 7 hereof."

The Annex sets forth, in some detail, the judgments of the United Nations with respect to the cognate areas of trusteeship and sets forth the policies, as we elaborated, which explain and elaborate the two sentences quoted by the Respondent. But, without venturing to go into an elaborate argument, there are of course all sorts of qualifications upon the phrases used, "the institution of universal adult suffrage" and the "participation on the part of all qualified individuals". There is no absolute or mechanical standard which is applicable or not, without reference to the issue in this case, which is that *apartheid*, which denies all effective rights of participation—denies suffrage totally—is a violation of the Mandate. That has been, and remains, our case. We believe that the United Nations standards, as elaborated in the Reply, may be considered and, with all respect, should be considered by this honourable Court in interpreting the Mandate and applying the undisputed facts of record constituting apartheid in this respect. I apologize if I have exceeded the Court's patience with an argument. This is directed to, and responsive to, the comments made by the Respondent's counsel.

The PRESIDENT: Mr. de Villiers, you must just proceed and the Court will have to determine later on what relevance the evidence has.

Mr. DE VILLIERS: Thank you, Mr. President. Mr. Cillie, would you indicate to the Court very briefly what you consider to be the effect upon the prospective well-being and progress of the peoples concerned of what you have called "pressures from outside"?

Mr. CILLIE: Yes, Mr. President. These pressures have, in my view, been increasingly directed to the main purpose of making South Africa itself, and South West Africa, conform to this standard of one man, one vote—this standard of universal adult suffrage. It was my conception of the case of the Applicants that this was what they wanted in South West Africa, and if you want that in South West Africa, and we have to grant that in South West Africa, with such a system in a territory next to us, which we administer as an integral part of the country itself, there would be no valid reason for refusing to do so at home. This certainly would, and does, create the utmost resistance and the utmost resolution in the White population of South Africa to resist all these pressures.

When applied to South West Africa, this sort of one man, one vote thinking would create havoc in inter-group relations in that Territory. The dominant group, in terms of numbers, is the Ovambos, whom I believe form about 45 per cent. of the total population. On the basis of one man, one vote their numerical preponderance could be exploited by ruthless and ambitious men to subject all the other groups to Ovambo rule. Not only would the Whites be submerged—and they are going to form for a very long time the framework and the sinews of the administration and economic development in that Territory—but also the most under-developed non-White groups, the weak groups such as the Bushmen or the tribes of the Kaokoveld would be submerged. Thirdly, you are going to submerge the most highly developed of all the non-White groups which are, I think, the Coloured people of South West Africa and the distinctive Rehoboth people. It means to these people, as it means to the Whites, that they are being forced to commit a form of national suicide, and that prospect evokes all the forces of resistance that you would expect in any nation in similar circumstances.

Mr. DE VILLIERS: What connection do you see between this attempt, or this threat, call it what you like, from outside to attempt to impose a standard of that kind and the prospects of evolutionary development which you put to the Court before?

Mr. CILLIE: As I said, it does raise fears among the ruling Whites as to their position and their safety, and it does make them behave in more negative ways than is appropriate in the circumstances, than they should behave. The Whites certainly are not going to surrender themselves to so-called majority rule based on the numerical preponderance of the Black peoples in South Africa or South West Africa. They would resist it as meaning the end of their world, and they will deal with it as such.

Mr. DE VILLIERS: Would that resistance come from the White people only?

Mr. CILLIE: No, I don't think so. As they become wise to what is the probable end product of this, some of the minority groups would act likewise. In fact, we are all minority groups in South Africa. South Africa and South West Africa are really a collection of minorities and you can only get a preponderant majority by a ganging-up of various minorities, say in the name of their blackness, or in the name of their non-whiteness, or what you will. I think the resistance will not be confined to the White people only.

Mr. DE VILLIERS: Now, what do you see as the prospective effect of serious attempts to impose a norm or standards of that kind on unwilling people in South Africa and in South West Africa?

Mr. CILLIE: I think the effects are going to be very evil, because, to

put it in philosophical terms, unity is really a divine idea and the corruption of the best is the worst. Satan himself is supposed to be a fallen angel. So if you try to impose unity, which is a very great and idealistic concept, if you try to impose it on peoples who are not ripe for it, you are going to get the most devilish results.

The thinking on the other side has lately been directed to economic sanctions as a means of forcing South Africa to abandon apartheid as a policy in South Africa and South West Africa. And all discussions—and they have been many: these discussions have taken place in various forums, also in the Security Council—point to the conclusion that sanctions, to achieve any sort of notable results, have to be backed by a naval blockade. That would be an act of war, of course, and be regarded as . . .

Mr. GROSS: Mr. President, may I interject at this line of question and answer, sir, please?

The PRESIDENT: I frankly don't see what we have got to do with this part of your presentation, Mr. de Villiers.

Mr. DE VILLIERS: Mr. President, I shall not press it upon the Court if that is how you firmly feel about it. My concept of it is that the well-being and progress of the peoples of South West Africa have very definite connections with the well-being and progress of other peoples in the whole of Southern Africa. The whole concept of the Mandate is that of a territory to be administered as an integral portion of South Africa. The funds and the resources for development are, to a large extent, coming from South Africa. The whole well-being and progress of Southern Africa of which these peoples form part, is being held up to the Court as part of the implications of this litigation—implications which extend so far beyond the borders of South West Africa itself. Surely it must be, with the greatest respect, a relevant consideration to bring to the attention of the Court that these implications do exist.

The PRESIDENT: To what extent is it relevant to determining whether at the time the Application was filed, there had or had not been a breach by the Respondent, of the Mandate? Are we speaking about the question of the future or present threats of imposing sanctions upon South Africa?

Mr. DE VILLIERS: Mr. President, the relevance of it, in my submission, is this: that the allegation that there has been a violation of the obligation of Article 2 of the Mandate, takes the form implicitly, and explicitly on occasions, that there is to be applied in the political sphere a system of universal adult suffrage, that that is to be imposed upon people, whether they be willing or not to accept it, that is, universal adult suffrage within the context of a single territorial unit, and these are implications of the situation which arise.

The PRESIDENT: They are implications of today are they—implications of today?

Mr. DE VILLIERS: That has been part of the case, as I understood it, as presented to the Court, namely that the situation with which the Court is dealing, is not a static one; it is a dynamic one; it is a developing one. My learned friends have not confined their case to what happened as at the date when these proceedings were initiated.

The PRESIDENT: Very well, Mr. de Villiers. All the Court can indicate to you at the moment is that it seems to be wandering some distance away from the issue the Court has to decide.

Mr. DE VILLIERS: Well, Mr. Cillie, would you briefly conclude what

you consider to be the implications of attempts to enforce standards of the nature I have mentioned, from outside.

Mr. CILLIE: Well, as I said, these discussions at the United Nations and elsewhere point to a desire to impose a certain system on South Africa, and as I said, if it is going to be done in this way, in the way that is being canvassed, certainly it is going to be a mortal threat to the whole of Southern Africa. Innumerable tensions would be created and sharpened, perhaps to the point of sporadic revolt and group wars, and by the time that South Africa itself gets properly strangled economically, practically the whole of the sub-continent would be in a state which I find rather ghastly to contemplate. I am assuming that on the other side there will be forthcoming the unified and sustained will and the military resources to see this thing through, and I realize that this is quite a large assumption, but it is the one on which our persecutors are working. In actual fact, I think tremendous international complications are bound to develop with any such worsening of the South African position.

Mr. GROSS: Mr. President.

The PRESIDENT: Yes, Mr. Gross.

Mr. GROSS: I object strenuously to the polemic or propaganda which has just been enunciated. I feel it my duty to indicate that the Applicants strongly resent the use of this honourable Court as a forum for this type of unsupported accusation lodged against the organization which is responsible for the supervision of the Mandate, and I would request the honourable Court to note that a strenuous objection is made to this line of questioning and to this line of response.

The PRESIDENT: I do not think there is any reference at all to the United Nations or any organ of the United Nations, Mr. Gross. The reference is to "persecutors". There is not the slightest doubt whatever, Mr. de Villiers, that in the presentation of the witness, there are great overtones of politics which may have a bearing on the case which we have to decide, but, surely, it can only be a peripheral one?

Mr. DE VILLIERS: Mr. President, if you will bear with me for a moment . . .

The PRESIDENT: I think the Court has been very patient in respect of a great deal of this evidence, Mr. de Villiers.

Mr. DE VILLIERS: Yes, but I find myself at a disadvantage, with respect. The form which the proceedings have taken has made it impossible for me to do what I indicated to the Court earlier on was our intention, before the presentation of the factual aspects of the case to the Court —and that is, to indicate to the Court the enormous importance of the political aspects of this case. I do not want to present an argument to the Court about it at the moment, but those political aspects which are, very often in our submission, played down by the Applicants, when it suits them, are, in our submission, of the essence of this whole case concerning the well-being and progress of the peoples concerned.

I have not been able—in the way in which the case has progressed, and in the way in which the presentation is now taking place, of to a large extent presenting evidence before there has been argument on the factual aspects where these matters can be brought together, as we intend to do eventually for the benefit of the Court—to lay that foundation as I should have liked to do it, in a way which can only be done in argument. I should like to have this evidence as to the political implica-

tions of the subject on record. The idea is not to create atmosphere; the idea is not to bring political overtones into a Court of law. After all, Mr. President, we objected, and objected most strenuously, to the use of this Court for the trial of a case which is, in essence, a political case; the Court overruled those objections and the case is now in this Court.

The PRESIDENT: Whatever purpose for which you are seeking to introduce the evidence, Mr. de Villiers, there does not seem to be the necessity for the polemics which are introduced by the witness into the presentation of his views, as an expert.

Mr. DE VILLIERS: Very well, Mr. President.

Mr. Cillie, could you indicate to the Court whether you consider that outside interest, outside criticism, outside discussion of the situation has no bearing and no possible influence for the good of the peoples concerned?

Mr. CILLIE: Well, outside criticism, if it is informed, has always been welcome in our country but these pressures that have been building up have not been well-informed, they have been emotional and they have been directed to what we regard as a total destruction of the present South African order. I think these pressures have done great damage to the processes and the speed of that sane and orderly evolution that we want in South West Africa and in South Africa.

We do want time and opportunity to work out the solutions to a vastly complicated and, I think, a universally important human problem. The only sort of pressure, if one can call it that, the only sort of help that is going to do any good at all, as far as I can see, is that which encourages us to go ahead and put our principles into practice with all deliberate speed. Those principles, as I have tried to show, are rooted in our history, which is part of Western history, which is part of universal history. These principles are not strange or alien, only their application in our situation is bound to be a very great test of statesmanship and ingenuity.

Mr. DE VILLIERS: Thank you.

