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

AFFAIRES DU SUD-OUEST AFRICAIN
(ETHIOPIE *c.* AFRIQUE DU SUD;
LIBERIA *c.* AFRIQUE DU SUD)

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

SOUTH WEST AFRICA CASES

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

VOLUME VIII

1966

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRES DU SUD-OUEST AFRICAIN

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

VOLUME VIII

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The present volume contains the minutes of the public sittings and the oral arguments on the merits relating to the *South West Africa* cases covering the period 15 March to 26 April 1965. The proceedings in these cases, which were entered on the Court's General List on 4 November 1960 under numbers 46 and 47, were joined by an Order of the Court of 20 May 1961 (*South West Africa, Order of 20 May 1961, I.C.J. Reports 1961*, p. 13). Two Judgments have been rendered, 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).

The page references originally appearing in the pleadings have been altered to correspond with the pagination of the present edition. Where the reference is to another volume of the present edition, the volume is indicated by a roman figure in bold type.

The Hague, 1966.

Le présent volume reproduit les procès-verbaux des audiences publiques tenues dans les affaires du *Sud-Ouest africain*; il porte sur la période allant du 15 mars au 26 avril 1965 et contient le texte des plaidoiries sur le fond prononcées à l'occasion de ces audiences. Les affaires du *Sud-Ouest africain* ont été inscrites au rôle général de la Cour sous les n^{os} 46 et 47 le 4 novembre 1960 et les deux instances ont été jointes par ordonnance de la Cour le 20 mai 1961 (*Sud-Ouest africain, ordonnance du 20 mai 1961, C.I.J. Recueil 1961*, p. 13). Elles ont fait l'objet de deux arrêts rendus le 21 décembre 1962 (*Sud-Ouest africain, exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 319) et le 18 juillet 1966 (*Sud-Ouest africain, deuxième phase, arrêt, C.I.J. Recueil 1966*, p. 6).

Les renvois d'un mémoire à l'autre ont été modifiés pour tenir compte de la pagination de la présente édition. Lorsqu'il s'agit d'un renvoi à un autre volume de la présente édition, un chiffre romain gras indique le numéro de ce volume.

La Haye, 1966.

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PART II *(continued)*

SECTION B

ORAL ARGUMENTS ON THE MERITS

PUBLIC HEARINGS

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

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PARTIE II *(suite)*

SECTION B

PLAIDOIRIES RELATIVES AU FOND

AUDIENCES PUBLIQUES

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

MINUTES OF THE HEARINGS HELD FROM 15 MARCH TO 14 JULY, 20 SEPTEMBER TO 15 NOVEMBER AND 29 NOVEMBER 1965, 21 MARCH AND ON 18 JULY 1966

YEAR 1965

FIRST PUBLIC HEARING (15 III 65, 3 p.m.)

Present: President Sir Percy SPENDER; *Vice-President* Wellington KOO; *Judges* WINIARSKI, BADAWI, SPIROPOULOS, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS; *Judges* ad hoc Sir Louis MBANEFO, van WYK; *Deputy-Registrar* AQUARONE.

Also present:
For the Government of Ethiopia:
H.E. Dr. Tesfaye GEBRE-EGZY,
The Honourable Ernest A. GROSS, Member of the New York Bar,
as Agents;
Mr. Edward R. MOORE, Under Secretary of State of Liberia,
Mr. Keith HIGHET, Member of the New York Bar,
as Counsel.

For the Government of Liberia:
H.E. Mr. Nathan BARNES,
The Honourable Ernest A. GROSS, Member of the New York Bar,
as Agents;
Mr. Edward R. MOORE, Under Secretary of State of Liberia,
Mr. Keith HIGHET, Member of the New York Bar,
as Counsel.

For the Government of South Africa:
Dr. J. P. verLoren van THEMAAT, S.C., Professor of International Law at the University of South Africa and Consultant to the Department of Foreign Affairs,
Mr. R. McGREGOR, Deputy Chief State Attorney,
as Agents;
Mr. D. P. de Villiers, S.C., Member of the South African Bar,
Mr. G. van R. MULLER, S.C., Member of the South African Bar,
Dr. P. J. RABIE, S.C., Member of the South African Bar,
Mr. E. M. GROSSKOPF, Member of the South African Bar,
Dr. H. J. O. van HEERDEN, Member of the South African Bar,
as Counsel;
Mr. R. F. BOTHA, Department of Foreign Affairs and Advocate of the Supreme Court of South Africa,
Mr. H. J. ALLEN, Department of Bantu Administration and Development,

PROCÈS-VERBAUX DES AUDIENCES TENUES DU 15 MARS AU 14 JUILLET, 20 SEPTEMBRE AU 15 NOVEMBRE ET 29 NOVEMBRE 1965, 21 MARS ET LE 18 JUILLET 1966

ANNÉE 1965

PREMIÈRE AUDIENCE PUBLIQUE (15 III 65, 15 h)

Présents: sir Percy SPENDER, *Président*; M. WELLINGTON KOO, *Vice-Président*; MM. WINIARSKI, BADAWI, SPIROPOULOS, sir Gerald FITZMAURICE, MM. KORETSKY, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS, *Juges*; sir Louis MBANEFO, M. van WYK, *Juges* ad hoc; M. AQUARONE, *Greffier adjoint.*

Présents également:
Pour le Gouvernement éthiopien:
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L'honorable Ernest A. GROSS, membre du barreau de New York,
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M. Edward R. MOORE, sous-secrétaire d'Etat du Libéria,
M. Keith HIGHET, membre du barreau de New York,
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S. Exc. M. Nathan BARNES,
L'honorable Ernest A. GROSS, membre du barreau de New York,
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M. Edward R. MOORE, sous-secrétaire d'Etat du Libéria,
M. Keith HIGHET, membre du barreau de New York,
comme conseils.

Pour le Gouvernement sud-africain:
M. J. P. VERLOREN VAN THEMAAT, S.C., professeur de droit international à l'Université d'Afrique du Sud, consultant auprès du département des Affaires étrangères,
M. R. MCGREGOR, *Chief State Attorney* adjoint,
comme agents;
M. D. P. de VILLIERS, S.C., membre du barreau d'Afrique du Sud,
M. G. van R. MULLER, S.C., membre du barreau d'Afrique du Sud,
M. P. J. RABIE, S.C., membre du barreau d'Afrique du Sud,
M. E. M. GROSSKOPF, membre du barreau d'Afrique du Sud,
M. H. J. O. van HEERDEN, membre du barreau d'Afrique du Sud,
comme conseils;
M. R. F. BOTHA, du département des Affaires étrangères, avocat à la Cour suprême d'Afrique du Sud,
M. H. J. ALLEN, du département de l'Administration et du Développement bantous,

Mr. H. HEESE, Department of Foreign Affairs and Advocate of the Supreme Court of South Africa,

as Advisers.

The PRESIDENT opened the hearing and delivered an address to mark the twentieth anniversary of the United Nations.

After formally opening the hearing in the South West Africa cases, the President said that before, however, proceeding further, mention should be made of a matter of a preliminary character, not concerned with the merits of the case, which had suddenly arisen at the instance of the Agent for one of the States Parties to these proceedings. In these circumstances the Court had decided to recess the public hearing in order to deal immediately with this matter. For that purpose, after a short recess, the Court would reconvene and sit in private to hear this preliminary matter, in accordance with a decision of the Court taken under Article 46 of the Statute of the Court, and there being no objection by the Parties.

The Court rose at 3.20 p.m.

(Signed) Percy C. SPENDER,
President.
(Signed) S. AQUARONE,
Deputy-Registrar.

FIRST CLOSED HEARING (15 III 65, 3.35 p.m.)

Present: [See first public hearing.]

The Court sat in private to hear the contentions of the Parties with regard to the application of the Respondent concerning the composition of the Court [see *South West Africa, Order of 18 March 1965, I.C.J. Reports 1965*, page 3].

The Court rose at 6 p.m.

[Signatures.]

[SECOND CLOSED HEARING (16 III 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The Court sat in private to hear the contentions of the Parties with regard to the application of the Respondent concerning the composition of the Court [see *South West Africa, Order of 18 March 1965, I.C.J. Reports 1965*, page 3].

The Court rose at 11 a.m.

[Signatures.]

M. H. HEESE, du département des Affaires étrangères, avocat à la Cour suprême d'Afrique du Sud,

comme conseillers.

Le PRÉSIDENT ouvre l'audience et prononce une allocution à l'occasion du vingtième anniversaire des Nations Unies.

Après avoir officiellement ouvert la procédure orale dans les affaires du *Sud-Ouest africain*, le Président déclare qu'avant de poursuivre, il doit mentionner qu'une question de caractère préliminaire, ne touchant pas au fond de l'affaire, vient soudainement de se poser sur l'initiative de l'agent de l'un des Etats Parties aux instances. Cela étant, la Cour a décidé de lever l'audience publique afin d'examiner immédiatement le problème. A cet effet, après une brève suspension, la Cour se réunira à huis clos pour s'entendre exposer cette question préliminaire, conformément à la décision qu'elle a prise en vertu de l'article 46 du Statut de la Cour et sans objection de la part des Parties.

L'audience est levée a 15 h 20

Le Président,
(Signé) Percy C. SPENDER,
Le Greffier adjoint,
(Signé) S. AQUARONE.

PREMIÈRE AUDIENCE À HUIS CLOS (15 III 65, 15 h 35)

Présents: [Voir première audience publique.]

La Cour siège à huis clos pour entendre les observations des Parties sur la requête du défendeur relative à la composition de la Cour [voir *Sud-Ouest africain, ordonnance du 18 mars 1965, C.I.J. Recueil 1965,* p. 3].

L'audience est levée à 18 h

[Signatures.]

DEUXIÈME AUDIENCE À HUIS CLOS (16 III 65, 10 h)

Présents: [Voir audience du 15 III 65.]

La Cour siège à huis clos pour entendre les observations des Parties sur la requête du défendeur relative à la composition de la Cour [voir *Sud-Ouest africain, ordonnance du 18 mars 1965, C.I.J. Recueil 1965,* p. 3].

L'audience est levée à 11 h

[Signatures.]

SECOND PUBLIC HEARING (18 III 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT said that the public hearings in the South West Africa cases were resumed. They had been suspended since 15 March to enable the Court to hear in private an application by South Africa concerned with the composition of the Court to hear and decide on the cases presently before the Court, and to enable the Court to deliberate thereon. On that application an Order was made by the Court. After reading the text of the Order of 18 March 1965, the President called upon the Agent for the Applicants.

Mr. GROSS made the speech reproduced in the annex [1].
The PRESIDENT called upon Mr. Barnes.
Mr. BARNES made the speech reproduced in the annex [2].
The PRESIDENT called upon Mr. Gross.
Mr. GROSS began the speech reproduced in the annex [3].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. GROSS concluded the speech reproduced in the annex [4].
The PRESIDENT called upon Mr. Moore.
Mr. MOORE began the speech reproduced in the annex [5].

The Court rose at 12.55 p.m.

[Signatures.]

THIRD PUBLIC HEARING (19 III 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon Mr. Moore
Mr. MOORE continued the speech reproduced in the annex [6].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. MOORE concluded the speech reproduced in the annex [7].
The PRESIDENT called upon Mr. Gross.
Mr. GROSS began the speech reproduced in the annex [8].

The Court rose at 1 p.m.

[Signatures.]

FOURTH PUBLIC HEARING (22 III 65, 3 p.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon Mr. Gross.

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[1] See p. 105.
[2] See p. 106.
[3] See pp. 107-120.
[4] See pp. 120-136.
[5] See pp. 136-138.
[6] See pp. 138-155.
[7] See pp. 155-166.
[8] See pp. 167-170.

DEUXIÈME AUDIENCE PUBLIQUE (18 III 65, 10 h)

Présents : [Voir audience du 15 III 65.]