The PRESIDENT: Mr. Gross.

Mr. GROSS: Mr. President, I should like to cross-examine briefly but I wonder whether it would be convenient to the honourable President and the Court if I were granted 20 minutes in which to prepare my notes with the objective of finishing the cross-examination this afternoon?

The PRESIDENT: Certainly, Mr. Gross.

* * *

The PRESIDENT: Mr. de Villiers, just before the cross-examination commences, during the course of this afternoon you made some observations to the effect that you had been prejudiced in presenting the question of relevance of evidence, and in some sense, by reason of the fact that you had not fully opened the case upon the facts, as I understood it.

Mr. DE VILLIERS: Mr. President, may I correct that. I did not suggest prejudice. I merely meant that it was a matter with which I would deal adequately at a later stage, but, because of the fact that that foundation had not been laid, it was a little more difficult for me to explain the relevance than it would otherwise have been. That is all, I did not suggest any prejudice.

The PRESIDENT: Because you will recall that in the Order which the

Court made with respect to procedure, on 24 May, it was indicated that you had the right under paragraphs 1 and 2 to plead such facts, or open the case in such way as you thought fit.

Mr. DE VILLIERS: That is certainly so, sir. But we took the decision ourselves, namely that to deal with that aspect of the matter fully at that stage would have meant a much longer opening at that stage than was being contemplated, and we thought it would be more convenient to leave it over till later. That is just an historical part of it; I did not imply any criticism of your ruling, Mr. President.

The PRESIDENT: Then, do I understand that in no way have you been prevented, in the course of this afternoon's proceedings, from eliciting all the facts that you needed to elicit from the witness?

Mr. DE VILLIERS: No, Mr. President.

The PRESIDENT: You have elicited all?

Mr. DE VILLIERS: Yes, I have presented certain parts more briefly than I might otherwise have done, in the light of your remarks, but that was also my decision.

The PRESIDENT: You do not seem to be very unhappy about that?

Mr. DE VILLIERS: No, Mr. President.

The PRESIDENT: Mr. Gross—

Mr. GROSS: Mr. President—Mr. Cillie, as you know, I do not have the advantage of a verbatim record, and therefore I shall attempt to rely on my notes to quote your testimony accurately; I shall reconstruct it to the best of my ability, and if I paraphrase it incorrectly, I wish you would please correct me at once and I shall give you every opportunity, as the Court would wish me to, not to misrepresent your testimony—I am working from my notes. Now, Mr. Cillie, I will confine my questions entirely to the mandated Territory of South West Africa, and if I do not specify that fact in any particular context or question, I trust that you will understand that that is the scope, and the purport, of the questions I shall ask. You testified, substantially, to the following effect, that within South West Africa, there is a great variety of non-White people for whom "we have responsibilities", generally similar to those of colonial powers—did I get your thought accurately?

Mr. CILLIE: Yes, it could be a parallel responsibility.

Mr. GROSS: And you went on, I believe, to say substantially that, my notes show, the ruling White group had to see to it that trusteeship was not used for oppression—is that correct, sir?

Mr. CILLIE: I think I actually said that trusteeship should not degenerate into oppression.

Mr. GROSS: That is perfectly all right, Sir. My emphasis for the purpose of the next question is with regard to the use of the word "trusteeship", and the interpretation you would wish the Court to place upon the word, particularly in the context of this litigation, and generally as well. I should like, with the President's permission, to read from a statement by Prime Minister Verwoerd in the House of Assembly Debates in the Third Session, Second Parliament on 4 May to 8 May 1964. This is at column 5636 to column 5637 and it was on the date of 8 May 1964, and the statement reads, in relevant part, as follows:

> "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 has taken certain obligations upon itself; it has taken upon itself the

> obligation to promote the wellbeing and the progress of those people. [This is the Debate concerning South West Africa, I may remark parenthetically] 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 itself 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."

I should like to ask, Mr. Cillie, whether you would take this as reflecting the official position and policy of the Nationalist Party?

Mr. CILLIE: Oh, yes, definitely.

Mr. GROSS: And of the Government, as far as you know?

Mr. CILLIE: Yes.

Mr. GROSS: Do you use the word "trusteeship" in the same sense, for the purpose of your response to my question, as the word as used by the Prime Minister?

Mr. CILLIE: Yes, I think so.

Mr. GROSS: Now does that concept of "trusteeship", in your understanding, sir—I do not ask you, of course, to speak for, or interpret the comments of, the Prime Minister, but in your understanding of the word "trusteeship"—does it connote or imply any responsibility to account to others?

Mr. CILLIE: You are speaking about South West Africa?

Mr. GROSS: All my questions will be directed with respect to South West Africa. My question—would you like me to repeat it, sir?

Mr. CILLIE: Yes, please.

Mr. GROSS: Certainly. In your concept of the word and your interpretation of the concept of "trusteeship" as you use it, and I take it you were referring, were you not, to the responsibilities of the Government with respect to South West Africa—in your appreciation of the word "trusteeship", in the context and sense in which you use it—does it imply or connote in any way a responsibility to account or report to any body or agency outside of the Government itself?

Mr. CILLIE: Not that I can see, no.

Mr. GROSS: The way the word is used, then, if I understand you correctly, refers entirely, does it, to self-reporting, self-accountability?

Mr. CILLIE: Well, in a sense man does not live unto himself alone—but in this technical, political sense it is accountability to yourself and to your conscience.

Mr. GROSS: In other words it is, in this context, and in this sense, merely another way, is it, of saying "I act in accordance with my conscience", you would say?

Mr. CILLIE: I would put it more broadly than that, but you could put it that way.

Mr. GROSS: Well, would you put it broadly? I would like the Court to understand precisely what your meaning is here, sir.

Mr. CILLIE: You see, a nation's conscience is a very complex idea—the conscience of parliament is part of a nation's conscience, the conscience of the press is part of the nation's conscience; it means a very

broad accountability—it does not mean that you sit in a room and you ask yourself "What does my conscience dictate?"—it is a complicated political concept in that sense.

Mr. GROSS: Yes, sir. We take it in the terms in which, according to my notes, you used it, in the context of the ruling White group—could you define for the Court the connotation or meaning of the phrase "ruling White group"?

Mr. CILLIE: Well, it is obvious that the ruling power presides at the moment in South West Africa and in South Africa in the hands of the White group—the predominant power, not the exclusive power, but the predominant power—that is what I meant by the ruling White nation.

Mr. GROSS: That applies to South West Africa, does it not, sir?

Mr. CILLIE: Yes.

Mr. GROSS: Now with regard to the White population of South West Africa, are they the "ruling group" in South West Africa according to your understanding of the term you use?

Mr. CILLIE: No. Surely they are not an exclusive ruling group in South West Africa; South West Africa is partly ruled from South Africa. I mean that the White people of South West Africa have not got exclusive power over the Territory of South West Africa.

Mr. GROSS: I am trying to understand, Sir, and so that the Court can understand, what the content and meaning of your phrase "ruling White group" is—acting as trustee with respect to the Territory, if that was your meaning?

Mr. CILLIE: No, I would say in this sense that there is a double ruling power—the Government of the Republic of South Africa in the first instance, in the overriding instance, and then you have the local White group in South West Africa.

Mr. GROSS: And the "White group" of South Africa is composed, in your interpretation of the phrase, of what elements or organs—in your sense of the phrase, "White group" in the sense of ruling?

Mr. CILLIE: Are you talking about the ruling White people of South Africa, South West Africa . . .?

Mr. GROSS: Well, sir, you have used the expression, if I have it correctly in my notes, that "the ruling White group" had to see to it that trusteeship was not reduced, or words to that effect—used—for oppression, and obviously there are important concepts involved here, and it seemed to me that the Court might wish to have clarification of the use of your phrases there.

Mr. CILLIE: The ruling power of the White nation in South Africa is expressed through Parliament, of course.

Mr. GROSS: So that by "the ruling White group" in the sense in which you use it here you mean the Parliament of South Africa?

Mr. CILLIE: And in a lesser sense the Legislative Council in South West Africa—in a subordinate sense.

Mr. GROSS: And that is a ruling White group that is selected how, in the case of the Parliament?

Mr. CILLIE: The Parliament of South Africa?

Mr. GROSS: The "ruling White group" in the sense you use the term, the Parliamentary segment of the ruling White group—how is that selected?

Mr. CILLIE: Parliament, of course, consists of members chosen by the White electorate in constituencies, and also four members representing

the Coloured people of the Cape. There are also various nominated senators in the Upper House—some of them are chosen by electoral college, some are appointed for special knowledge of non-White affairs, and I believe there is consideration—I cannot give you now a whole lecture on the composition . . .

Mr. GROSS: No, sir, that is not necessary—I think you have answered my question, unless you wish to add to it—that this, as I understood you to say, segment of the "ruling White group" is elected by White persons in the population of South Africa—that is correct, sir?

Mr. CILLIE: Yes, and of course there are members from South West Africa itself—there are six members.

Mr. GROSS: Yes, sir, who are also, I understand, am I correct, elected by Whites in South West Africa?

Mr. CILLIE: A White electorate.

Mr. GROSS: Yes, sir. Now I believe you testified, or implied in your testimony, that in the course of the development of the policy of apartheid or separate development there had been, and I believe you said constantly are, middle-of-the-road suggestions being made—did you testify substantially to that effect, sir?

Mr. CILLIE: Yes.

Mr. GROSS: I think you testified, did you not, sir, that these middle-of-the-road suggestions are made by certain political parties, or members of political parties?

Mr. CILLIE: Yes. They are more than suggestions—they are worked-out policies.

Mr. GROSS: And they are proposed or projected by members of the Parliament, among others?

Mr. CILLIE: Amongst others.

Mr. GROSS: And I suppose, as in every parliament, votes are taken to determine the results?

Mr. CILLIE: Yes.

Mr. GROSS: And those votes are not always unanimous, I take it?

Mr. CILLIE: They are never unanimous.

Mr. GROSS: Never unanimous. And now, when there is a dissent, and I am speaking now particularly about matters affecting racial relations policies in South West Africa—and may I parenthetically ask you: have there been cases in which there have been dissents expressed in the Assembly on these matters?

Mr. CILLIE: Oh, yes, there was quite a debate on this Odendaal report, as you know.

Mr. GROSS: And I believe there was a rather substantial minority opposed to that?

Mr. CILLIE: Yes.

Mr. GROSS: Would you say, sir, and I am referring to your description in respect of the exercise of trusteeship in the sense of consulting oneself, in the Prime Minister's phrase, or consulting one's conscience—who determines, for example, when a strong or a large minority in the House of Assembly has a conscience on a matter which is not that of the majority—do you regard that the majority vote determines in every case where the balance of right or morality is in respect of the decisions to be made?