Le PRÉSIDENT déclare que la Cour reprend en audience publique les affaires du *Sud-Ouest africain*. Les audiences ont été suspendues depuis le 15 mars pour permettre à la Cour d'être saisie à huis clos d'une requête déposée par l'Afrique du Sud relativement à la composition de la Cour aux fins des affaires qui lui sont actuellement soumises, et pour lui permettre de délibérer sur cette requête. Sur ladite requête, la Cour a rendu une ordonnance. Après avoir lu le texte de l'ordonnance du 18 mars 1965 :

Le PRÉSIDENT donne la parole à l'agent des demandeurs.
M. GROSS prononce l'exposé reproduit en annexe [1].
Le PRÉSIDENT donne la parole à M. Barnes.
M. BARNES prononce l'exposé reproduit en annexe [2].
Le PRÉSIDENT donne la parole à M. Gross.
M. GROSS commence l'exposé reproduit en annexe[3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. GROSS termine l'exposé reproduit en annexe [4].
Le PRÉSIDENT donne la parole à M. Moore.
M. MOORE commence l'exposé reproduit en annexe [5].

L'audience est levée à 12 h 55

[Signatures.]

TROISIÈME AUDIENCE PUBLIQUE (19 III 65, 10 h)

Présents : [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. Moore.
M. MOORE continue l'exposé reproduit en annexe [6].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. MOORE termine l'exposé reproduit en annexe [7].
Le PRÉSIDENT donne la parole à M. Gross.
M. GROSS commence l'exposé reproduit en annexe [8].

L'audience est levée à 13 h

[Signatures.]

QUATRIÈME AUDIENCE PUBLIQUE (22 III 65, 15 h)

Présents : [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. Gross.

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[1] Voir p. 105.
[2] Voir p. 106.
[3] Voir p. 107-120.
[4] Voir p. 120-136.
[5] Voir p. 136-138.
[6] Voir p. 138-155.
[7] Voir p. 155-166.
[8] Voir p. 167-170.

Mr. GROSS continued the speech reproduced in the annex [1].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

Mr. GROSS continued the speech reproduced in the annex [2].

The Court rose at 6 p.m.

[Signatures.]

FIFTH PUBLIC HEARING (23 III 65, 10 a.m.)

Present: [See hearing of 15 III 65.]
The PRESIDENT opened the hearing and called upon Mr. Gross.
Mr. GROSS continued the speech reproduced in the annex [3].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. GROSS continued the speech reproduced in the annex [4].

The Court rose at 1 p.m.

[Signatures.]

SIXTH PUBLIC HEARING (24 III 65, 10 a.m.)

Present: [See hearing of 15 III 65.]
The PRESIDENT opened the hearing and called upon Mr. Gross.
Mr. GROSS continued the speech reproduced in the annex [5].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. GROSS concluded the speech reproduced in the annex [6].

The PRESIDENT asked when the Respondent would be ready to proceed with its presentation.

Dr. VERLOREN VAN THEMAAT said that Respondent had hoped to be ready by Monday, 29 March, but the presentation on behalf of the Applicants had been longer than expected, had introduced new material, and had dealt with certain factual issues. In those circumstances Respondent would need until at least Tuesday to prepare its argument fully.

The PRESIDENT said that while he would have hoped that Respondent might have been able to commence on Monday, the Court would adjourn until Tuesday, 30 March, at 10 a.m.

The Court rose at 1 p.m.

[Signatures.]

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[1] See pp. 170-188.
[2] See pp. 188-204.
[3] See pp. 204-221.
[4] See pp. 221-236.
[5] See pp. 237-253.
[6] See pp. 253-269.

M. GROSS continue l'exposé reproduit en annexe [1].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

M. GROSS continue l'exposé reproduit en annexe [2].

L'audience est levée à 18 h

[Signatures.]

CINQUIÈME AUDIENCE PUBLIQUE (23 III 65, 10 h)

Présents: [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. Gross.
M. GROSS continue l'exposé reproduit en annexe [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. GROSS continue l'exposé reproduit en annexe [4].

L'audience est levée à 13 h

[Signatures.]

SIXIÈME AUDIENCE PUBLIQUE (24 III 65, 10 h)

Présents: [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. Gross.
M. GROSS continue l'exposé reproduit en annexe [5].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. GROSS termine l'exposé reproduit en annexe [6].

Le PRESIDENT demande quand le défendeur sera prêt à présenter ses plaidoiries.

M. VERLOREN VAN THEMAAT déclare que le défendeur espérait être prêt à prendre la parole le lundi 29 mars mais que les demandeurs ont plaidé plus longuement que prévu et qu'ils ont présenté une documentation nouvelle et traité de quelques points de fait. Dans ces conditions, il conviendrait de donner au défendeur au moins jusqu'au mardi pour préparer complètement ses plaidoiries.

Le PRÉSIDENT déclare qu'il espérait que le défendeur serait en mesure de commencer ses plaidoiries le lundi; la prochaine audience se tiendra toutefois le mardi 30 mars à 10 h.

L'audience est levée à 13 h

[Signatures.]

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[1] Voir p. 170-188.
[2] Voir p. 188-204.
[3] Voir p. 204-221.
[4] Voir p. 221-236.
[5] Voir p. 237-253.
[6] Voir p. 253-269.

SEVENTH PUBLIC HEARING (30 III 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon the Agent for the Government of South Africa.

Dr. VERLOREN VAN THEMAAT asked the President to call upon Mr. de Villiers.

The PRESIDENT called upon Mr. de Villiers.

Mr. de VILLIERS began the speech reproduced in the annex [1].

The PRESIDENT asked the Agent for the Applicants whether it was his desire to express any view upon the matter which had been raised by the Agent for South Africa, or whether he would prefer to express such views as he desired to put to the Court at a later stage.

Mr. GROSS replied that with the Court's leave the Applicants would not deal with the subject then, but would reserve their right to deal with it in what they would regard as a more suitable time and context. It had been raised prematurely, and involved serious issues of fact with which the Applicants had not dealt in deference to the view that questions of law were to be treated at the present stage.

The PRESIDENT called upon Mr. de Villiers to continue his address.

Mr. de VILLIERS continued the speech reproduced in the annex [2].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [3].

The Court rose at 1 p.m.

[Signatures.]

EIGHTH PUBLIC HEARING (31 III 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon Mr. de Villiers.

Mr. de VILLIERS continued the speech reproduced in the annex [4].

The Court adjourned from 11.25 a.m. to 11.45 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [5].

The Court rose at 12.55 p.m.

[Signatures.]

NINTH PUBLIC HEARING (1 IV 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon Mr. de Villiers.

Mr. de VILLIERS continued the speech reproduced in the annex [6].

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[1] See pp. 270-280.
[2] See pp. 280-285.
[3] See pp. 285-300.
[4] See pp. 301-317.
[5] See pp. 317-331.
[6] See pp. 331-347.

SEPTIÈME AUDIENCE PUBLIQUE (30 III 65, 10 h)

Présents: [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent du Gouvernement sud-africain.

M. VERLOREN VAN THEMAAT prie le Président de bien vouloir donner la parole à M. de Villiers.

Le PRÉSIDENT donne la parole à M. de Villiers.

M. de VILLIERS commence l'exposé reproduit en annexe [1].

Le PRÉSIDENT demande à l'agent des demandeurs s'il désire donner son avis sur la question soulevée par l'agent de l'Afrique du Sud ou s'il préfère présenter à la Cour à un stade ultérieur les vues qu'il désire exprimer.

M. GROSS répond qu'avec la permission de la Cour les demandeurs préféreraient ne pas discuter la question immédiatement et se réserver le droit d'en traiter à un moment et dans un contexte plus appropriés. Cette question, qui a été introduite prématurément, soulève d'importants points de fait que les demandeurs n'ont pas encore abordés étant donné que la présente phase doit porter sur les points de droit.

Le PRÉSIDENT invite M. de Villiers à continuer sa plaidoirie.

M. de VILLIERS continue l'exposé reproduit en annexe [2].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [3].

L'audience est levée à 13 h

[Signatures.]

HUITIÈME AUDIENCE PUBLIQUE (31 III 65, 10 h)

Présents: [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.

M. de VILLIERS continue l'exposé reproduit en annexe [4].

L'audience, suspendue à 11 h 25, est reprise à 11 h 45.

M. de VILLIERS continue l'exposé reproduit en annexe [5].

L'audience est levée à 12 h 55

[Signatures.]

NEUVIÈME AUDIENCE PUBLIQUE (1 IV 65, 10 h)

Présents: [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.

M. de VILLIERS continue l'exposé reproduit en annexe [6].

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[1] Voir p. 270-280.
[2] Voir p. 280-285.
[3] Voir p. 285-300.
[4] Voir p. 301-317.
[5] Voir p. 317-331.
[6] Voir p. 331-347.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [1].

The Court rose at 12.55 p.m.

[Signatures.]

TENTH PUBLIC HEARING (2 IV 65, 10 a.m.)

Present: [See hearing of 15 III 65.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS continued the speech reproduced in the annex [2].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [3].

The Court rose at 12.55 p.m.

[Signatures.]

ELEVENTH PUBLIC HEARING (5 IV 65, 3 p.m.)

Present: [See hearing of 15 III 65.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS continued the speech reproduced in the annex [4].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

Mr. de VILLIERS continued the speech reproduced in the annex [5].

The Court rose at 6 p.m.

[Signatures.]

TWELFTH PUBLIC HEARING (6 IV 65, 10 a.m.)

Present: [See hearing of 15 III 65.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS continued the speech reproduced in the annex [6].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [7].

The Court rose at 12.50 p.m.

[Signatures.]

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[1] See pp. 347-362.
[2] See pp. 362-377.
[3] See pp. 377-391.
[4] See pp. 391-406.
[5] See pp. 406-421.
[6] See pp. 422-436.
[7] See pp. 436-450.

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [1].

L'audience est levée à 12 h 55

[Signatures.]

DIXIÈME AUDIENCE PUBLIQUE (2 IV 65, 10 h)

Présents : [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS continue l'exposé reproduit en annexe [2].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [3].

L'audience est levée à 12 h 55

[Signatures.]

ONZIÈME AUDIENCE PUBLIQUE (5 IV 65, 15 h)

Présents : [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS continue l'exposé reproduit en annexe [4].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [5].

L'audience est levée à 18 h

[Signatures.]

DOUZIÈME AUDIENCE PUBLIQUE (6 IV 65, 10 h)

Présents : [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS continue l'exposé reproduit en annexe [6].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [7].

L'audience est levée à 12 h 50

[Signatures.]

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[1] Voir p. 347-362.
[2] Voir p. 362-377.
[3] Voir p. 377-391.
[4] Voir p. 391-406.
[5] Voir p. 406-421.
[6] Voir p. 422-436.
[7] Voir p. 436-450.

THIRTEENTH PUBLIC HEARING (7 IV 65, 10 a.m.)

Present: [See hearing of 15 III 65.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS continued the speech reproduced in the annex [1].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [2].
The Court rose at 12.55 p.m.

[Signatures.]

FOURTEENTH PUBLIC HEARING (8 IV 65, 10 a.m.)

Present: [See hearing of 15 III 65.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS continued the speech reproduced in the annex [3].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [4].
The Court rose at 12.40 p.m.

[Signatures.]

FIFTEENTH PUBLIC HEARING (9 IV 65, 10 a.m.)

Present: [See hearing of 15 III 65.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS continued the speech reproduced in the annex [5].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [6].
The Court rose at 12.55 p.m.

[Signatures.]

SIXTEENTH PUBLIC HEARING (12 IV 65, 3 p.m.)

Present: [See hearing of 15 III 65.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS continued the speech reproduced in the annex [7].

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[1] See pp. 450-465.
[2] See pp. 465-481.
[3] See pp. 481-496.
[4] See pp. 496-508.
[5] See pp. 508-523.
[6] See pp. 523-538.
[7] See pp. 538-553.

TREIZIÈME AUDIENCE PUBLIQUE (7 IV 65, 10 h)

Présents: [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS continue l'exposé reproduit en annexe [1].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [2].

L'audience est levée à 12 h 55

[Signatures.]

QUATORZIÈME AUDIENCE PUBLIQUE (8 IV 65, 10 h)

Présents: [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS continue l'exposé reproduit en annexe [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [4].

L'audience est levée à 12 h 40

[Signatures.]

QUINZIÈME AUDIENCE PUBLIQUE (9 IV 65, 10 h)

Présents: [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS continue l'exposé reproduit en annexe [5].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [6].

L'audience est levée à 12 h 55

[Signatures.]

SEIZIÈME AUDIENCE PUBLIQUE (12 IV 65, 15 h)

Présents: [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS continue l'exposé reproduit en annexe [7].