Mr. CILLIE: No, not necessarily. The majority is not always right; as a theoretical proposition moral right may reside in a minority, of course.

Mr. GROSS: But in the case of a conflict of view, and particularly one deeply held, who then is to serve as the judge to decide whose conscience is right in the case of a conflict of that sort?

Mr. CILLIE: In these practical political matters you have to come to decisions, you cannot sit and wait indefinitely for some sort of divine light, you have to take a decision as best you may.

Mr. GROSS: And that may or may not reflect what perhaps all of the members of the Parliament would regard as conformable to the requirements of conscience in a particular racial policy?

Mr. CILLIE: No; it certainly may militate against the conscience of the minority.

Mr. GROSS: And similarly, sir, with respect to the conscience of the executive arm of the Government, would that or would it not be a factor of the official or officials who might be in office from time to time? Did you understand my question?

Mr. CILLIE: No, not very clearly.

Mr. GROSS: In respect of the executive branch, the sector of the ruling White power that is represented in the executive branch of the Government, would you or would you not say that the factors of conscience, or self-judgment, or call them whatever you prefer, would vary from time to time depending upon the incumbent in such office?

Mr. CILLIE: Yes, it may vary.

Mr. GROSS: And would it be possible that persons in office from time to time might have different conscientious or subjective views concerning the rightness or wrongness of policies?

Mr. CILLIE: Certainly.

Mr. GROSS: What, if any, safeguards would exist, then, with respect to the rightness or wrongness of the decisions of that segment of the ruling White power?

Mr. CILLIE: I do not understand that question, I am afraid.

Mr. GROSS: What safeguards would exist to assure the rightness of decisions made by the executive branch of the ruling White power in a particular situation?

Mr. CILLIE: The usual safeguards of democracy—there is always the right of revision—you can always take a vote on another day, or after another General Election; you have that safeguard of revision.

Mr. GROSS: Now if the question arose in the context of a dispute with regard to what was right or wrong with respect to the rights or freedoms of the non-White groups in South West Africa, would they have a voice in the decision that you have referred to?

Mr. CILLIE: Not a direct voice, no.

Mr. GROSS: In what form would their indirect voice be manifest?

Mr. CILLIE: We would soon know if we made a really ghastly mess, you know—that would be apparent very soon, because they do have their ways of expressing themselves.

Mr. GROSS: Those ways, sir, are by what means—if you would give the Court an illustration.

Mr. CILLIE: By making representations to authorities; by sending deputations; by giving interviews to newspapers.

Mr. GROSS: In other words you would say, sir, that they have the right of petition and do they have any other ways or methods of expressing their consternation or . . .

Mr. CILLIE: We are trying to build that up—we are trying to build up

organs of self-government in order to give them that orderly way of expressing themselves—that channel for consultation—an official organic channel for consultation.

Mr. GROSS: When you use the term "organs of self-government" do you mean organs of self-government within certain areas?

Mr. CILLIE: Yes.

Mr. GROSS: Now may I confine your attention for a moment to the southern sector, outside the Reserves; do you know what the population of that area is?

Mr. CILLIE: The figures have been mentioned, but having had a mathematical training, I am very bad at figures.

Mr. GROSS: Would you regard it as of significance to qualitative or moral judgments concerning the matter, whether there are a few people or a substantial number?

Mr. CILLIE: Yes, in terms of divine morality one man is as important as a thousand, I think.

Mr. GROSS: Suppose we take it between us then, as I think the record does show it, that there are approximately 166,000 of these persons permanently resident in this sector and some 27,000 who live there from time to time under work contracts—a total of 194,000 persons; men, women and children.

Mr. CILLIE: Is that in the southern zone?

Mr. GROSS: We are talking now about the southern sector—the total non-White population of the southern sector. With respect to these people, these individuals . . .

Mr. CILLIE: I am sorry, Mr. President, I think that is the figure for the non-Whites outside the Reserves in the southern sector.

Mr. GROSS: I said the southern sector, sir. I was now going to talk about the sector outside the Reserves. I think the record will show that I said southern sector but in any event I appreciate the suggestion.

Mr. CILLIE: Outside of the Reserves in the southern sector.

Mr. GROSS: The figure was put in this morning I believe; I was now going to come to that—the total non-Whites outside the Reserves in the southern sector are 128,000 and if you include the migrants from outside who come in on work contracts—155,000. We will now confine ourselves to the non-Whites in the southern sector outside the Reserves. With respect to these people, sir—I paraphrased your answer and described it as a right of petition—do they have any other methods of expressing a voice or participating in decisions with respect to legislation considered or passed by the House of Assembly?

Mr. CILLIE: Any other apart from . . .?

Mr. GROSS: Apart from what I think we agreed between us, did we not, would amount to right of petition?

Mr. CILLIE: You are asking in effect if they have—I am sorry Mr. President, I should be addressing you.

The PRESIDENT: Not at all. You are addressing me while you are also replying to Mr. Gross.

Mr. CILLIE: Thank you.

Mr. GROSS: We are speaking to each other through the Court, as I understand it, sir.

Mr. CILLIE: I think what you are asking me in effect is whether these people in the southern sector, the non-White peoples there, have any organs of self-government.

Mr. GROSS: Well I do not know quite what that phrase means. I have preferred to put it in the form of the question which I addressed to you —whether they have any method or means of voice other than the right of petition with regard to decisions made by the legislature of South Africa which, as I understand it, passes laws with respect to their welfare—that is correct, is it not?

Mr. CILLIE: Maybe not at the moment—this whole situation is evolving, as you know.

Mr. GROSS: When you say "maybe not" do you have doubt about that matter, sir?

Mr. CILLIE: Well, I am not so conversant with the precise position there.

Mr. GROSS: In South West Africa?

Mr. CILLIE: In South West Africa—I do not know whether they have little councils, perhaps they have spontaneous councils which make representations to the Government—I do not know.

Mr. GROSS: How long have you resided in South West Africa, sir?

Mr. CILLIE: I have never resided in South West Africa. I have been there on and off on visits.

Mr. GROSS: Approximately how much time, would you tell the Court, have you spent there?

Mr. CILLIE: I would not like to make an estimate—it would be a matter not of months but of weeks.

Mr. GROSS: And what portions of the Territory have you visited, sir?

Mr. CILLIE: The north, Windhoek and Rehoboth.

Mr. GROSS: The north being what, sir?

Mr. CILLIE: Up to Ovamboland.

Mr. GROSS: How much time did you spend in Ovamboland approximately?

Mr. CILLIE: That was just a flying visit.

Mr. GROSS: A day or two?

Mr. CILLIE: Yes, maybe.

Mr. GROSS: How much time did you spend in other areas of the southern sector outside of Windhoek?

Mr. CILLIE: I was in the Rehoboth area for say a week or so.

Mr. GROSS: So that you do not regard yourself—would not wish the Court to regard you—as thoroughly knowledgable about situations in South West Africa, by reason of what you would call first-hand knowledge?

Mr. CILLIE: No, I am not testifying as an expert witness on the situation in South West Africa.

Mr. GROSS: Are you testifying as a witness who has knowledge of South West Africa at all in any sense of the word other than as a person who has visited it for a few weeks?

Mr. CILLIE: I am an editor of a newspaper. I have a newspaper editor's knowledge of South West Africa which has to be pretty extensive.

Mr. GROSS: That is based upon reports received, no doubt, sir?

Mr. CILLIE: Yes.

Mr. GROSS: Now you had used in your testimony the expression, I do not think I had finished that line of testimony—I am not certain that I recall your answer—I just wanted to ask you one more question with respect to the persons we are discussing who are involved in my question to you in the southern sector, the non-Whites. I believe you said that,

in so far as you know they do not have any participation in the Government in South Africa that passes laws with respect to the Territory.

Mr. CILLIE: No direct participation.

Mr. GROSS: No direct participation and I think you testified that the only indirect participation they have is by submitting petitions or requests or making noises, would that be a fair interpretation of your testimony, sir?

Mr. CILLIE: Well, I think it is a very derogatory way of describing petitions, as making noises.

Mr. GROSS: Well, I thought you said that they have ways of making their affairs known—their objections known—I will not insist on that phrase. Is there any other method by which they can advance their interest other than by submitting petitions or making statements?

Mr. CILLIE: Many of them are in fact linked up with their tribal organizations in the various non-White areas and these have been built up further. The idea is to build them up into organic and representative institutions.

Mr. GROSS: Thank you, sir. In your testimony you referred, if I understood you correctly, to "integration" in the sense that, according to my notes, the policy of "integration" is feared by the White ruling group. Is that a substantially correct version of your testimony?

Mr. CILLIE: Yes, that is a generalization—I should say by the large majority of the ruling group.

Mr. GROSS: And what to your mind is the meaning of the word "integration" used in your response to Mr. de Villiers' question?

Mr. CILLIE: I defined it more closely as what I call the one-nation concept—the forming of one nation in the modern sense of the word or the generally accepted sense of the word, out of various and divergent peoples.

Mr. GROSS: You were thinking, sir, of political integration in that sense?

Mr. CILLIE: No, I think I was thinking . . . I cannot remember the context . . . I was thinking in general of social, economic, political integration—we do not think we can separate these concepts very clearly.

Mr. GROSS: Well, can we discuss one aspect of that for a moment, with the President's permission: the economic integration that you mentioned. Would you regard what the Odendaal Commission report refers to as "[the absorption of] approximately half of the Herero"—this is one example—as they put it, in the "White economy" of the southern sector, as a form of "integration" in the sense in which you use the latter word?

Mr. CILLIE: No, it would be a partial integration only—even economically it is only a partial integration.

Mr. GROSS: And what makes it "partial", sir, in your sense of the term?

Mr. CILLIE: That they are not completely accepted; they are not completely accepted even economically inside the . . .

Mr. GROSS: By "accepted" do you mean, sir, that they are subject to certain limitations enforced upon their freedoms?

Mr. CILLIE: Well, you are speaking economically now . . .

Mr. GROSS: I am talking about economic integration.

Mr. CILLIE: There are certain limitations on their economic advancement.

Mr. GROSS: And who imposes those limitations, sir?

Mr. CILLIE: The laws of the Parliament of the Republic of South Africa.

Mr. GROSS: Of what you talked about as the "ruling White group"? Now in the "diversified economy of the southern section" South West Africa, as the Odendaal report described it, are Whites in competition with non-Whites for positions and jobs?

Mr. CILLIE: That would only be for lower rate economic jobs—it could possibly happen.

Mr. GROSS: Now, do they compete only at that level for any reason that relates solely to the capacity of the individual persons involved? Do you understand my question?

Mr. CILLIE: No.

Mr. GROSS: I am not sure I understood your response. I will rephrase my question, if the President will permit. You said, if I understood you, that the competition between the White and the non-White existed only at certain levels, and I understood you to say "at certain lower levels".

Mr. CILLIE: Well, possibly at lower levels.

Mr. GROSS: Well now, perhaps I could state my question this way. For what reason, if any, would it be true that competition between Whites and non-Whites in the economy does not exist at higher levels than you have in mind in your response?

Mr. CILLIE: Well, there are several answers to that—the first part of the answer is what I tried to explain in my main evidence, that you have to protect the sense of security of the Whites in order to make them behave wisely. If they are racked with fears, hostilities and bitterness they cannot behave as real trustees should.

In the second place you are telling these groups that their real future, their advancement, unlimited advancement, does not lie in this southern sector, it lies in their various homelands. You want to direct their ambitions, you want to direct their energies to the development of their own homelands.

Mr. GROSS: Do I understand you to say that in order to alleviate or avoid tensions or jealousy or other emotional phenomena that might interfere with the sound exercise of conscience on the part of the trustee, non-Whites are deprived of economic advancement up to the level of their individual capabilities?

Mr. CILLIE: You can only deprive a man of something that he has already had. This is no deprivation.

Mr. GROSS: Sir, I am sure you misunderstood me, because your answer baffles me and I do not want to argue with you. Do you mean to say that you cannot deprive a man of an opportunity to achieve something he has never had?

Mr. CILLIE: But we are opening up opportunities all the time.

Mr. GROSS: In the southern sector of the Territory outside the Reserves?

Mr. CILLIE: Even there, I would not be surprised if opportunities are, all the time, opening up on a limited scale, but the opportunities are certainly not going to be unlimited.

Mr. GROSS: Have there been any restrictions or alleviations of the job reservation policy, so far as you are aware, within the last year?

Mr. CILLIE: The job reservation policy is a very, very flexible policy

indeed. I have not got the details here, but the job reservation policy is being applied with the greatest flexibility all the time.

Mr. GROSS: By flexibility, you mean that the ceilings are being raised?

Mr. CILLIE: No, in effect, job reservation demarcates jobs to certain races in certain areas of employment and the flexibilities come in when you raise either the percentage of Whites or the percentage of non-White or Blacks or Browns or whatever you have, because this is not merely a question of reservation as between Whites and non-Whites, it is a question also of reservations between these various groups.

Mr. GROSS: I am talking only about the ceiling set upon a person because he is non-White. There are such ceilings, are there, applicable in the Territory?

Mr. CILLIE: Yes, but now again . . .

Mr. GROSS: You cannot answer that question?

Mr. CILLIE: It is a varied position altogether because there is no ceiling to a non-White doctor, following his profession in the southern sector, there is no ceiling at all to that. In certain areas of employment there are certain limitations, but it is not a universal ceiling that keeps everybody down to the level of . . .

Mr. GROSS: I dare say that there would be no universal ceilings, except the blue sky. I was just asking whether there are, or are not, ceilings which are imposed upon non-Whites, solely on account of the fact that they are non-White. Can you answer that, yes or no?

Mr. CILLIE: Would you repeat that, please?

Mr. GROSS: Are there ceilings imposed upon non-Whites, solely on the basis of their being non-White?

Mr. CILLIE: Yes, as long as you say this is a selective process and not a . . .

Mr. GROSS: You cannot answer that, yes or no?

The PRESIDENT: Let the witness answer his question.

Mr. CILLIE: It is not a general ceiling. Your question seems to imply that there is a sort of general ceiling keeping everybody down. That is not the position.

Mr. GROSS: I am not implying anything, sir. Can you tell the Court whether or not there are any ceilings placed upon economic advancement with regard to non-Whites, solely on the basis that a person is a non-White?

Mr. CILLIE: Are you talking about the southern sector, now?

Mr. GROSS: Yes, sir.

Mr. CILLIE: Yes.

Mr. GROSS: That is . . .

Mr. CILLIE: The answer is yes.

Mr. GROSS: And the answer is "yes" to the question that there are ceilings placed upon non-Whites, solely because they are non-Whites? Is that correct?

Mr. CILLIE: No, I would say no. If you put it like that, I would say placed upon them because they do not belong to the White group.

Mr. GROSS: You would prefer to state it that way, sir?

Mr. CILLIE: Yes.

Mr. GROSS: All right, sir. Now, I would like to refer to the testimony of Professor Bruwer on 6 July, at page 296, *supra*, in which Professor Bruwer was asked to define the term "integration" and he stated as follows:

"I would say that integration would be where you create a society by giving rights and privileges to members of other groups, who have already got their rights and privileges in another area, in that specific society of another group."

That was his response. Then, just to complete my question, on page 297 of the same verbatim, in response to a question as to how he understood "economic integration", he said "what I understand by economic integration would be that one would have all the rights and privileges connected with the economy of that country". Would you accept that as a definition of economic integration?

Mr. CILLIE: Well, I would have to think that over. I would not put it exactly like that, but it sounds to me more or less correct.

Mr. GROSS: Now, you having used the phrase "economic integration", I should like to ask you, again, if I have asked you before, how you define that term, in your usage of it?

Mr. CILLIE: It is very difficult. You know, you sometimes think that you have a clear idea of these concepts and then when you have really to define it, it becomes rather difficult. Economic integration, to me, would be the idea of what I call a one-nation concept in the economic sphere, that everybody would be able to advance in a single economic structure, to the limit, that there would be no limitations, no differentiations, no discriminations at all.

Mr. GROSS: No discriminations based upon . . .

Mr. CILLIE: Upon group affiliations, at all.

Mr. GROSS: Upon group affiliations, where the individual would be given economic opportunities in accordance with his innate capability, quality, capacity, would that be within your concept?

Mr. CILLIE: Yes. In one area, in one economic structure.

Mr. GROSS: Well, we are talking now about a particular area and a particular economic structure, to wit, the southern sector, and in order to avoid confusion in the Court's mind, which has sometimes been engendered in mine, as to whether we are talking about one area as *against* another or *within* one area, if you will bear with me, we will confine ourselves, as I said at the outset of this line of questions, to the southern sector outside the Reserves.

The PRESIDENT: You asked him what he meant by an integrated economic society.

Mr. GROSS: Economic integration within this area, yes, sir.

The PRESIDENT: That was at large was it not?

Mr. GROSS: If it was, sir, then I will apologize to the witness for having forgotten the point of my own line of questions. I would like to ask you then, with respect to your answer to my question as at large, would you give the same answer with respect to the limited area? I am now discussing the southern sector outside the Reserves.

Mr. CILLIE: Yes, I would have to change my terminology, but it would be the same sort of idea of a one-nation concept operating in that area.

Mr. GROSS: Now, within this area, Professor Bruwer, in his testimony at page 319, *supra*, in response to a question, testified—and I will qualify this by saying "in effect" because it is a fairly lengthy exchange but the "effect" was, and I will ask you to comment about it, assuming I am correct in my paraphrase of it—that "there will always be a need for non-White labour in the White sector". Do you agree with that statement, sir?

Mr. CILLIE: Always is a very long time.

Mr. GROSS: Would you then agree with the following statement, which is more specific? It appears at page 320 of the same verbatim. I asked Professor Bruwer "I take it that the Odendaal Commission considered that the present non-White population was an indispensable feature of the functioning of the White economy. That is correct, is it not?" And Mr. Bruwer replied "Mr. President, that is correct, for the present and the foreseeable future". Would you agree with that?

Mr. CILLIE: That would be a better . . .

Mr. GROSS: For the foreseeable future?

Mr. CILLIE: Yes.

Mr. GROSS: That non-White labour is an indispensable feature for the functioning of the "White economy"?

Mr. CILLIE: As I told you, I have no very close knowledge of the local conditions in that area, but I would accept Professor Bruwer's opinion about that.

Mr. GROSS: Does your newspaper have an editorial policy, with respect to South West Africa, on this matter?

Mr. CILLIE: *We would probably follow the line that Professor Bruwer* has taken.

Mr. GROSS: Now, I would like to clarify, for the benefit of the Court, the basic element or premise of separate development or apartheid, with respect to the problem of physical separation of races. Does the policy of separate development involve a substantial physical separation of races in different territories, different areas, economically speaking?

Mr. CILLIE: I am not quite sure what you are driving at. It does envisage a substantial physical separation, but there is no idea of really cutting up the South African economy . . .

Mr. GROSS: South *West* Africa.

Mr. CILLIE: . . . South West African or South African economy in watertight compartments. That would be utter foolishness.

Mr. GROSS: Well, just to avoid more general terms than the question may warrant, physical separation in the economic context—by that I meant, does the policy of separate development or apartheid contemplate the physical separation of non-Whites from the White economy, in any area of South West Africa?

Mr. CILLIE: Yes. You said substantial, you used the qualification "substantial"—you have now made it absolute.

Mr. GROSS: I have now said "any", yes.

Mr. CILLIE: Yes, certainly, if you have homelands for people, you expect that as these lands develop, that a substantial majority of them will, in the end, make their home there, make their living there.

Mr. GROSS: There will then be, under this premise of separate development, never a total physical separation, from the standpoint of the operation of the "White economy", so-called, in South West Africa? Is that correct?

Mr. CILLIE: No, no, we shall need them and they will need us, for a long time to come, you see. I mean, this is a mutual co-operation, that you will need labour from those areas and that labour will need the work that you can supply.

Mr. GROSS: And that is in the foreseeable future?

Mr. CILLIE: In the foreseeable future.

Mr. GROSS: Now, with respect to those non-Whites who will be inel-

igible or else unwilling, or for some reason do not remove themselves physically from the White economy, will they remain under the apartheid policy, subject to restrictions upon their freedoms, so long as they remain in the "White economy"?

Mr. CILLIE: That was rather difficult to understand, but as I understood it, there is no question of forcibly making a physical separation . . .

Mr. GROSS: Perhaps I may restate my question, sir. With respect to the non-Whites who remain for any reason in the "White economy", will they, under the policy of separate development, be subject to limitations upon their freedoms, such as, for example, job reservation?

Mr. CILLIE: Yes, but with the various flexibilities that we do have in changing circumstances.

Mr. GROSS: But, in principle, as a matter of policy, there will be some limitations imposed by reason of their colour. Is that correct?

Mr. CILLIE: It is not a question of colour. It is not mainly a question of colour, it is a question of different peoples. These people are lesser developed, they are different from us and they haven't attained the Western standard of living. I don't know why you are concentrating on colour.

Mr. GROSS: I am not concentrating on colour, sir, except that it seemed that the Odendaal Commission constantly uses the expressions "White" and "non-White", and I was referring to colour in the sense in which the Odendaal Commission used the word "White" or "non-White". I had no other meaning in mind. Now, just to clarify the answer to my question, would a non-White person, who remained in the economy, then be subject to restrictions or ceilings, as a matter of policy, under the doctrine or policy of apartheid?