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[1] Voir p. 450-465.
[2] Voir p. 465-481.
[3] Voir p. 481-496.
[4] Voir p. 496-508.
[5] Voir p. 508-523.
[6] Voir p. 523-538.
[7] Voir p. 538-553.

The Court adjourned from 4.20 p.m. to 4.40 p.m.

Mr. de VILLIERS continued the speech reproduced in the annex [1].

The Court rose at 5.50 p.m.

[Signatures.]

SEVENTEENTH PUBLIC HEARING (13 IV 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Spiropoulos was absent.]

The PRESIDENT opened the hearing and announced that Judge Spiropoulos was indisposed and would not be sitting. He called upon Mr. de Villiers.

Mr. de VILLIERS continued the speech reproduced in the annex [2].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex. [3]

The Court rose at 12.55 p.m.

[Signatures.]

EIGHTEENTH PUBLIC HEARING (14 IV 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judges Winiarski and Spiropoulos absent.]

The PRESIDENT opened the hearing and announced that Judge Spiropoulos remained indisposed and would not be sitting. Judge Winiarski was unable to sit, for personal reasons. He called upon Mr. de Villiers.

Mr. de VILLIERS concluded the speech reproduced in the annex [4].

The PRESIDENT called upon Mr. Grosskopf.

Mr. GROSSKOPF made the speech reproduced in the annex [5].

The PRESIDENT called upon Mr. de Villiers.

Mr. de VILLIERS commenced the speech reproduced in the annex [6].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [7].

The PRESIDENT announced that a member of the Court desired to put a question to the Parties, and called upon Judge Jessup.

Judge JESSUP asked both counsel for the Applicants and counsel for the Respondent to reply at some convenient time to the following question:

> "In the interpretation and application of Article 73 of the Charter of the United Nations, is South West Africa to be considered one of those 'territories whose peoples have not yet attained a full

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[1] See pp. 553-567.
[2] See pp. 567-580.
[3] See pp. 580-594.
[4] See pp. 594-595.
[5] See pp. 596-610.
[6] See pp. 611-612.
[7] See pp. 612-625.

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [1].

L'audience est levée à 17 h 50

[Signatures.]

DIX-SEPTIÈME AUDIENCE PUBLIQUE (13 IV 65, 10 h)

Présents: [Voir audience du 15 III 65. M. Spiropoulos, absent.]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers. Il annonce que M. Spiropoulos, souffrant, n'assistera pas à l'audience.

M. de VILLIERS continue l'exposé reproduit en annexe [2].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [3].

L'audience est levée à 12 h 55

[Signatures.]

DIX-HUITIÈME AUDIENCE PUBLIQUE (14 IV 65, 10 h)

Présents: [Voir audience du 15 III 65. MM. Winiarski et Spiropoulos, absents.]

Le PRÉSIDENT ouvre l'audience et annonce que M. Spiropoulos, encore souffrant, n'assistera pas à l'audience. M. Winiarski sera également empêché de siéger, pour des motifs d'ordre personnel. Il donne la parole à M. de Villiers.

M. de VILLIERS termine l'exposé reproduit en annexe [4].

Le PRÉSIDENT donne la parole à M. Grosskopf.

M. GROSSKOPF prononce l'exposé reproduit en annexe [5].

Le PRÉSIDENT donne la parole à M. de Villiers.

M. de VILLIERS commence l'exposé reproduit en annexe [6].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [7].

Le PRÉSIDENT déclare qu'un membre de la Cour désire poser une question aux Parties et donne la parole à M. Jessup.

M. JESSUP demande aux conseils des demandeurs et du défendeur de répondre, à un moment approprié, à la question suivante:

> «Aux fins de l'interprétation et de l'application de l'article 73 de la Charte des Nations Unies, le Sud-Ouest africain doit-il être considéré comme l'un des «territoires dont les populations ne

[1] Voir p. 553-557.
[2] Voir p. 567-580.
[3] Voir p. 580-594.
[4] Voir p. 594-595.
[5] Voir p. 596-610.
[6] Voir p. 611-612.
[7] Voir p. 612-625.

measure of self-government' as this phrase is used in that article?"

The Court rose at 12.55 p.m.

[Signatures.]

NINETEENTH PUBLIC HEARING (22 IV 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Winiarski absent.]

The PRESIDENT opened the hearing and announced that Judge Winiarski would not be sitting. He called upon Mr. de Villiers.

Mr. de VILLIERS continued the speech reproduced in the annex [1].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [2].

The PRESIDENT announced that Judge Koretsky desired to put a question to the Respondent.

Judge KORETSKY put the following question to the Respondent:

> "If the Mandate for South West Africa lapsed on the termination of the League of Nations, what, in Respondent's view, is now the legal nature of the right of the Republic of South Africa to administer South West Africa?"

The PRESIDENT said that the Respondent would at the appropriate time reply to the question put by Judge Koretsky.

The Court rose at 12.50 p.m.

[Signatures.]

TWENTIETH PUBLIC HEARING (23 IV 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Winiarski absent.]

The PRESIDENT opened the hearing and announced that Judge Winiarski would not be sitting. He called upon Mr. de Villiers.

Mr. de VILLIERS continued the speech reproduced in the annex [3].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [4].

The PRESIDENT asked the Agent for the Applicants when he would be prepared to proceed with the presentation of his views on the request of the Respondent for inspection, if Mr. de Villiers concluded his speech on 26 April.

Mr. GROSS stated that the Applicants would be prepared to proceed on 27 April.

The PRESIDENT said that it was understood that after the presentation of the Applicants' views on the request for inspection, the Respondent's reply on this question would follow immediately or after a very brief ad-

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[1] See pp. 625-639.
[2] See pp. 639-652.
[3] See pp. 652-667.
[4] See pp. 667-680.

s'administrent pas encore complètement elles-mêmes » au sens où cette expression est employée dans ledit article? »

L'audience est leveé à 12 h 55

[Signatures.]

DIX-NEUVIÈME AUDIENCE PUBLIQUE (22 IV 65, 10 h)

Présents: [Voir audience du 15 III 65. M. Winiarski, absent.]

Le PRÉSIDENT ouvre l'audience et annonce que M. Winiarski n'assistera pas à l'audience. Il donne la parole à M. de Villiers.

M. de VILLIERS continue l'exposé reproduit en annexe [1].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

M. de VILLIERS continue l'exposé reproduit en annexe [2].

Le PRÉSIDENT annonce que M. Koretsky, juge, désire poser une question au défendeur.

M. KORETSKY pose la question suivante au défendeur:

« Si le Mandat pour le Sud-Ouest africain est devenu caduc à la dissolution de la Société des Nations, quelle est maintenant, de l'avis du défendeur, la nature juridique du droit de la République sud-africaine à administrer le Sud-Ouest africain? »

Le PRÉSIDENT déclare que le défendeur répondra en temps opportun à la question posée par M. Koretsky.

L'audience est levée à 12 h 50

[Signatures.]

VINGTIÈME AUDIENCE PUBLIQUE (23 IV 65, 10 h)

Présents: [Voir audience du 15 III 65. M. Winiarski, absent.]

Le PRÉSIDENT ouvre l'audience et annonce que M. Winiarski n'assistera pas à l'audience. Il donne la parole à M. de Villiers.

M. de VILLIERS continue l'exposé reproduit en annexe [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [4].

Le PRÉSIDENT demande à l'agent des demandeurs quand il sera prêt à exposer ses vues sur la requête du défendeur relative à une visite sur les lieux, en supposant que M. de Villiers achève la plaidoirie le 26 avril.

M. GROSS déclare que les demandeurs pourront prendre la parole le 27 avril.

Le PRÉSIDENT déclare qu'il est entendu que, lorsque les demandeurs auront exposé leurs vues sur la requête relative à une visite sur les lieux, le défendeur leur répondra immédiatement ou après une très brève

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[1] Voir p. 625-639.
[2] Voir p. 639-652.
[3] Voir p. 652-667.
[4] Voir p. 667-680.

journment. Thereafter the Agent for the Applicants would present his views in reply on the legal issues.

The Court rose at 12.45 p.m.

[Signatures.]

TWENTY-FIRST PUBLIC HEARING (26 IV 65, 3 p.m.)

Present: [See hearing of 15 III 65. Judge Winiarski, absent.]

The PRESIDENT opened the hearing and announced that Judge Winiarski would not be present until 28 April. He called upon Mr. de Villiers.

Mr. de VILLIERS continued the speech reproduced in the annex [1].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

Mr. de VILLIERS concluded the speech reproduced in the annex [2].

The Court rose at 6.05 p.m.

[Signatures.]

TWENTY-SECOND PUBLIC HEARING (27 IV 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Winiarski, absent.]

The PRESIDENT opened the hearing and called upon the Agent for the Applicants to commence his reply to the request of the Respondent for inspection.

Mr. GROSS began the speech reproduced in the annex [3].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. GROSS continued the speech reproduced in the annex [4].

The Court rose at 1 p.m.

[Signatures.]

TWENTY-THIRD PUBLIC HEARING (28 IV 65, 10.15 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon the Agent for the Applicants.

Mr. GROSS continued the speech reproduced in the annex [5].

The PRESIDENT announced that a Member of the Court desired to put a question to him as Agent for the Applicants, and called upon Judge Sir Gerald Fitzmaurice.

Judge Sir Gerald FITZMAURICE said that his question was directed to enabling him to feel quite clear as to the position taken by the Applicants over the question of inspection and witnesses. It fell into two parts.

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[1] See pp. 680-695.
[2] See pp. 695-712.
[3] See **IX**, pp. 1-18.
[4] See **IX**, pp. 18-31.
[5] See **IX**, pp. 31-44.

interruption et qu'ensuite l'agent des demandeurs présentera sa réplique orale sur les points de droit.

L'audience est levée à 12 h 45

[Signatures.]

VINGT ET UNIÈME AUDIENCE PUBLIQUE (26 IV 65, 15 h)

Présents : [Voir audience du 15 III 65. M. Winiarski, absent.]

Le PRÉSIDENT ouvre l'audience et annonce que M. Winiarski sera absent jusqu'au 28 avril. Il donne la parole à M. de Villiers.

M. de VILLIERS continue l'exposé reproduit en annexe [1].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

M. de VILLIERS termine l'exposé reproduit en annexe [2].

L'audience est levée à 18 h 5

[Signatures.]

VINGT-DEUXIÈME AUDIENCE PUBLIQUE (27 IV 65, 10 h)

Présents : [Voir audience du 15 III 65. M. Winiarski, absent.]

Le PRÉSIDENT ouvre l'audience et invite l'agent des demandeurs à présenter sa réponse à la requête du défendeur relative à une visite sur les lieux.

M. GROSS commence l'exposé reproduit en annexe [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. GROSS continue l'exposé reproduit en annexe [4].

L'audience est levée à 13 h

[Signatures.]

VINGT-TROISIÈME AUDIENCE PUBLIQUE (28 IV 65, 10 h 15)

Présents : [Voir audience du 15 III 65.)

Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent des demandeurs.

M. GROSS continue l'exposé reproduit en annexe [5].

Le PRÉSIDENT annonce qu'un membre de la Cour désire poser une question à l'agent des demandeurs et donne la parole à sir Gerald Fitzmaurice.

Sir Gerald FITZMAURICE déclare qu'il désire se faire une idée très précise de la position des demandeurs quant à la visite sur les lieux et quant aux auditions des témoins. La question qu'il posera en conséquence se divise en deux parties :

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[1] Voir p. 680-695.
[2] Voir p. 695-712.
[3] Voir IX, p. 3-18.
[4] Voir IX, p. 18-31.
[5] Voir IX, p. 31-44.

1. Was the Applicants' contention about apartheid to be understood in the sense that a policy of group differentiation was in all circumstances, necessarily and in itself, contrary to Article 2 of the Mandate, irrespective of any other steps taken by the Mandatory for promoting the welfare of the inhabitants of the mandated Territory?

2. If the Applicants' contention did not go so far as that, and if there might be circumstances in which measures of group differentiation might have some justification, would the Applicants still wish to maintain that an investigation of the factual situation, by hearing evidence or by local inspection, would be wholly superfluous?

The PRESIDENT asked Mr. Gross for clarification on a point in relation to Submissions 3 and 4 in the Memorial. Submission 3 was that the Court should adjudge and declare that the Respondent:

> "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; [and] that such practice is in violation . . ."

of the obligations of Article 2 of the Mandate. Submission 4 was that the Court should adjudge and declare that the Respondent:

> "by virtue of the economic, political, social and educational policies applied within the Territory, which are described in detail in Chapter V . . . and summarized at paragraph 190"

not summarized in paragraphs 189 and 190

> "has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants . . ."

What was the distinction between the one and the other?

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. GROSS concluded the speech reproduced in the annex [1].

The PRESIDENT said that his enquiry had been directed to the phase of the proceedings concerning the question on inspection, and he would be grateful if Mr. Gross would give his answer to it before that phase was concluded. He asked the Agent for the Respondent whether he would be prepared to proceed on the following morning.

Dr. VERLOREN VAN THEMAAT said that before replying in detail to the speech made by the Agent for the Applicants, the Respondent would wish to have an opportunity of studying the verbatim record, which would require an adjournment until 30 April. He asked if Mr. de Villiers might be allowed to make a short general statement in respect of the inspection and the need for an adjournment until 30 April.

The PRESIDENT called upon Mr. de Villiers.

Mr. de VILLIERS made the speech reproduced in the annex [2].

The PRESIDENT said that he expected that when Mr. Gross replied

[1] See IX, pp. 44-53.
[2] See IX, pp. 54-55.

«1. L'allégation des demandeurs concernant l'*apartheid* doit-elle être entendue comme signifiant qu'une politique de différenciation entre les groupes est en toutes circonstances, nécessairement et en soi contraire à l'article 2 du Mandat, quelles que soient les autres mesures prises par le Mandataire en vue d'accroître le bien-être des habitants du territoire sous Mandat?

2. Si l'allégation des demandeurs n'allait pas jusque-là et s'il y avait des circonstances dans lesquelles des mesures de différenciation entre les groupes seraient à certains égards justifiées, les demandeurs voudraient-ils encore soutenir qu'une enquête sur la situation de fait par voie d'audition des témoins ou de visite sur les lieux serait tout à fait superflue? »

Le PRÉSIDENT demande à M. Gross des éclaircissements sur les conclusions nos 3 et 4 des mémoires. Par la conclusion n° 3, il est demandé à la Cour de dire et juger que le défendeur:

«dans toutes les circonstances exposées au chapitre V du présent mémoire et résumées dans les paragraphes 189 et 190 dudit mémoire, a pratiqué l'*apartheid*, c'est-à-dire qu'[il] a établi une discrimination fondée sur la race, la couleur, l'origine nationale ou tribale, lorsqu'[il] a fixé les droits et devoirs des habitants du Territoire; [et] que cette pratique constitue une violation [des obligations de l'article 2 du Mandat] ».

Par la conclusion n° 4, il est demandé à la Cour de dire et juger que le défendeur:

«par l'effet des principes économiques, politiques, sociaux et éducatifs appliqués dans le Territoire et décrits en détail au chapitre V . . . puis résumés au paragraphe 190 [et non plus aux paragraphes 189 et 190] . . . n'a pas accru par tous le moyens en son pouvoir le bien-être matériel et moral ainsi que le progrès social des habitants ».

Quelle distinction convient-il de faire entre ces deux conclusions?

L'audience, suspendue à 11 h 20, est reprise à 11 h 45.

M. GROSS termine l'exposé reproduit en annexe [1].

Le PRÉSIDENT souligne que sa question entre dans le cadre de la présente phase de la procédure, relative à la visite sur les lieux, et qu'il serait reconnaissant à M. Gross de lui répondre avant la fin de cette phase. Il demande à l'agent du défendeur s'il est prêt à reprendre la parole le lendemain matin.

M. VERLOREN VAN THEMAAT déclare que, avant de répondre en détail à l'exposé de l'agent des demandeurs, le défendeur souhaiterait avoir la possibilité d'étudier le compte rendu intégral de la présente audience, ce qui rendrait nécessaire d'ajourner les audiences jusqu'au 30 avril. Il demande que M. de Villiers soit autorisé à faire une brève déclaration d'ordre général sur la visite sur les lieux et sur la nécessité de renvoyer la suite des audiences au 30 avril.

Le PRÉSIDENT donne la parole à M. de Villiers.

M. de VILLIERS prononce l'exposé reproduit en annexe [2].

Le PRÉSIDENT compte qu'en répondant à sa question relative aux

[1] Voir **IX**, p. 44-53.
[2] Voir **IX**, p. 54-55.

to his enquiry in relation to Submissions 3 and 4 in the Memorial, replies would be forthcoming to the questions which had been raised by Mr. de Villiers. As he had understood the Applicants they had said that apartheid, that was to say, distinguishing as to race, colour, national or tribal origin in relation to the rights, duties and status of individuals was, *per se* and in itself, a breach of the Mandate. That was why he had asked the Applicants whether Submission 4 in the Memorial was in any way different to Submission 3, and if so in what respect. He called upon Mr. de Villiers.

Mr. de VILLIERS said that an adjournment had been requested until 30 April to enable Respondent to study the verbatim record carefully; the following afternoon was another possibility.

The PRESIDENT said that he had hoped that Mr. de Villiers would have been prepared to proceed on the following morning, but if a Party said that it was unable to proceed and requested an adjournment, then he thought the Court would be prepared to accede to the request. He called upon the Agent for the Applicants.

Mr. GROSS made the speech reproduced in the annex [1].

The PRESIDENT, addressing Mr. Gross, said that it was important for the determination of the future procedure in the case and of the very issue which the Court was now called upon to decide, namely whether it should accede to the request for an inspection, that it should have made clear to it what was in issue on the point which had been raised by himself arising out of the Applicants' Submissions 3 and 4 in the Memorial. Was there any dispute now that the case turned solely, from the Applicants' point of view, upon the issue whether differentiation or discrimination as to race, colour, national or tribal origin, had been practised by the Respondent in establishing the rights and duties and status of the inhabitants of the Territory through its policy of apartheid, and that that was the sole basis upon which the Applicants rested their case that there had been a breach of Article 2 of the Mandate? Or was there an alternative basis upon which they sought to make out their case, namely that irrespective of any such differentiation or discrimination, by its policies of administration in fact applied by the Respondent in the various economic, political, social and educational fields it had failed to promote to the utmost the material and moral well-being and social progress of the inhabitants. If that could be clarified, it might well be that a great deal of the evidence foreshadowed by the Respondent might become unnecessary.

Mr. GROSS said that he would endeavour to attempt a reply to the question and asked when the President desired this to be done.

The PRESIDENT said that while he was very reluctant that the Court should lose a day's sitting, it was not easy to readjust the programme to meet in the afternoon, and it would adjourn until 10 a.m. on 30 April. At that time it would be of assistance to the Court if Mr. Gross gave the clarification which he had asked for before he called upon Counsel for the Respondent.

The Court rose at 1 p.m.

[Signatures.]

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[1] See **IX**, pp. 56-58.

conclusions nos 3 et 4 des mémoires M. Gross répondra aux questions soulevées par M. de Villiers. Si le Président a bien compris les demandeurs, ils ont déclaré que l'*apartheid*, c'est-à-dire la distinction fondée sur la race, la couleur, l'origine nationale ou tribale quant aux droits, aux devoirs et au statut des personnes, constitue en soi une violation du Mandat. C'est pourquoi il a invité les demandeurs à dire si la conclusion n° 4 de leurs mémoires diffère de la conclusion n° 3 et, si oui, en quoi. Il donne la parole à M. de Villiers.

M. de VILLIERS indique que, si un ajournement a été demandé jusqu'au 30 avril, c'est pour permettre au défendeur d'examiner attentivement le compte rendu de l'audience. On pourrait aussi envisager de tenir une audience le lendemain après-midi.

Le PRÉSIDENT déclare qu'il avait espéré que M. de Villiers serait prêt à plaider dès le lendemain matin mais que, lorsqu'une partie déclare qu'elle n'est pas en mesure de plaider et demande un ajournement, la Cour ne peut qu'accueillir favorablement sa demande. Il donne la parole à l'agent des demandeurs.

M. GROSS prononce l'exposé reproduit en annexe [1].

Le PRÉSIDENT indique à M. Gross qu'il importe, pour fixer la procédure ultérieure et pour résoudre le problème qui se pose présentement à la Cour et qui est de savoir si elle doit faire droit à la requête relative à une visite sur les lieux, d'obtenir une réponse claire à la question que le Président a posée au sujet des conclusions nos 3 et 4 des mémoires des demandeurs. Est-il maintenant contesté que l'affaire consiste exclusivement pour les demandeurs à déterminer si une différenciation ou une discrimination fondée sur la race, la couleur, l'origine nationale ou tribale a été pratiquée par le défendeur, dans le cadre de sa politique d'*apartheid*, pour établir les droits, les devoirs et le statut des habitants du Territoire et que c'est là le seul motif sur lequel les demandeurs s'appuient pour prétendre qu'il y a eu violation de l'article 2 du Mandat? Ou bien les demandeurs se fondent-ils sur un autre motif, à savoir que, indépendamment de cette différenciation ou discrimination, le défendeur, par l'effet de sa politique administrative en matière économique, politique, sociale et éducative, n'a pas accru par tous les moyens en son pouvoir le bien-être ainsi que le progrès social des habitants. Si cela pouvait être éclairci, une grande part des moyens de preuve annoncés par le défendeur pourrait se révéler inutile.

M. GROSS déclare qu'il s'efforcera de répondre à la question et demande quand le Président l'invitera à le faire.

Le PRÉSIDENT déclare qu'il hésite beaucoup à faire perdre un jour à la Cour mais qu'il n'est pas facile de modifier son horaire et de la faire siéger dans l'après-midi; les audiences sont donc suspendues jusqu'au 30 avril à 10 h. Il sera alors utile à la Cour que, avant que le défendeur prenne la parole, M. Gross donne les éclaircissements qui lui ont été demandés.

L'audience est levée à 13 h

[Signatures.]

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[1] Voir IX, p. 56-58.

TWENTY-FOURTH PUBLIC HEARING (30 IV 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon the Agent for the Applicants.

Mr. GROSS made the speech reproduced in the annex [1].

The PRESIDENT called upon Mr. de Villiers to reply on the issue of the request for inspection.

Mr. de VILLIERS asked for thirty minutes adjournment to enable him to confer with his colleagues on the position, which might have been quite dramatically affected by the statement which had just been made, though whether this had gone far enough to achieve complete clarity was another question. After consultation he might be able to shorten considerably what he had otherwise intended to say.

The Court adjourned from 10.45 a.m. to 11.30 a.m.

The PRESIDENT called upon Mr. de Villiers.

Mr. de VILLIERS made the speech reproduced in the annex [2].

The Court rose at 1 p.m.

[Signatures.]

TWENTY-FIFTH PUBLIC HEARING (3 V 65, 3 p.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and, at the request of the Applicants and there being no objection on the part of the Respondent, called upon the Agent for the Applicants.

Mr. GROSS made the speech reproduced in the annex [3].

The PRESIDENT called upon Mr. de Villiers.

Mr. de VILLIERS began the speech reproduced in the annex [4].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

Mr. de VILLIERS continued the speech reproduced in the annex [5].

The Court rose at 6 p.m.

[Signatures.]

TWENTY-SIXTH PUBLIC HEARING (4 V 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon Mr. de Villiers.

Mr. de VILLIERS concluded the speech reproduced in the annex [6].

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[1] See **IX**, pp. 58-65.
[2] See **IX**, pp. 66-82.
[3] See **IX**, pp. 83-93.
[4] See **IX**, pp. 94-99.
[5] See **IX**, pp. 99-114.
[6] See **IX**, pp. 114-121.

VINGT-QUATRIÈME AUDIENCE PUBLIQUE (30 IV 65, 10 h)

Présents : [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent des demandeurs.
M. GROSS prononce l'exposé reproduit en annexe [1].
Le PRÉSIDENT invite M. de Villiers à prononcer sa réplique sur la question de la requête relative à une visite sur les lieux.
M. de VILLIERS demande une suspension d'audience de trente minutes en vue de pouvoir consulter ses collègues; il se peut en effet que l'exposé qui vient d'être prononcé ait des conséquences considérables sur la situation, bien que ce soit une autre question de savoir si la clarté est totale. Après avoir consulté ses collègues, M. de Villiers pourrait être en mesure de raccourcir considérablement ce qu'il avait l'intention de dire.