Mr. CILLIE: The ceilings could be raised in certain cases. In other cases, the ceilings do not exist. I told you a non-White doctor was quite free to operate in that sphere.

Mr. GROSS: So that there is no policy or principle, with regard to ceilings placed on the advancement of non-Whites in the "White economy"?

Mr. CILLIE: No, this is an empirical policy. It is not a question of principle that you have limitations and keep them there for ever, never lift them and never adapt them. This is a changing situation.

Mr. GROSS: Do you foresee then, sir, that the restrictions, or ceilings, or limitations will be lifted with respect to the non-Whites in the "White economy"?

Mr. CILLIE: In some cases they don't exist now.

Mr. GROSS: Where they do exist now—would you answer my question in those terms? Do you foresee that they will be lifted in the policy of apartheid?

Mr. CILLIE: I can see them being adapted, but as I see things at the moment I cannot see some of them being lifted in the foreseeable future.

Mr. GROSS: So that some will remain? Would you say that it was a fair interpretation of your testimony that those which remain will be retained on the ground of preventing the White group from developing jealousies, or other emotions, which will preclude them from being fair trustees? Is that a fair paraphrase of your testimony, sir?

Mr. CILLIE: No, I don't think so. These people will certainly not stay there if greater opportunities open up to them back in their homelands. If there were more work there, more advancement and no limitations

at all in their particular sphere of employement, they would prefer to go back. Nothing would prevent them.

Mr. GROSS: Now, this is what I was referring to before about the problem of remaining within the area which I am talking about. I am talking about the non-White who remains in the area. What would be a fair paraphrase (or state it in your own way)—what would be a fair explanation of the reason why certain ceilings will be imposed on a non-White who remains in the White economy, other than the one I have mentioned? What reasons would you assign for the maintenance of ceilings?

Mr. CILLIE: But I told you that there were there two considerations: on the one hand, the protection of the White man's feeling of security, protecting it against encroachment and making it possible for him to follow a statesmanlike policy; on the other hand, there is also the object, in certain cases, whether you really want this particular Herero or Ovambo to go back to his homeland and to serve his people there. On the one side you could say it is a negative consideration, on the other side, a positive one.

Mr. GROSS: The two elements, then, with respect to the non-White who remains in the "White economy" are, first, if I understood you correctly, to prevent encroachment on the White and, secondly, to facilitate the White serving as a good guardian. Is that a fair paraphrase?

Mr. CILLIE: That is only one part of the story.

Mr. GROSS: Are there any other factors relevant to the non-White who remains in the White sector?

Mr. CILLIE: No, you were talking about the limitations, any sort of limitations. I was saying that these limitations have a double function. They are a guard against undue encroachment and they also serve as an encouragement for non-White groups and non-White peoples who are qualified to serve their people in the areas where they establish their homelands.

Mr. GROSS: Do I understand you to say that the ceilings imposed upon the non-White are designed to encourage him to leave the area? Is that what you meant?

Mr. CILLIE: Yes. Well, you put it rather as if it were a question of driving him out. If you have a ceiling here and you don't have a ceiling there, people are inclined, if the economic possibilities are there, to prefer the area where there is no ceiling.

Mr. GROSS: That would be an observable human phenomenon, would you say, sir?

Mr. CILLIE: Yes. I think a Spaniard would rather not work in Holland, he would like to work in Spain if the economic opportunities were there.

Mr. GROSS: If Holland limited his freedom?

Mr. CILLIE: They do.

Mr. GROSS: I did not know that, sir. Now, I would like to read to you a quotation from the verbatim record at page 317, *supra*, in which Professor Bruwer responded to a question I asked him, my question being:

> "So that an individual and his family, who were born, perhaps, in the White sector, have the option of remaining there so long as he pays the price of the limitation upon his freedom, or else taking himself and his family and removing outside the area. Is that the alternative posed by the Odendaal Commission?"

and Mr. Bruwer answered:

> "Mr. President, that is the alternative within this framework [meaning the framework of the policy of *apartheid*]."

Do you agree with Mr. Bruwer in his response to me?

Mr. CILLIE: Yes.

Mr. GROSS: Would you characterize this situation in terms of an option to remain or escape? Would you accept that characterization?

Mr. CILLIE: Escape is a very hard word in this connection.

Mr. GROSS: I won't press it, sir. You have referred several times in your testimony, if I correctly understood it, once in particular, to re-drawing the map of South West Africa, if I understood the expression, and that the Government was only at the beginning of demarcating the areas and that there would be Native states under the present projected plan, with their own self-governing states, I think you called them, in the "way we have chosen" were the words I quoted.

Now, first, with respect to the re-drawing of the map of South West Africa and the process of demarcating the areas, are you aware whether the Government has consulted with the supervisory agency over the Mandate, specifically with the United Nations or any other international agency, with respect to re-drawing the map of South West Africa?

Mr. CILLIE: I would think not.

Mr. GROSS: When you say "the way we have chosen", what, sir, do you mean by "we"? Who is "we"?

Mr. CILLIE: Yes, that is rather a broad "we". I think I was thinking generally of the Government and the ruling party in South Africa.

Mr. GROSS: Then, if I understand you correctly, that would be a unilateral determination made by the ruling party, the ruling people? Was that the phrase you used in your testimony?

Mr. CILLIE: If you want to call it that.

Mr. GROSS: I wouldn't care what you wish to call it, sir, I was just wondering what your meaning was, whether or not the "we" meant the ruling White group in the context of your expression.

Mr. CILLIE: Yes, the ruling White party, the ruling White Government in South Africa. One would not like to include in this generalization the whole of the Opposition.

Mr. GROSS: Now, you also referred in your testimony, according to my notes, to the fact that "there will arise new possibilities of contact and consultation and it stands to reason that as children grow up their wishes have to be taken into account". Were you using the analogy of the child to all of the non-Whites as a group in South West Africa?

Mr. CILLIE: As groups.

Mr. GROSS: Do you accept the term "group" as applying to non-Whites as such?

Mr. CILLIE: No.

Mr. GROSS: In respect of the relationship between White and non-White, how would you characterize the collectivity known as the White as distinguished from the collectivity known as the non-White? What word would you use other than group?

Mr. CILLIE: But there is no collectivity of the non-Whites. Except in one's mind, there is no collectivity of non-Whites.

The PRESIDENT: There is a mathematical collectivity, I suppose.

Mr. GROSS: Now, I am referring, sir, to the collectivity which is com-

posed of persons whose freedoms, or opportunities, are established or limited on the basis of their classification as non-White. Is that a sufficient designation of a collectivity?

Mr. CILLIE: But there are differentiations between them too, you see. It is not a question of a universal set of limitations imposed upon all non-Whites in South West Africa, or in South Africa. There are differentiations between these various groups.

Mr. GROSS: Are you aware of any legislation which fixes rights, or limits rights or freedoms, such as job reservation, which is based upon the mere fact of being non-White?

Mr. CILLIE: I am not so sure. Yes, you could have some legislation.

Mr. GROSS: You could have—but do you, sir?

Mr. CILLIE: I think we have. That may happen. But I am just suggesting to you that there is no such thing as a universal set of limitations applying to everybody.

Mr. GROSS: I am not intending to refer to universals, sir. I would like, however, to ask you a few more questions and conclude.

You said, in your testimony, that you could foresee at least one Black state in South West Africa. Was this a correct rendition of your testimony?

Mr. CILLIE: Yes, that was a personal opinion.

Mr. GROSS: Now, is it an opinion of the Nationalist Party or the Government, so far as you are aware?

Mr. CILLIE: No, I think it is a general idea amongst nationalists. I don't think it has been formulated in a policy statement, but you can see that some sort of viable state could be formed out of Ovamboland.

Mr. GROSS: And do you foresee any other viable, so-called Black states in South West Africa?

Mr. CILLIE: Not very easily, no. I can see some collections, if they want to get together. They could perhaps form collectivities, as you call it.

Mr. GROSS: Briefly, in responding to Mr. de Villiers' question as to what you regard as threats to orderly evolution, you referred to threat of "encroachment" by one group upon the "preserves" of another. Would you apply that statement specifically to the southern sector outside the Reserves, the so-called modern economy of South West Africa? What would be the "preserves" of whom, and what would constitute "encroachment", in your use of the phrase?

Mr. CILLIE: Well, that is very difficult. You ask me for examples now from a territory that I don't know very closely. There is certainly not a very highly developed economy in the southern sector of South West Africa and these encroachments, or dangers of encroachment, really arise in industrial situations.

Mr. GROSS: Excuse me, sir, have you finished? Would the "encroachments" you refer to include economic competition?

Mr. CILLIE: Yes, unfair economic competition.

Mr. GROSS: What do you mean by "unfair", sir, unfair by reason of race or are there any other criteria?

Mr. CILLIE: Well, people on a lower level of civilization are sometimes willing to work at lower rates and you have to protect the civilized standards.

Mr. GROSS: But would this, or would it not, be a justification for setting ceilings on the non-White?

Mr. CILLIE: It would certainly be a justification for demarcating rights and demarcating . . .

Mr. GROSS: I asked you about setting a ceiling on non-Whites—would that be a justification or explanation for setting a ceiling on the level which a non-White could attain?

Mr. CILLIE: Well, if you can remove the ceiling with safety to group relations, certainly, by all means let us do so. But if you have ceilings for a good reason, because if they were removed you would have an ugly group relations problem on your hands, I would say, keep the ceilings rather than have that.

Mr. GROSS: Does the element of cushioning the Whites against economic competition from the non-Whites enter into the policy to which you are referring and which is described as apartheid, or separate development?

Mr. CILLIE: "Cushioning"—I think that again is a loaded word, Mr. President.

Mr. GROSS: What word would you substitute then?

The PRESIDENT: I think you had better substitute the word yourself because you are seeking an answer, rather than ask the witness, Mr. Gross.

Mr. GROSS: Well, I like the word "cushioning". Would you respond in the following form? Does the prevention or limitation of competition between White and non-White enter into the policy of apartheid, or separate development? Does it play a role in the policy itself?

Mr. CILLIE: Certainly, the limitation of competition in the sense that you cannot have indiscriminate competition between these various groups.

Mr. GROSS: Mr. President, I have a few more questions. I heard the bell. I would like the guidance of the President. May I continue? I think I can finish, sir.

The PRESIDENT: Yesterday, Mr. Gross, you said you could finish your cross-examination of a witness in a quarter of an hour if the Court continued into the luncheon hour, which the Court did not see fit to do, but it has taken you an hour today to complete that task. How long do you say it will take you tonight?

Mr. GROSS: About five minutes. May I ask, sir, is the Court to have a session tomorrow morning?

The PRESIDENT: I must first direct a question to Mr. de Villiers. Mr. de Villiers, is the present witness your last witness before the summer recess?

Mr. DE VILLIERS: Yes, Mr. President. I did not expect this degree of co-operation in curtailment of the time to be taken by the witness, so there is nobody to follow him.

The PRESIDENT: Very well, then perhaps we might continue and see whether we can conclude this evening.

Mr. GROSS: Yes, sir. Thank you for your patience, sir. I really would like to address myself to not more than two more lines of question. These fall into the general area of testimony with respect to education and I should like to refer to the Reply of the Applicants, at **IV**, page 451, which is headed "Government and Citizenship in Dependent Territories, as viewed by the United Nations" and the sub-heading is "United Nations policy regarding establishment of universal adult suffrage". I should like to ask your comment on the following brief quotations, which I should like to read to you, sir.

The first is a quotation from the *Repertory of Practice of United Nations Organs* which is cited in the footnote.

> "Among the forms of development supported by the actions of the Trusteeship Council, either by approval of existing policies or by recommendation, has been . . . the introduction of methods of suffrage leading eventually to elections by universal adult suffrage . . ."

Do you favour the introduction of methods of suffrage which might lead eventually to elections by universal adult suffrage? Would that be compatible with the policy of apartheid or separate development?

Mr. CILLIE: Well universal adult suffrage is quite compatible with the policy of apartheid as long as you define the group in which this voting power operates.

Mr. GROSS: May I define it for you, sir, so that you can answer my question briefly and responsively? I define the group as all those who may be determined to be qualified in a geographical area specifically in this case South West Africa.

Mr. CILLIE: And you are asking my opinion on that as a prospect for South West Africa?

Mr. GROSS: Yes, sir, that is all I am talking about, sir.

Mr. CILLIE: It would mean chaos.

Mr. GROSS: It would mean chaos. And then secondly—I read from the same page—this is from the report of the Trusteeship Council and it is cited on page 232 in the footnote:

> "The Trusteeship Council has consistently recommended 'such democratic reforms as will eventually give the indigenous inhabitants of the Trust Territory the right of suffrage and an increasing degree of participation in the executive, legislative and judicial organs of government' . . ."

Do you agree with that standard, sir?

Mr. CILLIE: Yes, if I heard correctly I think that is quite a good standard but then I am not quite sure that I heard correctly.

Mr. GROSS:

> "Such democratic reforms as will eventually give the indigenous inhabitants of the Trust Territory the right of suffrage and an increasing degree of participation in the executive, legislative and judicial organs of government . . ."

Mr. CILLIE: Yes, if that word "organs" means different organs for the various groups I agree with it.

Mr. GROSS: Would you take it perhaps, for the sake of another response, as meaning one organ, either in the sense of a unitary organ of a State or several organs in a federated State?

Mr. CILLIE: Yes, as I told you, I do not like the concept of federation, because it does put the whole development into a strait-jacket. But if these people, once they know their own minds, once they have built up self-governing organs through which they can express themselves, if they want to federate say, a certain group of peoples including perhaps the White people in South West Africa, if they want to federate, I would agree, because then they have a will of their own.

Mr. GROSS: But it would have to be, in your opinion, in order to avoid

whatever the word you used was, "disaster" I think, an agreement among separate groups, is that correct, sir?

Mr. CILLIE: Yes.

Mr. GROSS: And finally the Trusteeship Council in 1950, following upon a recommendation to the British administering authority of Togoland, in this case, noted with satisfaction, and I quote:

> ". . . that a beginning has been proposed by the Coussey Committee in the introduction of methods of suffrage on all levels of government, appreciating the difficulty of introducing at once a modern system of suffrage, recommends that all necessary educative measures be undertaken to prepare the population for the adoption of universal suffrage with the least possible delay."

May I ask you, sir, first do you regard this standard, as thus expressed by the United Nations organ in question, a revolutionary standard or an evolutionary standard?

Mr. CILLIE: I don't know enough about Togoland. It may be perfectly all right for Togoland.

Mr. GROSS: Therefore you would not be prepared to reject this as a principle or standard in certain areas?

Mr. CILLIE: No, certainly if they are a fairly homogeneous people or you can weld them together by some system of education in the foreseeable future, I see no objection to that sort of . . .

Mr. GROSS: But in South West Africa you would not agree to any of the elements of this—"the introduction of methods of suffrage on all levels of government, appreciating the difficulty of introducing at once a modern system of suffrage"—would you disagree with that in South West Africa?

Mr. CILLIE: Yes, but in South West Africa you have these very disparate elements, and I cannot see you getting them to work in one system at all, unless you impose it with *force majeure*, and that is certainly going to start enmities between the various groups that you will never see the end of.

Mr. GROSS: And may I ask the next element? Do you agree with this element of the United Nations standard which enters into those for which the Africans truly . . .?

The PRESIDENT: It is not a United Nations standard, it is a United Nations observation in relation to one particular trusteeship territory.

Mr. GROSS: I accept that correction, sir.

> "recommends that all necessary educative measures be undertaken to prepare the population for the adoption of universal suffrage with the least possible delay".

Do you feel that that is not applicable to South West Africa without dire consequences?

Mr. CILLIE: No, not in that form, not as a single territorial unit or a single political system, that cannot be done.

Mr. GROSS: And "educative measures"?

Mr. CILLIE: We can do the education all right.

Mr. GROSS: Would the educative measures prepare the population for the adoption of universal suffrage? Would that be incompatible with the situation in South West Africa?

Mr. CILLIE: I do not see how education is going to make an Herero less of an Herero. It is going to make him more of an Herero, and that

goes for an Ovambo too, and for all the peoples of South West Africa.

Mr. GROSS: One final question, Mr. President, if I may. The Counter-Memorial, which is one of the Respondent's pleadings in the case, in Book IV, Chapter VII, at II, page 471, states as follows:

> "The policy of separate development is not based on a concept of superiority or inferiority, but merely on the fact of people being different."

Now, would you regard the assignment of priority rights to Whites in the White sector of South West Africa or to "white domination"—I quote the phrase by Prime Minister Verwoerd which is quoted in the Rejoinder, V, page 213—or your own phrase "White rule", as being *compatible with equality between the Whites and the non-Whites?*

Mr. CILLIE: This is balanced by priority rights for the various non-White peoples in other parts of South West Africa.

Mr. GROSS: Within the area itself in which the non-Whites are "absorbed in the economy"—in the words of the Odendaal Commission report—and where in the foreseeable future they will be needed—in that context would you regard these phenomena, White domination and so forth that I have just mentioned, as being compatible with equality between Whites and non-Whites in that sector?

Mr. CILLIE: No, there is no equality of Whites and non-Whites in the White sector, just as there is eventually going to be no equality between Whites and Ovambos in Ovamboland.

Mr. GROSS: Now, confining ourselves finally to the White sector, is the economic subordination of the non-Whites in that sector equivalent to "inferiority" in any sense of the term?

Mr. CILLIE: But you talk as if these people are doing the Whites a wonderful one-sided favour by working for them. These people need work, they come there to work, they get paid for it. I am not aware of a terribly passionate urge in this particular sector of South West Africa for breaking ceilings or changing racial demarcations, I have never heard of it.

Mr. GROSS: Or economic equality?

Mr. CILLIE: I have never heard of a tremendous movement there, because these people are fairly low down in the economic scale, and, of course, as they come up, adjustments are going to be made.

Mr. GROSS: Thank you, Mr. President, for your patience.

[Public hearing of 14 July 1965]

The PRESIDENT: The hearing is resumed, and I call upon Judge Forster who desires to put a question to the witness.

Judge FORSTER: Monsieur l'expert, pouvez-vous me dire, en votre qualité d'expert en *apartheid*, le souci majeur qui dicta l'application de l'*apartheid* dans le Sud-Ouest africain. Est-ce le souci d'accroître le bien-être matériel et moral, ainsi que le progrès social des habitants du Territoire ou bien est-ce le souci de protéger les intérêts des Blancs moins nombreux que les indigènes.

Mr. CILLIE: I would answer that question by saying that it is really a matter of both purposes. The White people of South West Africa is also a people of South West Africa. The policy there is followed for the protection of all groups. Do I have to expand on that, Mr. President?

The PRESIDENT: No, you just give the answer that you feel that you should give to any question which is put to you. Is there any further question, Judge Forster?

Judge FORSTER: Non, merci, Monsieur le Président.

The PRESIDENT: Sir Louis?

Judge Sir Louis MBANEFO: My question seems to lead off from the last question, and in doing so I would like to refer you to some passages of your evidence. Some of them I shall quote from the verbatim record of yesterday morning; the transcript of your evidence of yesterday evening has not yet been supplied, so I have got to read from my own notes, and if it is not correct, will you please correct me?

Mr. CILLIE: I shall do so.

Judge Sir Louis MBANEFO: Now, in the verbatim record at page 508, *supra*, you were asked to give the main determinant of the policies of differentiation, and at page 512, *supra*, you said:

> "Well, as happened elsewhere, our relationships with these peoples became more urgent as the tide of anti-colonialism gathered force during this century. As their aspirations and ambitions grew, we, the ruling White Africans in these territories, in South Africa as well as South West Africa, had to see to it that our trusteeship did not degenerate into oppression."

I take it you mean oppression by the non-Whites against the Whites?

Mr. CILLIE: No, that meant that in our trusteeship as White people we did not, as the urge to freedom gathered momentum amongst the various non-White peoples, oppress them just for the sake of maintaining the status quo. "Oppression" was referring there to possible White oppression of the non-White people.

Judge Sir Louis MBANEFO: Thank you. And you said, further down:

> "These solutions [by people who wanted integration] do open up a prospect of the White Africans in these two countries being politically overwhelmed by the sheer weight of non-White numbers, and the overwhelming involves not only the White Africans, it involves the smaller non-White groups."

Mr. CILLIE: Yes. I would like to put it even more broadly than that because, as I stated somewhere else, there is no single people in South Africa or South West Africa that forms a majority. We are in fact all minority peoples.

Judge Sir Louis MBANEFO: Yes, you said that yesterday.

Mr. CILLIE: Yes, and as regards non-White numbers, one could envisage a political movement that tries to unite all non-White peoples of South Africa and South West Africa on the basis of non-Whiteness; in other words, a racially contrived majority that could be used by ruthless men to oppress not only the White people but all minority peoples—in fact, the whole of the South African population, in the end.

Judge Sir Louis MBANEFO: And you also said, at page 512, *supra*:

> "When dealing with majorities, or collections of minorities that could be manipulated as majorities, even the beginnings of such an integration policy raise such fears among the ruling people that the policy itself never gets off the ground."

Mr. CILLIE: Yes.