L'audience, suspendue à 10 h 45, est reprise à 11 h 30

Le PRÉSIDENT donne la parole à M. de Villiers.
M. de VILLIERS prononce l'exposé reproduit en annexe [2].

L'audience est levée à 13 h

[Signatures.]

VINGT-CINQUIÈME AUDIENCE PUBLIQUE (3 V 65, 15 h)

Présents : [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience. A la requête des demandeurs et en l'absence d'objection de la part du défendeur, il donne la parole à l'agent des demandeurs.
M. GROSS fait l'exposé reproduit en annexe [3].
Le PRÉSIDENT donne la parole à M. de Villiers.
M. de VILLIERS commence l'exposé reproduit en annexe [4].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [5].

L'audience est levée à 18 h

[Signatures.]

VINGT-SIXIÈME AUDIENCE PUBLIQUE (4 V 65, 10 h)

Présents : [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS termine l'exposé reproduit en annexe [6].

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[1] Voir **IX**, p. 58-65.
[2] Voir **IX**, p. 66-82.
[3] Voir **IX**, p. 83-93.
[4] Voir **IX**, p. 94-99.
[5] Voir **IX**, p. 99-114.
[6] Voir **IX**, p. 114-121.

The PRESIDENT, having ascertained that there was no objection on the part of the Respondent, called upon the Agent for the Applicants, who had indicated his desire to make a very short statement.

Mr. GROSS made the speech reproduced in the annex [1].

The PRESIDENT said that the Statute contemplated that parties should be at liberty to present their case in their own way, including the calling of witnesses. Could the Agent for the Applicants, without argument, indicate any provision of the Statute or the Rules which would empower the Court to deal with the matter in the terms which he had proposed.

Mr. GROSS said that he could not. He had searched the Rules, and had found no precedent because the situation was unprecedented. No such proposal had ever been placed before the Court for exercise of its inherent power of judicial discretion in the light of what, he respectfully submitted, was the exercise of judicial administration to meet the situation. He relied upon the inherent power of the Court and the inherent nature of the judicial process with respect to the administration of the Court. That was the basis of his submission.

The PRESIDENT asked whether the Respondent desired to make any comment.

Mr. de VILLIERS said that there was one factor of convenience that also weighed the other way; South Africa was preparing to be ready to present oral evidence to the Court, but the nature of the task of preparing instead what might be voluminous further written material to present to the Court was also surely a factor to be taken into account in the circumstances.

The PRESIDENT asked the Agent for the Applicants when he would be prepared to proceed with the presentation of his reply upon the legal issues.

Mr. GROSS requested an adjournment until the morning of 7 May.

The PRESIDENT said that he would have hoped that Mr. Gross could have proceeded on 6 May. However, if counsel indicated that he was unable to proceed until 7 May, the Court would adjourn until then.

The Court rose at 11 a.m.

[Signatures.]

TWENTY-SEVENTH PUBLIC HEARING (7 V 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon the Agent for the Applicants to commence the reply on the legal issues.

Mr. GROSS began the speech reproduced in the annex [2].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. GROSS continued the speech reproduced in the annex [3].

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[1] See **IX**, pp. 122-123.
[2] See **IX**, pp. 124-140.
[3] See **IX**, pp. 140-151.

Le PRÉSIDENT, après s'être assuré qu'aucune objection n'est soulevée par le défendeur, donne la parole à l'agent des demandeurs qui a indiqué son désir de faire une très brève déclaration.

M. GROSS prononce l'exposé reproduit en annexe [1].

Le PRÉSIDENT précise que, d'après le Statut, les parties sont libres de présenter leur thèse comme elles l'entendent et peuvent notamment citer des témoins. L'agent des demandeurs pourrait-il, sans faire de commentaires, indiquer une disposition du Statut ou du Règlement qui autoriserait la Cour à traiter de cette question de la manière qu'il a proposée?

M. GROSS dit que cela ne lui est pas possible. Il a étudié le Règlement et n'a trouvé aucun précédent car la situation est sans précédent. La Cour n'a jamais été saisie d'une proposition de ce genre l'invitant à exercer le pouvoir discrétionnaire qui lui appartient de façon inhérente en matière judiciaire, compte tenu de ce que, d'après lui, une bonne administration de la justice exige pour faire face à la situation. Il invoque le pouvoir inhérent de la Cour et le caractère inhérent du processus judiciaire en ce qui concerne l'administration de la Cour. Telle est la base de sa proposition.

Le PRÉSIDENT demande au défendeur s'il a des observations à présenter.

M. de VILLIERS déclare qu'il existe un élément de commodité jouant en sens opposé; l'Afrique du Sud se dispose à présenter à la Cour des témoignages oraux mais la tâche consistant à préparer ce qui peut constituer une documentation écrite volumineuse à l'intention de la Cour est également de telle nature que l'on ne peut manquer de la prendre en considération, en l'occurrence.

Le PRÉSIDENT demande à l'agent des demandeurs quand il sera prêt à poursuivre la présentation de sa réponse sur les questions de droit.

M. GROSS demande une suspension des audiences jusqu'au 7 mai au matin.

Le PRÉSIDENT dit qu'il espérait que M. Gross pourrait continuer le 6 mai. Toutefois, le conseil indiquant qu'il n'est pas en mesure de poursuivre avant le 7 mai, la Cour s'ajournera jusqu'à cette date.

L'audience est levée à 11 h

[Signatures.]

VINGT-SEPTIÈME AUDIENCE PUBLIQUE (7 V 65, 10 h)

Présents : [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et invite l'agent des demandeurs à présenter sa réplique sur les questions de droit.

M. GROSS commence l'exposé reproduit en annexe [2].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. GROSS continue l'exposé reproduit en annexe [3].

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[1] Voir **IX**, p. 122-123.
[2] Voir **IX**, p. 124-140.
[3] Voir **IX**, p. 140-151.

The PRESIDENT called upon Judge Sir Gerald Fitzmaurice, who desired to put certain questions to the Parties.

Judge Sir Gerald FITZMAURICE put the following questions to the Parties:

"Regarding that part of the case which relates to the interpretation and application of Article 2 of the Mandate, both the Parties have invoked certain general international norms, standards and principles, of an *a priori* character, the existence or applicability of which they either affirm or deny. Thus the Applicants have invoked a norm said to prohibit absolutely any practices of *apartheid*, as that term has been defined by the Applicants for the purposes of the present case. Equally the Respondent seems to postulate an inherent discretionary power in the Mandatory as to the methods to be employed for implementing Article 2, and on that basis has contended that the propriety of the measures concerned must be assessed with reference to the underlying intentions of the Mandatory.

It would be helpful if the Parties could attach their respective contentions somewhat more closely to the actual text of Article 2, and the following points in particular call for further clarification:

(a) *In relation to the position of the Applicants*

1. Taking for granted the great importance of the humanitarian and sociological considerations involved, but having regard to the position of the Court as a court of law, what is the purely juridical basis on which the Applicants contend that the '*non-apartheid* norm' amounts to an accepted rule of law, and whence does it derive its obligatory force as such—for instance, does the application of this norm form part of general State practice in such a way as to constitute a rule of customary international law; or in what other way is the norm, considered as a legal norm, said to be derived?

2. Irrespective of the answer to be given to the preceding question, is it contended that on the language of Article 2 itself, measures or practices of *apartheid*, as defined by the Applicants, must necessarily and in all circumstances be illegitimate?

3. Is the criterion of compatability with the Mandate, or otherwise, to be found in the general or apparent character of the measure or practice; and if so, is it contended that this suffices *per se*, or is the criterion the actual results of the measure or practice concerned and its concrete effects on the well-being and social progress of the persons affected?

4. Are the Applicants in a position (and do they propose) to furnish the Court with factual evidence (for instance by the personal testimony of inhabitants of the mandated territory) showing what have been the actual effects of the Mandatory's measures and practices in individual cases?

(b) *In relation to the position of the Respondent*

5. Is it solely on a basis of general principle that the Respondent claims for the Mandatory an absolute discretionary power to determine for itself by what methods Article 2 of the Mandate shall be

Le PRÉSIDENT donne la parole à sir Gerald Fitzmaurice, qui désire poser certaines questions aux Parties.

Sir Gerald FITZMAURICE pose aux Parties les questions suivantes:

«Pour ce qui est de l'élément de l'affaire relatif à l'interprétation et à l'application de l'article 2 du Mandat, les deux Parties ont invoqué, sur un plan international général, certaines normes, certains «standards» et certains principes ayant un caractère à priori, et dont ils affirment ou nient l'existence ou l'applicabilité. Ainsi les demandeurs ont invoqué une norme qui interdirait de façon absolue les pratiques de l'*apartheid* au sens où ce terme a été défini par les demandeurs aux fins de la présente instance. De la même manière, le défendeur semble parti du postulat que le Mandataire avait un pouvoir discrétionnaire inhérent quant aux méthodes à employer pour mettre en œuvre l'article 2 et, sur cette base, il a soutenu que le caractère approprié des mesures en cause devait être évalué par référence aux intentions dont le Mandataire était animé.

Il serait utile que les Parties relient leurs thèses respectives d'un peu plus près au libellé même de l'article 2; les points suivants en particulier appellent des éclaircissements:

a) *Quant à la position des demandeurs*

1. Etant admise la grande importance des considérations humanitaires et sociologiques en cause mais compte tenu de la position de la Cour en tant que cour de justice, quelle est la base purement juridique sur laquelle les demandeurs s'appuient pour soutenir que la «norme de non-*apartheid*» correspond à une règle de droit admise et d'où tire-t-elle par suite sa force obligatoire en tant que telle? L'application de cette norme fait-elle par exemple partie de la pratique générale des Etats de sorte qu'elle constitue une règle de droit international coutumier ou de quelle autre manière dit-on que cette norme, envisagée comme norme juridique, prend naissance?

2. Indépendamment de la réponse qui sera donnée à la question précédente, soutient-on que, eu égard au libellé de l'article 2 lui-même, des mesures ou des pratiques d'*apartheid*, au sens défini par les demandeurs, doivent nécessairement et en toutes circonstances être illégitimes?

3. Le critère de compatibilité ou d'incompatibilité avec le Mandat résulte-t-il du caractère général ou apparent de la mesure ou de la pratique? Si oui, soutient-on que cela seul suffit? Ou bien le critère résulte-t-il des conséquences réelles de la mesure ou de la pratique en cause et de ses effets concrets sur le bien-être et le progrès social des personnes qu'elle concerne?

4. Les demandeurs sont-ils en mesure (et se proposent-ils) de présenter à la Cour des preuves relatives aux faits (témoignages personnels des habitants du territoire sous Mandat par exemple) montrant quels ont été les effets réels des mesures et des pratiques adoptées par le Mandataire dans des cas individuels?

b) *Quant à la position du défendeur*

5. Est-ce uniquement sur la base d'un principe général que le défendeur revendique pour le Mandataire un pouvoir discrétionnaire absolu lui permettant de déterminer lui-même les modalités de mise

implemented—subject only to good faith and correct intentions?—or does the Respondent claim that a discretionary power of this kind is to be derived from the language of Article 2 itself?

6. In so far as it is simply a matter of fact whether in any particular respect there has been a breach of Article 2 or not, do the *intentions* (good or bad) of the Mandatory have any relevance to the question of whether a given practice constitutes a breach of the Mandate; more especially, do the Mandatory's *good* intentions have any relevance, supposing it to be established *as a fact* that the practice is injurious to, or incompatible with, well-being and social progress?

7. The Respondent has contended that, on the correct interpretation of Article 2, the Mandatory's obligation does not extend beyond endeavouring honestly and in good faith to carry out the Article according to its own judgment of what is required for that purpose. Admitting that the Mandatory must possess a certain latitude, can there be more than an initial presumption in its favour? Suppose a prima facie case were made out for the view that certain measures instituted by the Mandatory were in fact detrimental to well-being or social progress—would the Respondent still maintain that the Court was incompetent to assess or pronounce on the matter, except on the basis of the Mandatory's good or bad faith, and the nature of its purposes and intentions, or would the Respondent be prepared to agree, having regard to the language of Article 2, that it must in such an event rebut the allegations on their actual merits?