Judge Sir Louis MBANEFO: Now the question I want to ask: is it

correct to say that the basic reason for evolving the policy of apartheid was to safeguard what one of your colleagues called "White nationalism" in South Africa?

Mr. CILLIE: That was a basic reason.

Judge Sir Louis MBANEFO: That is a basic reason?

Mr. CILLIE: That is a basic reason.

Judge Sir Louis MBANEFO: To avoid being overwhelmed?

Mr. CILLIE: Yes.

Judge Sir Louis MBANEFO: By the more numerous amount of people?

Mr. CILLIE: Yes, to avoid losing our freedom, to avoid losing the freedom that we won in a very hard way in South Africa.

Judge Sir Louis MBANEFO: That assumes a basic antagonism between the two nationalisms.

Mr. CILLIE: Basic antagonism? *No, not necessarily. I do not see why* there should be a basic antagonism at all.

Judge Sir Louis MBANEFO: But if that is so, then why should the mere mention of integration raise fears amongst the minds of the people?

Mr. CILLIE: Well, you do not want to subject your own nationalism to any other sort of nationalism—I mean, it does raise fears, as it would raise fears in any similar situation where you have two peoples, say the Dutch people and the German people. Their nationalisms may not be basically antagonistic, but I think that as soon as you start trying to integrate on that basis, if you try to integrate the Dutch with the German people, you immediately would see the most awful results in the form of *hostility and bitterness between these two peoples. Nationalisms* can live together, but as soon as there is the threat of one overwhelming the other, then you have a situation almost bordering on war. I do not see that there is any—there need not be any basic hostility; it is a question of coexistence, a coexistence of two different nationalisms.

Judge Sir Louis MBANEFO: Your example of the Dutch and the Germans I am afraid I find difficult, because the Dutch and the Germans do not occupy the same territory, except in the time of occupation during the war.

Mr. CILLIE: Yes, but I did yesterday go into the question that we are demarcating, that we are re-drawing, in a way, the map of South *Africa and South West Africa;* we are beginning to make these demarcations.

Judge Sir Louis MBANEFO: What is hoped to be achieved ultimately?

Mr. CILLIE: A peaceful coexistence, a peaceful co-operation, between these various peoples.

Judge Sir Louis MBANEFO: And you say that this cannot be achieved in any other way except by a policy of apartheid?

Mr. CILLIE: Not that I can see, sir; I cannot envisage it. There are people in South Africa who differ from me and take various other views, and they state their case quite openly—we argue these things in the ordinary, democratic way, we argue it very vehemently, but that line *of thinking*—the opposite to my line of thinking—on integration has been losing ground all along the line during the last, say, 10 to 20 years. Quite objectively, I do not think you can win the White people of South Africa for that prospect.

Judge Sir Louis MBANEFO: I just want to get clear in my mind, you see, the whole picture. You talk of political separation, but you do not talk of economic separation.

Mr. CILLIE: No.

Judge Sir Louis MBANEFO: Is it true that in apartheid—I believe you said something similar yesterday, but if I am wrong, will you please correct me—you do not go the whole way in talking of geographical separation or territorial separation of the groups?

Mr. CILLIE: No, only as much as possible—if you demarcate a homeland for a people you do envisage that the large majority of them will eventually find a living and a home there, but to talk about a complete physical separation with everybody on this side of the line and all other people on the other side of the line—it does not make sense in the modern world—I do not think so.

Judge Sir Louis MBANEFO: You accept the characterization that it makes economic nonsense?

Mr. CILLIE: Yes—it makes economic nonsense if you build a sort of wall between peoples who are so very closely inter-locked and so closely inter-dependent in many ways, and I do not see that political separation involves economic separation—you can have a great degree of economic inter-dependence and still have political independence.

Judge Sir Louis MBANEFO: So that in the field of economy, apartheid does not offer the Natives anything new because you already have economic integration and you do not intend under apartheid to separate that.

Mr. CILLIE: No, it does offer the prospect of intense development of their territories, of the various non-White homelands; it does offer that prospect.

Judge Sir Louis MBANEFO: Yes, but already the Mandatory is committed to do that, under the Mandate. It is committed to develop the Territory materially, socially and morally to the maximum.

Mr. CILLIE: You see this is a co-operation really, because the White people, who are the leading people in many respects in South Africa at this moment, do offer the know-how, they offer the administrative and technological abilities for the development of the other peoples, and on the other hand they accept the labour of the non-White peoples. It is an inter-locked co-operation; it is give and take on both sides.

Judge Sir Louis MBANEFO: Inter-locking in the economic field?

Mr. CILLIE: Yes, in various ways—by labour, by investment, in all sorts of ways—there is this inter-dependence and I do not see that ending. There will always be this inter-dependence between these various peoples. In fact, we are in rather an opposite position to, say, the European Common Market, where you first had independence and now they are working for economic inter-dependence with the retention of a large measure of political independence. We start from the point where we already have economic inter-dependence, and we try to give these various non-White groups forms of self-government and forms of political self-expression.

Judge Sir Louis MBANEFO: Now, I want to read to you from a statement by Professor Logan, at page 405, *supra*:

> "In the case of the exceptional individual, sometimes the regulations [introduced in South West Africa] bear heavily upon him—I think there is no question of this . . . A few, yes, I think unquestionably are harmed by this; we have exactly the same thing in our own societies."

In the course of implementation of the policy this says a few people will be harmed. Do you accept that?

Mr. CILLIE: We get these odd cases in South Africa and we try our best to accommodate them.

Judge Sir Louis MBANEFO: The few, I take it, are those who have ambitions to get higher, men of exceptional ability, and I think also that in the report by the Odendaal Commission it says that in the Ovambo area you have approximately 40 per cent. of the population are already literate, 40 per cent. of the population of Ovambo would give you something like 95,000 people. Now this few referred to by Professor Logan—have you tried to work out the degree of misery or how many people would be affected by implementation of this policy?

Mr. CILLIE: No. I mean, being literate does not make you an exceptional individual. I think, as far as I gather from your quotation, Professor Logan was talking about "exceptional individuals" and, of course, we need these people. If we find in one of these lesser developed groups exceptional individuals, say in the sphere of administration or in the sphere of medicine or science, we need them. I mean their own people need them and we need them to build them up as leaders for their own people. So, in fact, I think if cases of that kind are brought to the attention—and as I have said, we have an open society and such cases can always be brought to the attention of the authorities by way of the press, by way of deputations and things like that—we do our best to accommodate these cases. As I said yesterday, the policy of separate development is a dynamic policy and it is capable of adjusting itself to the circumstances as they arise.

Judge Sir Louis MBANEFO: Where I mentioned the 40 per cent., I did not intend that 40 per cent. would be the few but even if you have 1 per cent. of the 40 per cent. as the few you are talking about a few thousands.

Mr. CILLIE: I could not really put a figure on the exceptional individuals in that particular case. Education is going ahead there. Education is a huge movement. You have to build it from the bottom up and you have to work up to the university standard. To lift the educational standards of a people is not a simple process, it becomes a whole people's movement.

Judge Sir Louis MBANEFO: For these few, they may be a thousand or more people in South West Africa, the policy offers them nothing. I would like to see what they get out of it—for the misery that they suffer, what do they get out of it?

Mr. CILLIE: No. This is not a question of misery, it is a question of, in some cases, facilities not being available perhaps for further study, and we are doing our best to supply those deficiencies. After all, we are committed to separate development, we need all the talent that we can get, all the leadership that we can get among these people, and you can be assured that we are doing our best to accommodate all these people who are of any use in leading their own people to self-expression and self-realization.

Judge Sir Louis MBANEFO: We have been told in the course of this sitting that any Bantu in South West Africa who goes abroad and studies as an engineer should not expect employment in the White sector because they would not have him—rather that he would not be allowed to work in a position where he would have White people under him.

Mr. CILLIE: Yes, that is rather difficult in South Africa—that position

is rather delicate, but if we have a man like that, we shall find him a place in the homelands, certainly.

Judge Sir Louis MBANEFO: But the existence of that, you would accept, is unfair discrimination?

Mr. CILLIE: Yes, it bears rather hard on a man like that if he has this tremendous desire to work in the White area, but I do not think that that is a position that is likely to arise—the scope for his talents and for his know-how is all the time being expanded inside the Bantu homelands, and we shall find quite a lot of work for him to do in those areas.

Judge Sir Louis MBANEFO: Now you said, and if I am wrong please correct me, that the whole idea in South West Africa envisages having at least one African State that will be viable and others that will not be viable.

Mr. CILLIE: I suggested that as rather a personal opinion, because of the numerical strength of the Ovambo people and also the resources of the area in which they live. That was more a personal opinion, because it also depends upon whether the Ovambos want to be a separate viable state in the end.

Judge Sir Louis MBANEFO: I see you have got your White state on one side in the White area, now in the Native Reserves would you envisage a bigger ultimate status, independent states or local governments or what? I would like to get this clear because . . .

Mr. CILLIE: Some of those units could obviously not be independent states in any accepted sense.

The PRESIDENT: The witness might complete his answer to the question.

Mr. CILLIE: Some of them are so small and the numbers are so low that obviously you cannot speak of all those smaller areas as viable states. You cannot envisage that, not for the foreseeable future. But the immediate outlook is that we want them to be self-respecting peoples, we want to develop their institutions and their organs of self-government, and then they will have an organized voice in their own affairs; they will have a voice which could be heard in the councils of South Africa, they could talk to the Government in an organized way, not merely by way of individual agitators and so on. You want to build up their personalities and then you can talk to them.

Judge Sir Louis MBANEFO: You see, what I find difficult is the term "self-government". That is a very nebulous term because you probably have about 50 degrees of self-government.

Mr. CILLIE: Yes, I agree with you. The degree that is attained by people depends on so many factors that you just have to start the process and see where you get, to see what these peoples are capable of and whether a people is viable or not. If they cannot build a viable state or viable government, then you have to make other arrangements, perhaps bring the various groups together and ask them: How do you see your future? This is not a matter for unilateral decision, as I explained yesterday.

Judge Sir Louis MBANEFO: Could you, for instance, say what is the degree of self-government you expect them to attain in ten years from now?

Mr. CILLIE: I wouldn't like to bind myself to timetables at all in these matters. Timetables can be very dangerous. You can work on a tentative timetable and I do not know enough about these territories and about the administration there even to suggest a tentative timetable, but I

should think that the administration itself would work to some sort of timetable. They would say: next year we are going to have this sort of council, perhaps a nominated council to start with, then the elective process will be brought in. They could work to a very flexible timetable and I think that is the way things are being done in South Africa and in South West Africa.

Judge Sir Louis MBANEFO: I take it, then, that in introducing the policy to the people you have to explain it to them and get their approval or consent—some sort of consent?