(c) *In relation to the position of both Parties*

8. There are certain differences between the English and French texts of Article 2 of the Mandate. Instead of 'shall *promote*' ('promouvoir', 'favoriser'), the French text says 'accroître' (shall *increase* well-being, etc.). Instead of shall promote 'to the *utmost*' ('au plus haut point'), the French text says 'par tous les moyens en son pouvoir' ('by all the means in its power' or 'by all available means'). What significance do the Parties respectively attach to these differences? What is the resultant of the combined texts, as a matter of legal interpretation?

9. Suppose that certain measures instituted by the Mandatory have had a beneficial effect, but that others have not: in these circumstances, would it be correct to say that if, *on balance*, there has been a promotion of or increase in the sum total of well-being and social progress viewed as a whole, then the provisions of the Mandate have been complied with, or would it be correct to say that irrespective of any *total* increase in well-being, and even if there has been such an increase, any particular measures which are, or prove to be, detrimental, constitute *pro tanto* a breach of the Mandate?

10. And last, Article 2 of the Mandate provides not only (by its second paragraph) for the promotion (or increase) of the well-being and social progress of the inhabitants, but also (by its first paragraph) that the Mandatory is to have 'full power of administration and legislation over the mandated territory' as an 'integral portion' of

en œuvre de l'article 2 du Mandat sous réserve seulement de la bonne foi et d'intentions légitimes? Ou bien le défendeur prétend-il qu'un pouvoir discrétionnaire de ce genre procède du libellé de l'article 2 lui-même?

6. Dans la mesure où la question de savoir si, sur un point particulier quelconque, il y a eu ou non violation de l'article 2 est simplement une question de fait, les intentions du Mandataire (bonnes ou mauvaises) sont-elles pertinentes s'agissant de savoir si une certaine pratique constitue une violation du Mandat? Plus particulièrement, les *bonnes* intentions du Mandataire sont-elles pertinentes si l'on suppose prouvé *en fait* que la pratique est nuisible au bien-être ou au progrès social ou incompatible avec eux?

7. Le défendeur a soutenu que, si l'on interprète correctement l'article 2, l'obligation du Mandataire ne consiste pas à faire plus qu'essayer honnêtement et de bonne foi d'appliquer l'article de la manière dont, d'après lui, il est nécessaire de le faire. Etant admis que le Mandataire doit avoir une certaine latitude, peut-il y avoir plus qu'une présomption initiale en sa faveur? A supposer que l'on puisse montrer *prima facie* que certaines mesures adoptées par le Mandataire ont été en fait préjudiciables au bien-être ou au progrès social, le défendeur continuerait-il à soutenir que la Cour n'a pas compétence pour apprécier la question ou pour se prononcer sur elle, sauf sur la base de la bonne ou mauvaise foi du Mandataire et compte tenu de la nature des objectifs et des intentions du Mandataire? Ou bien le défendeur serait-il disposé à admettre que, eu égard au libellé de l'article 2, il doit, dans ce cas, réfuter sur le fond les allégations formulées?

c) *Quant aux positions des deux Parties*

8. Il existe certaines différences entre les textes français et anglais de l'article 2 du Mandat. Au lieu de «shall *promote*» («promouvoir», «favoriser»), le texte français dit «accroître». Au lieu de dire «to the *utmost*» («au plus haut point»), le texte français dit «par tous les moyens en son pouvoir». Quelle importance les Parties attachent-elles respectivement à ces différences? Quelle est la résultante des textes combinés, pour ce qui est de l'interprétation en droit?

9. A supposer que certaines mesures adoptées par le Mandataire aient eu des effets heureux mais que cela n'ait pas été le cas de toutes: dans ces conditions, serait-on fondé à dire que si, *tout bien posé*, le bien-être et le progrès social envisagés dans leur ensemble se sont au total accrus, les dispositions du Mandat ont été respectées? Ou bien serait-on fondé à dire que, indépendamment de tout accroissement *total* sur le plan du bien-être, et même s'il y a bien eu accroissement, toute mesure préjudiciable ou se révélant préjudiciable constitue en tant que telle une violation du Mandat?

10. L'article 2 du Mandat ne prévoit pas seulement dans son deuxième alinéa l'accroissement (ou l'amélioration) du bien-être et du progrès social des habitants; il dispose aussi, dans son premier alinéa, que le Mandataire «aura pleins pouvoirs d'administration et de législation sur le territoire faisant l'objet du Mandat», que ce

its own territory, and may apply its own laws 'subject to such local modifications as circumstances may require'. What do the Parties respectively consider to be the exact relationship between these two sets of provisions? Neither is specifically subordinated to the other. Should either nevertheless be read as being so subordinated, and if so in what sense and to what extent? If not, and if the two clauses are independent of one another, what is the resulting legal situation?"

The Court rose at 12.45 p.m.

[Signatures.]

TWENTY-EIGHTH PUBLIC HEARING (10 V 65, 3 p.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon the Agent for the Applicants.

Mr. GROSS continued the speech reproduced in the annex [1].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

Mr. GROSS continued the speech reproduced in the annex [2].

The Court rose at 6 p.m.

[Signatures.]

TWENTY-NINTH PUBLIC HEARING (11 V 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon the Agent for the Applicants.

Mr. GROSS continued the speech reproduced in the annex [3].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. GROSS continued the speech reproduced in the annex [4].

The Court rose at 12.55 p.m.

[Signatures.]

THIRTIETH PUBLIC HEARING (12 V 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon the Agent for the Applicants.

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[1] See **IX**, pp. 151-167.
[2] See **IX**, pp. 167-184.
[3] See **IX**, pp. 184-199.
[4] See **IX**, pp. 199-214.

dernier sera administré «comme partie intégrante de son territoire» et que sa législation y sera appliquée «sous réserve des modifications nécessitées par les conditions locales». Quel est, d'après chacune des Parties, le rapport exact entre ces deux catégories de dispositions? Aucune n'est expressément subordonnée à l'autre. Doit-on cependant estimer qu'un lien de subordination existe et, si oui, en quel sens et dans quelle mesure? Sinon et si les deux dispositions sont indépendantes l'une de l'autre, quelle est la situation qui en résulte en droit?»

L'audience est levée à 12 h 45

[Signatures.]

VINGT-HUITIÈME AUDIENCE PUBLIQUE (10 V 65, 15 h)

Présents : [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent des demandeurs.

M. GROSS continue l'exposé reproduit en annexe [1].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

M. GROSS continue l'exposé reproduit en annexe [2].

L'audience est levée à 18 h

[Signatures.]

VINGT-NEUVIÈME AUDIENCE PUBLIQUE (11 V 65, 10 h)

Présents : [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent des demandeurs.

M. GROSS continue l'exposé reproduit en annexe [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. GROSS continue l'exposé reproduit en annexe [4].

L'audience est levée à 12 h 55

[Signatures.]

TRENTIÈME AUDIENCE PUBLIQUE (12 V 65, 10 h)

Présents : [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent des demandeurs.

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[1] Voir **IX**, p. 151-167.
[2] Voir **IX**, p. 167-184.
[3] Voir **IX**, p. 184-199.
[4] Voir **IX**, p. 199-214.

Mr. GROSS continued the speech reproduced in the annex [1].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. GROSS continued the speech reproduced in the annex [2].

The Court rose at 1 p.m.

[Signatures.]

THIRTY-FIRST PUBLIC HEARING (13 V 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon the Agent for the Applicants.

Mr. GROSS continued the speech reproduced in the annex [3].

The Court adjourned from 11.20 to 11.45 a.m.

Mr. GROSS continued the speech reproduced in the annex [4].

The PRESIDENT called upon Judge Sir Gerald Fitzmaurice to put to the Parties certain questions.

Judge Sir Gerald FITZMAURICE said that despite one of the answers which Mr. Gross had been good enough to give to his questions, he would like him to give a little further consideration to the status of the French text to the Mandate. Although the Mandate had originally been drafted in English and the French translation then made, both texts had then been embodied respectively as the official English and French texts of the resolution of the Council of the League, in which the Mandate had been adopted. At an early meeting of the Permanent Mandates Commission it had been decided, as a working rule, to go on the English text of British administered mandates, and on the French text of French administered mandates. In the light of that position, he thought that the two texts had been, in practice, treated as being on the footing of equality and that, consequently, any differences that might exist between them were not wholly irrelevant.

He then put the following question:

> "What, in the opinion of the Parties respectively, is the present and potential objective legal position relative to the mandated territory of the Powers which, at the end of the First World War, came to be known as the Principal Allied and Associated Powers, namely (in their then French alphabetical order) the United States of America, France, Great Britain, Italy and Japan? When these Powers, in favour of whom sovereignty over the future mandated territories was renounced under the Peace Treaties, consented to the arrangements whereby the territories were placed under League of Nations mandate, did they thereby divest themselves of all right, title and interest relative to the territories, or did they, as a matter of law, retain a residual right of sovereignty or other right, title or interest which would revive and become operative in the event, for instance, of a dissolution of the League of Nations, or of a termination of the mandate on a basis other than self-government

[1] See **IX**, pp. 214-229.
[2] See **IX**, pp. 229-242.
[3] See **IX**, pp. 242-258.
[4] See **IX**, pp. 258-268.

M. GROSS continue l'exposé reproduit en annexe [1].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. GROSS continue l'exposé reproduit en annexe [2].

L'audience est levée à 13 h

[Signatures.]

TRENTE ET UNIÈME AUDIENCE PUBLIQUE (13 V 65, 10 h)

Présents : [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent des demandeurs.

M. GROSS continue l'exposé reproduit en annexe [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

M. GROSS continue l'exposé reproduit en annexe [4].

Le PRÉSIDENT donne la parole à sir Gerald Fitzmaurice en vue de poser certaines questions aux Parties.

Sir Gerald FITZMAURICE déclare qu'en dépit de l'une des réponses que M. Gross a bien voulu faire à ses questions il désirerait que celui-ci examine plus attentivement la question du statut du texte français du Mandat. Le Mandat a été primitivement rédigé en anglais pour être ensuite traduit en français mais les deux textes ont été inclus dans les textes officiels français et anglais de la résolution du Conseil de la Société des Nations par laquelle le Mandat a été adopté. A l'une des premières réunions de la Commission permanente des Mandats, il a été décidé comme règle de travail d'utiliser le texte anglais pour les pays sous Mandat britannique et le texte français pour les pays sous Mandat français. Il semble dans ces conditions que les deux textes aient été en pratique traités sur un pied d'égalité et que par conséquent les différences qui pourraient exister entre eux ne sauraient être considérées comme totalement sans pertinence.

Sir Gerald Fitzmaurice pose ensuite la question suivante:

> «Quelle est, de l'avis des Parties, la situation objective actuelle et virtuelle sur le plan du droit en ce qui concerne les territoires sous Mandat des Puissances qui, à la fin de la première guerre mondiale, ont été désignées sous le nom de Principales Puissances alliées et associées, à savoir (dans l'ordre alphabétique français de l'époque), les Etats-Unis d'Amérique, la France, la Grande-Bretagne, l'Italie et le Japon? Lorsque ces Puissances, en faveur desquelles il a été renoncé à la souveraineté sur les futurs territoires sous Mandat en vertu des traités de paix, ont accepté les arrangements consistant à placer lesdits territoires sous le Mandat de la Société des Nations, ont-elles par là même renoncé à tout droit, titre ou intérêt sur ces territoires ou bien ont-elles, sur le plan juridique, conservé un droit résiduel de souveraineté ou un autre droit, titre ou intérêt pouvant renaître et reprendre effet dans l'hypothèse, par exemple, d'une dissolution de la S.d.N. ou d'une cessation du Mandat résultant

[1] Voir **IX**, p. 214-229.
[2] Voir **IX**, p. 229-242.
[3] Voir **IX**, p. 242-258.
[4] Voir **IX**, p. 258-268.

or independence for the territory concerned—and, if so, what is the nature and extent of such right, title or interest and how may it operate?"