Mr. CILLIE: Yes.

Judge Sir Louis MBANEFO: Now, what would you be offering them that would make them agree to the policy?

The PRESIDENT: You mean, what are you doing now, or what will you do in the future?

Judge Sir Louis MBANEFO: When you explain to the people you say to them: look, this is what we are offering you under this policy, that you will get, maybe next year, or in five years' time, or ultimately. Have you worked that out clearly in your mind?

Mr. CILLIE: No. That is the sort of thing that arises through the process. There are already traditional organs of expression amongst some of these people, and as you progress the whole process becomes a two-way process and you are in constant consultation with these people. Their will becomes more and more important as they develop. It is not a question of promises, it is a question of co-operation from day to day.

Judge Sir Louis MBANEFO: Do you envisage a situation where you might withdraw from that policy if it did not meet with the approval of the people?

Mr. CILLIE: Yes. Certainly we cannot indefinitely impose a policy on a people that rejects it; if the plans do not work, if it is utterly rejected by masses of people, then we have to think again. I don't think there is any evidence that these policies are rejected by masses of people and that they simply won't have anything to do with them.

Judge Sir Louis MBANEFO: Well, they cannot reject it until they understand what it is, and that is what I am trying to find out.

Mr. CILLIE: Yes, but it is being explained to them. It is going to be explained to them more and more, and they are going to be asked to co-operate with it. Certainly, if, in the process, we find points of friction and if their objections are valid, we shall make the necessary accommodations.

Judge Sir Louis MBANEFO: "We", being the Government.

Mr. CILLIE: Yes. I was talking in the sense of the administration, of the ruling White people.

Judge Sir Louis MBANEFO: And would any adjustment involve adjusting the position or attitude of the White population, or White nationalism, if I use the expression as meaning the composite idea?

Mr. CILLIE: We are making adjustments all the time. The buying of land, for instance, is done at the expense of vested White interests. Of course, they are paid for it, but it is mainly the White taxpayer who bears the burden of the buying of land to extend these people's homelands. That is one way in which we are adjusting ourselves to this new reality.

Judge Sir Louis MBANEFO: Now there is just one last question I would like to ask. There seems to me to be an assumption that if a Native, an

Ovambo, or Dama, was given education, or put in a township, he wouldn't want to go back to his homeland.

The PRESIDENT: Is this a question or is it a statement?

Judge Sir Louis MBANEFO: No, I am saying that there is an assumption in the evidence, in the formulation of this policy, that if a Native was educated, or had reached what is described here as the focal point, he would not want to go back to his village.

Mr. CILLIE: Well, you could have cases like that. We do have cases like that. I think that is a phenomenon that is not only true of people in South West Africa. It is also a universal phenomenon, that people cut loose from their origins and places of birth and do not return. It is rather sad, but there it is.

Judge Sir Louis MBANEFO: I don't want to start an argument about that, but it doesn't seem to have been the experience in West Africa.

The PRESIDENT: Well, I don't think that statement can be made, Judge Mbanefo.

Judge Sir Louis MBANEFO: I am sorry. Why I mentioned that is because yesterday you seemed to indicate that the person who is discriminated against in the southern sector, outside the Reserves, will have his compensation by going back.

Mr. CILLIE: Yes, but I don't think that this matter of discrimination in the southern sector is as important as has been made out in the cross-examination. I think this has been blown up. These are matters of life and death, and these points are trivial, piffling points which do not affect the real case.

Judge Sir Louis MBANEFO: Life and death for whom?

Mr. CILLIE: It is life and death for all the peoples of Southern Africa.

Judge Sir Louis MBANEFO: And for an educated Native who has a ceiling put on his economic opportunities it is more a matter of life and death than for anybody else?

Mr. CILLIE: No, but, in fact, sir, these vast deprivations that are sometimes imagined are not there. The people who work in the southern sector—I suppose one has to go and look at them really to find the real position. I mean, we are an open society and injustice is brought to light somehow . . .

Judge Sir Louis MBANEFO: What, then, is the purpose of the Job Restriction Act?

Mr. CILLIE: I think I explained that yesterday, that these Acts are there, on the one hand to guard against encroachments, to protect the various peoples, to protect their sense of security, their security itself, and on the other to encourage the various non-White peoples, if they are ambitious and are very, very capable men, to pursue their highest ambitions rather in serving their own groups than in trying to compete and, in a very difficult situation, to embitter group relations in South Africa. On the one hand there is the negative aspect of protection and on the other it does tend to channelize the ambitions and capacities of these people.

The PRESIDENT: I desire to ask a few questions of Mr. Cillie, but, before I do so, I wish to ask the Agent for the Applicants a question. Do the Applicants contend that their final submissions, as filed in the Court, contain, in the content of the obligatory norm for which they have contended, an obligation to grant universal adult suffrage in South West Africa within the framework of a single territorial unit?

Mr. GROSS: No, sir.

The PRESIDENT: Thank you. I just desire to ask a few questions. I am seeking only information.

In South Africa, as I understand the position, the policy of apartheid, or separate development, is a political policy based upon a claimed necessity to protect the White civilization of South Africa. Is that correct?

Mr. CILLIE: Yes, it is correct, Mr. President. It is much more.

The PRESIDENT: To what extent is it beyond a political policy?

Mr. CILLIE: It has social aspects; it has economic aspects and, as far as the protection of White civilization is concerned, it is also designed to protect the evolutionary situation. It is not just a question of protecting a group, it is protecting that group in all its relationships. You have a very complicated network of relationships in South Africa and the policy of apartheid is designed not only to protect the group as a physical, separate, entity, but also to protect all these various relationships and also to make evolutionary development possible.

The PRESIDENT: That, I understand, as you have said, is the policy in practice. That is the manner in which it is being, you say, developed?

Mr. CILLIE: Yes.

The PRESIDENT: But you told us yesterday about the original settlement of the Cape and the extension of the areas of the Whites' settlement centuries ago farther north, so that there was established, as you stated, a Western civilization and that they established in South Africa their homeland and it is now their homeland, they have no other homeland.

Mr. CILLIE: That is true.

The PRESIDENT: That involves upward of how many million people?

Mr. CILLIE: The White population is about three-and-a-quarter million people.

The PRESIDENT: And you say that before 1948, certainly from the early forties, the thinking was in political circles, I suppose, primarily, or was it in sociological circles.

Mr. CILLIE: This was a whole movement involving many institutions and organizations, Mr. President. It was not only a question of a political party. The churches were involved because the churches are up to their necks in group relations questions all the time, both the churches and the universities. This was a broad national thinking process that was going on during those years.

The PRESIDENT: It was not the policy, then, created by any particular single individual or any single party.

Mr. CILLIE: No. In fact, it was an extension of what went before. It wasn't a new policy just thought up, you know. If there is one man who was actually the basic architect of this policy I would name General Herzog, because he was the man who started the idea, especially of separate territorial development, of territorial separation, or segregation as it was called in those days. He initiated that policy, but we had to speed things up considerably, especially in this post-war period.

In Africa, some of the Colonial powers thought they had another 50 to 100 years to develop their policies, and then they found that they had only about 5 years, or even less. In South Africa there was this considerable speeding-up. General Herzog certainly never, as far as we know, thought in terms of independent Black states. He did think in terms of

self-governing Black areas. We had to take all this further you see, under the pressures of the times, and pressures of conscience too.

The PRESIDENT: Although it arose in the manner in which you described, and you say was intended to be in the interests of all the separate communities—I will call them—or groupings, nonetheless each grouping would have an interest in it because of their desire to maintain their own separate national identity?

Mr. CILLIE: Yes, that is how we thought about it.

The PRESIDENT: So that, so far as the European people—we should call them South African, White, people—are concerned, in South Africa, the policy is supported by the majority or only by a small minority to protect their interests, as you stated yesterday, as a White civilization in their own homeland?

Mr. CILLIE: You see, if you could strip the policy of all its side issues, I do think that you would find that it is the vast majority of the South African Whites who would support the basic principles of the policy, but there are arguments about implementation and there are different nuances. There are, in fact, also White people who do believe in a policy of integration. It is very difficult in politics to get an exact division; the issues are not always posed very clearly, they get muddled up.

The PRESIDENT: I am aware of that!

Mr. CILLIE: They do get muddled up and for me to say this is supported by 90 per cent. of the White people would be presumptuous, because it would be very difficult to prove.

The PRESIDENT: You yourself, are unacquainted with South West Africa, except by reference?

Mr. CILLIE: Yes, by a few visits and by reading and by the usual information that is at the disposal of a newspaper editor.

The PRESIDENT: Sir Louis Mbanefo has directed questions to you to seek to ascertain in what direction the policy of separate development will lead one in South West Africa. You are unable to express any view with any precision as to what lies in the future?

Mr. CILLIE: Yes, I think what Sir Louis wanted of me is a sort of blueprint, and I thought that was the general tenor, to give a more complete picture, and I can appreciate that desire. That is a very legitimate desire, but this policy is, as I said, dynamic, it is an open-end policy, and you have to see where you get as you move along.

The PRESIDENT: Well, your concept then, is that the group or separate development in South West Africa will follow an evolutionary course or that it is the desire, rather, of the Administration, to follow an evolutionary course, in which the peoples of each particular group will have full liberties both political, social and otherwise, within their own groups but will be unable to share the rights of others outside their groups?

Mr. CILLIE: Yes, it will not be a complete separation like that, but . . .

The PRESIDENT: By and large?

Mr. CILLIE: By and large.

The PRESIDENT: When you speak about—this is a separate matter altogether—the ruling White, does that mean anything else than the White people who happen to have charge or control of the reins of Government? Has it any connotation of racial superiority?

Mr. CILLIE: No, I am very open-minded about the question of racial superiority, Mr. President. I am not an anthropologist and people are arguing about this all the time. I keep an open mind about it; there are

facts of development in Western terms and of underdevelopment, but I do not like using the words "superiority" or "inferiority" in these contexts.

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

Mr. GROSS: May I express on behalf of the Applicants, sir, our gratitude for the patience with which the Court has listened to our case and to wish the Members of the Court and the honourable President a pleasant summer, sir.

The PRESIDENT: Yes, Mr. de Villiers?

Mr. DE VILLIERS: I should very much like to associate myself with what my learned friend has said, on behalf of my colleagues and myself, and I should like to add in the list the very hard working Registrar and his personnel.

The PRESIDENT: The Court will adjourn, and before it does adjourn, it would wish to the Agents and counsel of the Parties some opportunity, during the two months of recess, for relaxation from the heavy responsibilities they have all carried during the course of this case.

The Court will adjourn until 20 September, at 3 o'clock in the afternoon, unless it is otherwise ordered and the Parties notified in the meantime.

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