The PRESIDENT addressed to the Parties a request, in the following terms, in relation to a question already put by a Member of the Court:

"In relation to the description of territories to which Article 73 of the Charter is stated to apply, namely 'territories whose peoples have not yet attained a full measure of self-government', and the question whether that Article was or was not intended to or did not include territories then held under Mandate, and the important question directed to both Parties by Judge Jessup on these issues, I would be grateful if both Parties would give consideration to certain facts, nine in number, stated hereafter (if they are admitted to be correctly stated as facts) in the response they make to Judge Jessup's question. I am not aware that these facts have yet, in these proceedings, received the consideration of the Parties.

1. The fact that the discussion in Committee 4 of Commission II at San Francisco was based not upon the paper presented by any one State, but upon a working paper prepared after study and consultation on proposals made by a number of States, divided into two sections, namely A. General Policy, and B. Territorial Trustee System.

2. The fact that in this working paper, dated 15 May 1945 (Doc. 323/II/4/12, U.N.C.I.O., Vol. 10, p. 677), the description of territories to which the declaration subsequently to be incorporated in Article 73 was intended to apply then read in the proposed draft Article as follows: 'Territories inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world' which are the precise words used in Article 22 (1) of the Covenant of the League to describe the mandated territories.

3. The fact that this text in the working paper remained unchanged up to 9 June 1945 (U.N.C.I.O., Vol. 10, p. 525).

4. The fact that between 9 and 11 June 1945, that text was changed to read as it now appears in Article 73 of the Charter (*ibid.*, p. 533), the reason for the alteration being stated in the Report of the Rapporteur of Committee IV of 20 June 1945 (*ibid.*, p. 608) to have been 'to find new language more suitable to existing conditions than the language employed in Paragraph 1 of Article 22 of the Covenant of the League of Nations' in order to describe 'the territories to which the declaration relates'.

5. The fact that the Rapporteur of Committee II/4 stated in his said Report of 20 June 1945, that the declaration contained in the text of Article 73 as finally approved (Annex A thereto) 'would be applicable to *all* such territories' and to all 'States Members of the United Nations having responsibilities for the administration of territories whose people have not yet attained a full measure of self-government'. (U.N.C.I.O., Vol. 10, p. 608).

d'un autre facteur que l'autodétermination ou l'indépendance des territoires en question et, dans l'affirmative, quelles sont la nature et la portée de ce droit, titre ou intérêt et comment ce droit, titre ou intérêt peut-il jouer? »

Le PRÉSIDENT adresse aux Parties, au sujet d'une question déjà posée par un membre de la Cour, la demande suivante:

«En ce qui concerne la description des territoires que l'article 73 de la Charte vise expressément, à savoir les «territoires dont les populations ne s'administrent pas encore complètement elles-mêmes», en ce qui concerne aussi la question de savoir si cet article avait trait ou non, s'il s'appliquait ou non aux territoires alors sous Mandat ainsi que la question importante adressée aux deux Parties par M. Jessup sur ces points, je serais reconnaissant aux deux Parties de bien vouloir prendre en considération certains faits — au nombre de neuf — que je vais indiquer (s'il est admis que ces faits sont exactement énoncés) dans la réponse qu'elles feront à M. Jessup. Je ne sache pas que ces faits aient déjà fait l'objet d'un examen de la part des Parties au cours de la présente procédure.

1. La discussion qui s'est déroulée au Comité 4 de la Commission II à San Francisco avait pour base non pas un document présenté par un Etat donné, mais un document de travail préparé après des études et des consultations à partir des propositions faites par un certain nombre d'Etats; il était divisé en deux sections: la section A concernait la politique générale et la section B le régime de tutelle territoriale.

2. Dans ce document de travail qui porte la date du 15 mai 1945 (doc. 323/II/4/12, U.N.C.I.O., vol. 10, p. 684) les territoires auxquels la déclaration incorporée plus tard dans l'article 73 devait s'appliquer étaient décrits de la manière suivante (projet d'article): «territoires habités par des populations qui ne sont pas encore capables de mener une existence indépendante dans les conditions difficiles du monde moderne»; ce sont là les termes mêmes qui sont employés [en anglais] au paragraphe 1 de l'article 22 du Pacte de la Société des Nations pour décrire les territoires sous Mandat.

3. Le texte du document de travail est resté inchangé jusqu'au 9 juin 1945 (*ibid.*, p. 529).

4. Entre le 9 et le 11 juin 1945, ce texte a été modifié et a pris la forme sous laquelle il se présente maintenant dans l'article 73 de la Charte (*ibid.*, p. 537); cette modification a été faite, d'après le rapport du rapporteur du Comité 4 en date du 20 juin 1945, parce qu'il était souhaitable, s'agissant de définir «les territoires auxquels s'applique cette déclaration» «d'employer des termes nouveaux, mieux adaptés aux conditions actuelles, que les termes employés au paragraphe 1 de l'article 22 du Pacte de la Société des Nations» (*ibid.*, p. 624).

5. Le rapporteur du Comité 4 de la Commission II a précisé dans ledit rapport du 20 juin 1945 que la déclaration contenue dans le texte de l'article 73 tel qu'il a été finalement approuvé (annexe A au rapport) «s'appliquerait à tous les territoires de ce genre . . . et à [tous] les Etats Membres des Nations Unies à qui incombe la responsabilité de l'administration de territoires habités par des peuples qui ne s'administrent pas encore eux-mêmes» (*ibid.*, p. 624).

6. The fact that in the same Report there appears (*ibid.*, p. 609) in connection with the said declaration the following words:

'It was said that independence was the aim of many dependent peoples and that its attainment should not be excluded by the terms of the Charter. On the other hand, it was urged that since the section on the declaration applied to *all* dependent "territories" and not *merely* to those placed under trusteeship, the reference to independence should more properly be made in the section on Trusteeship.'

7. The fact that when the said Report of Committee 4 of Commission II was brought before that Commission on 20 June 1945, the Chairman of that Commission in introducing the Report and opening the debate thereon stated as follows:

'Practically all that the Committee had before it was a section of the old Covenant of the League of Nations, which dealt with the subject of mandates . . .'

'This scheme [namely, that set out in the said Report] diverts in scope very largely from that old Covenant scheme. The principle of trusteeship is now applied generally. It applies to all dependent peoples in all dependent territories. It covers all of them . . .'

'Part A [i.e., the present Article 73] applies the trustee principle to all dependent territories, whether they are mandates, whether they are territories taken from defeated countries, or whether they are existing colonies of Powers [1]. The whole field of dependent peoples living in different territories is now covered.'

'A [i.e., the present Article 73] deals with that larger extension, and it puts countries, especially colonial powers who have colonies to look after, under certain obligations which you will find set out in the recommendations and in the Report.' (U.N.C.I.O., Vol. 8, pp. 126-127).

'The result will be that as both Section A [i.e., present Chapter XI] and B [i.e., present Chapter XII] are applied to dependent peoples all over the world wherever you have territory inhabited by dependent people—peoples who have not advanced enough to look after themselves . . . they will all have the benefit of this new administration. They will also have the United Nations Organization seeing that they do get those benefits, that these principles which have been evolved for their government and their advancement are duly carried out.'

'. . . this present scheme differs from the mandate scheme to which we have been accustomed hitherto . . .' (*Ibid.*, pp. 127-128.)

8. The fact that no dissent to such statements by the Chairman of Commission II was expressed during the course of the ensuing debate.

9. The fact that the text of Article 73 was finally adopted at this meeting on 20 June 1945, and the Charter was signed six days thereafter."

The Court rose at 12.50 p.m.

[Signatures.]

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[1] Compare the three categories of territories mentioned in Chapter XII, Article 77, of the Charter.

6. Dans le même rapport, on trouve le passage suivant à propos de la même déclaration (*ibid.*, p. 625):

«Il a été dit que l'indépendance est le but de beaucoup de peuples «dépendants et que son obtention ne devrait pas être exclue par «les conditions de la Charte. D'un autre côté, il a été dit que la men«tion de l'indépendance devrait figurer plutôt dans la section con«cernant la tutelle, puisque la section concernant la déclaration «s'applique à tous les territoires dépendants et non pas seulement à «ceux placés sous tutelle.»

7. Lorsque ce rapport du Comité 4 de la Commission II a été soumis à cette commission le 20 juin 1945, le président de la commission a dit, en présentant le rapport et en ouvrant le débat:

«. . . le comité n'avait guère pour le guider que la section du Pacte de «la Société des Nations se rapportant aux Mandats. . .

«Ce système [celui qui est indiqué dans le rapport] a une portée «très différente de l'ancien système prévu par le Pacte. Le principe «de la tutelle est maintenant d'une application générale. Il s'applique à «tous les peuples dépendants dans tous les territoires dépendants. «Il les concerne tous. . .

«La partie A [l'actuel article 73] applique le principe de la tutelle «à tous les territoires dépendants non autonomes; il s'agit à la fois «des territoires qui sont sous Mandat, des territoires conquis sur les «pays vaincus et des actuelles colonies des Puissances [1]. Il s'agit «maintenant de l'ensemble des peuples non autonomes vivant dans «des territoires non autonomes.

«La partie A [l'actuel article 73] concerne cet élargissement et il «impose aux pays, spécialement aux Puissances coloniales qui ont «à s'occuper de leurs colonies, certaines obligations que vous trou«verez énumérées dans la recommandation et dans le rapport.» (*Ibid.*, vol. 8, p. 162).

«Le résultat sera que les deux sections, la section A [l'actuel «chapitre XI] et la section B [l'actuel chapitre XII] s'appliquent «aux populations dépendantes du monde entier dès lors qu'il existe «un territoire habité par des populations dépendantes, populations «qui ne sont pas encore assez avancées pour se diriger elles-mêmes «et qui bénéficieront toutes des avantages de la nouvelle administra«tion. L'Organisation des Nations Unies veillera aussi à ce qu'elles «profitent de ces avantages, à ce que les principes élaborés en vue de «leur gouvernement et de leur progrès soient dûment appliqués. «. . . le système actuel diffère du système des Mandats dont nous «avions l'habitude» (*ibid.*, p. 162). *[Traduction du Greffe.]*

8. Au cours du débat qui a suivi, ces déclarations du président de la Commission II n'ont soulevé aucune objection.

9. Le texte de l'article 73 a été finalement adopté à la séance du 20 juin 1945 et la Charte a été signée six jours plus tard.»

L'audience est levée à 12 h 50

[Signatures.]

[1] Comparer ceci avec les trois catégories de territoires mentionnées à l'article 77, chapitre XII, de la Charte.

THIRTY-SECOND PUBLIC HEARING (14 V 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Padilla Nervo absent.]

The PRESIDENT opened the hearing and called upon the Agent for the Applicants.

Mr. GROSS continued the speech reproduced in the annex [1].

The PRESIDENT said that on 4 May the Applicants had requested the Court, in the event that the Respondent desired to produce any evidence the production of which was permitted by the Court, to order or otherwise decide that the Respondent, in lieu of calling witnesses or experts to testify personally, should embody the evidence of any such witness or expert in a deposition or written statement properly authenticated which should then constitute a full and complete statement of the evidence which such witness or expert would have adduced if personally in Court.

The Applicants had indicated that, in the event that the Court made an order to that effect, they would waive all right to be present during the taking of such depositions or the preparation of such statements for any purpose, including the purpose of cross-examination.

On 5 May, the Agent for the Applicants had directed a letter to the Agent for the Respondent, seeking the consent of the Respondent to procedures which the Applicants proposed should be followed, and recalling that in the event of the Parties failing to reach agreement thereon, the Court had already been requested to issue an order or otherwise decide that the said procedures should be followed.

A copy of this letter had been transmitted to the Court [2].

By a letter of 10 May 1965, the Agent for the Respondent had indicated to the Agent for the Applicants that Respondent was unable to agree to the latter's proposal. A copy of this letter had been transmitted to the Court [3].

The Court had considered the said request of the Applicants. In the view of the Court, the Statute and Rules contemplated a right in the party in contentious proceedings to produce all evidence before the Court by the calling of witnesses and experts, and a party must be left to exercise that right as it thought fit, subject, of course, to the provisions of the Court's Statute and Rules. Accordingly, the Court, having considered the request of the Applicants, was unable to accede thereto.

The request by the Applicants had been made in the course of discussion before the Court by the Parties of a previous request made by the Respondent that the Court, or a committee thereof, should make an inspection *in loco*. The decision which the Court had just announced on the request made by the Applicants in relation to the calling of evidence by the Respondent did not, of course, bear upon the Respondent's request for inspection *in loco*, upon which the Court had not yet deliberated.

The Court rose at 11.15 a.m.

[Signatures.]

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[1] See **IX**, pp. 268-281.
[2] See **XII**, Part IV.
[3] See **XII**, Part IV.

TRENTE-DEUXIÈME AUDIENCE PUBLIQUE (14 V 65, 10 h)

Présents : [Voir audience du 15 III 65. M. Padilla Nervo, absent.]

Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent des demandeurs.

M. GROSS continue l'exposé reproduit en annexe [1].

Le PRÉSIDENT déclare que, le 4 mai, les demandeurs ont prié la Cour de dire que, au cas où le défendeur désirerait présenter des témoignages dont la production serait autorisée par la Cour, le défendeur, au lieu d'inviter les témoins ou experts à comparaître en personne, devrait consigner leurs témoignages dans des dépositions ou exposés écrits dûment authentifiés, lesquels constitueraient un compte rendu intégral des déclarations que les experts ou témoins auraient faites s'ils s'étaient personnellement trouvés devant la Cour.

Les demandeurs ont indiqué que, au cas où la Cour rendrait une ordonnance à cet effet, ils renonceraient à tout droit d'assister à la prise de ces dépositions ou à la préparation de ces exposés, à quelque fin que ce soit, notamment aux fins d'un contre-interrogatoire.

Le 5 mai, l'agent des demandeurs a adressé une lettre à l'agent du défendeur pour demander l'accord du défendeur sur les procédures proposées par les demandeurs et rappeler que la Cour avait déjà été priée, pour le cas où les Parties ne pourraient se mettre d'accord à ce sujet, de dire, par voie d'ordonnance ou de toute autre manière, que lesdites procédures devaient être adoptées.

Une copie de cette lettre a été transmise à la Cour [2].

Par lettre en date du 10 mai 1965, l'agent du défendeur a fait connaître à l'agent des demandeurs qu'il ne pouvait accepter cette proposition. Une copie de cette lettre a été communiquée à la Cour [3].

La Cour a examiné la requête des demandeurs. Elle considère qu'aux termes du Statut et du Règlement toute partie à une instance a le droit de produire tous éléments de preuve en faisant citer des témoins et experts et toute partie doit être autorisée à exercer ce droit comme elle l'entend, sous réserve bien entendu des dispositions du Statut et du Règlement de la Cour. En conséquence, la Cour, après avoir examiné la requête des demandeurs, dit qu'elle ne peut y faire droit.

Les demandeurs ont présenté leur requête alors que les Parties étaient en train de discuter, devant la Cour, d'une proposition antérieure présentée par le défendeur et tendant à ce que la Cour ou un comité désigné par elle effectue une visite sur les lieux. La décision que la Cour vient de prendre en ce qui concerne la requête des demandeurs relative à la production de témoignages par le défendeur n'a, bien entendu, aucun effet sur la demande du défendeur ayant trait à une visite sur les lieux, demande sur laquelle la Cour n'a pas encore délibéré.

L'audience est levée à 11 h 15

[Signatures.]

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[1] Voir **IX**, p. 268-281.

[2] Voir **XII**, quatrième partie.

[3] Voir **XII**, quatrième partie.

THIRTY-THIRD PUBLIC HEARING (17 V 65, 3 p.m.)

Present: [See hearing of 15 III 65. Sir Louis Mbanefo absent.]

The PRESIDENT opened the hearing and called upon the Agent for the Applicants.

Mr. GROSS continued the speech reproduced in the annex [1].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

Mr. GROSS continued the speech reproduced in the annex [2].

The Court rose at 6 p.m.

[Signatures.]

THIRTY-FOURTH PUBLIC HEARING (18 V 65, 10 a.m.)

Present: [See hearing of 15 III 65. Sir Louis Mbanefo absent.]

The PRESIDENT opened the hearing and announced that, as at the previous hearing, Judge *ad hoc* Sir Louis Mbanefo was unable to sit. He called upon the Agent for the Applicants.

Mr. GROSS continued the speech reproduced in the annex [3].

The Court adjourned from 11.20 to 11.40 a.m.

Mr. GROSS continued the speech reproduced in the annex [4].

The Court rose at 1 p.m.

[Signatures.]

THIRTY-FIFTH PUBLIC HEARING (19 V 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon the Agent for the Applicants.

Mr. GROSS continued the speech reproduced in the annex [5].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. GROSS concluded the speech reproduced in the annex [6].

The PRESIDENT asked whether it was correct that the Applicants had now concluded their case, both on the law and the facts, subject to the reservations which Mr. Gross had indicated, and had thus made their final speech in the case based on the law and the facts.

Mr. GROSS said that that was correct.

The PRESIDENT asked the Agent for the Respondent when the Respondent would be prepared to address the Court on the questions of law which still remained open.

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[1] See **IX**, pp. 281-296.
[2] See **IX**, pp. 296-310.
[3] See **IX**, pp. 311-325.
[4] See **IX**, pp. 325-341.
[5] See **IX**, pp. 341-358.
[6] See **IX**, pp. 358-376.

TRENTE-TROISIÈME AUDIENCE PUBLIQUE (17 V 65, 15 h)

Présents : [Voir audience du 15 III 65. Sir Louis Mbanefo, absent.]

Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent des demandeurs.

M. GROSS continue l'exposé reproduit en annexe [1].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

M. GROSS continue l'exposé reproduit en annexe [2].

L'audience est levée à 18 h

[Signatures.]

TRENTE-QUATRIÈME AUDIENCE PUBLIQUE (18 V 65, 10 h).

Présents : [Voir audience du 15 III 65. Sir Louis Mbanefo, absent.]

Le PRÉSIDENT ouvre l'audience et déclare que sir Louis Mbanefo, qui n'a pas assisté à la précédente audience, sera encore absent ce jour. Il donne la parole à l'agent des demandeurs.

M. GROSS continue l'exposé reproduit en annexe [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. GROSS continue l'exposé reproduit en annexe [4].

L'audience est levée a 13 h

[Signatures.]

TRENTE-CINQUIÈME AUDIENCE PUBLIQUE (19 V 65, 10 h)

Présents : [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent des demandeurs.

M. GROSS continue l'exposé reproduit en annexe [5].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. GROSS termine l'exposé reproduit en annexe [6].

Le PRÉSIDENT demande s'il est exact que les demandeurs ont maintenant terminé l'exposé de leur argumentation, tant sur le droit que sur les faits, sous les réserves indiquées par M. Gross, et qu'ils ont par conséquent prononcé leur dernière plaidoirie en l'affaire tant sur le droit que sur les faits.

M. GROSS dit qu'il en est bien ainsi.

Le PRÉSIDENT demande à l'agent du défendeur à quel moment la partie défenderesse sera prête à plaider sur les questions de droit qui restent encore à exposer.

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[1] Voir **IX**, p. 281-296.
[2] Voir **IX**, p. 296-310.
[3] Voir **IX**, p. 311-325.
[4] Voir **IX**, p. 325-341.
[5] Voir **IX**, p. 341-358.
[6] Voir **IX**, p. 358-376.

Dr. VERLOREN VAN THEMAAT said that in connection with Article 2 South Africa would submit that the Applicants had in effect presented a new case, calling for considerable consideration and research in order to furnish a proper reply thereto. He accordingly requested that South Africa be permitted to commence its arguments on Monday, 24 May.

The PRESIDENT said that the request would be granted. The next hearing would be held at 3 p.m. on Monday, 24 May, when the Respondent would present its case in reply upon the law. By reason of the situation which had been arrived at following the statement made by the Agent for the Applicants that the case of the Applicants had now rested, the Court would find it necessary to consider the further procedure in the case in relation to the facts.

The Court rose at 1 p.m.

[Signatures.]

THIRTY-SIXTH PUBLIC HEARING (24 V 65, 3 p.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and said that the Court had just been informed of the sudden death of Helge Klaestad, who had rendered great and signal service to the cause of international law as a judge and President of the Court. The Court placed on record its deep sympathy at the event, and extended its condolences to his widow.

The matter of the further procedure to be followed in the case in relation to the facts had been considered by the Court.

The Applicants having at this stage of the proceedings concluded their case both on the law and the facts, subject to certain reservations indicated by them during the course of the oral hearing on 19 May, including the retention of the right pursuant to Article 50 of the Rules of Court to comment upon any evidence given by the Respondent, the procedure to be followed, subject however to any subsequent direction the Court might make, should be as follows:

1. At the conclusion by the Respondent of its speech in reply upon the legal issues which had been argued, and after it had replied to any questions put to it in respect to the same, the Respondent would immediately thereafter present its case upon the facts, during the course of which it would present such witnesses and experts as it might be advised to call and in respect of whom prior notice of its intention to call the same should have been given to the Court and the Applicants.

2. The Respondent should present the evidence of such witnesses and experts after a general opening of its case upon the facts, in which opening it would indicate to the Court the general scheme it proposed to follow in the presentation of such witnesses and experts.

3. In calling any witness or expert the Respondent would indicate in Court, with reasonable particularity, the point or points to which the evidence of each witness or expert would be directed, and the particular issue or issues to which such evidence was said to be relevant.

4. After the calling of the evidence and upon the subsequent conclusion of the Respondent's address the Applicants might make such comment upon the evidence of the said witnesses and experts as they desired to make.

M. VERLOREN VAN THEMAAT déclare que l'Afrique du Sud estime que, pour ce qui est de l'article 2, les demandeurs ont en fait présenté une nouvelle argumentation appelant de la part du défendeur un examen et des recherches considérables en vue d'y apporter la réponse appropriée. Il demande en conséquence que l'Afrique du Sud soit autorisée à reprendre ses plaidoiries le lundi 24 mai.

Le PRÉSIDENT déclare qu'il sera fait droit à cette demande. La prochaine audience aura lieu le lundi 24 mai à 15 heures; le défendeur présentera alors sa duplique orale sur le droit. Etant donné la situation dans laquelle on se trouve à la suite de la déclaration de l'agent des demandeurs selon laquelle il a achevé de présenter l'argumentation des demandeurs, la Cour devra examiner la procédure à suivre pour ce qui est des faits.

L'audience est levée à 13 h

[Signatures.]

TRENTE-SIXIÈME AUDIENCE PUBLIQUE (24 V 65, 15 h)

Présents: [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et annonce la mort soudaine d'Helge Klaestad, qui a rendu de grands et signalés services à la cause du droit international en sa qualité de juge et de Président de la Cour. La Cour tient à dire qu'elle ressent profondément ce deuil et adresse ses condoléances à sa veuve.

La question de la procédure à suivre en ce qui concerne les points de fait a été examinée par la Cour.

Les demandeurs ayant au présent stade de la procédure achevé la présentation de leurs thèses tant sur le droit que sur les faits, sous certaines réserves formulées par eux à l'audience du 19 mai et visant notamment leur droit de discuter, conformément à l'article 50 du Règlement, les moyens de preuve produits par le défendeur, il sera procédé comme suit, sous réserve de toute nouvelle directive éventuelle de la Cour:

1. Dès qu'il aura achevé sa duplique orale sur les points de droit en cause et répondu aux questions qui lui auront été posées à ce sujet, le défendeur présentera immédiatement son argumentation sur les faits et produira à cette occasion les témoins et experts qu'il estimera opportun de faire citer et dont les noms auront auparavant été communiqués à la Cour et aux demandeurs.

2. Le défendeur fera citer ses témoins et experts après avoir donné des indications générales sur son argumentation relative aux faits et sur l'ordre dans lequel il compte présenter ces témoins et experts.

3. Avant de présenter chaque témoin ou expert, le défendeur indiquera à la Cour d'une manière raisonnablement détaillée le ou les points sur lesquels portera sa déposition et la ou les questions à l'égard desquelles cette déposition sera considérée comme pertinente.

4. Lorsque l'audition des témoins et experts et la plaidoirie subséquente du défendeur auront pris fin, les demandeurs pourront formuler sur les dépositions toutes observations qu'ils désireront.

5. The Respondent would thereupon be at liberty to make its reply to comments on such evidence as might be made by the Applicants.

6. This reply of the Respondent should, subject to any explanations as might thereafter be asked by the Court or any question which might be put to the Parties by the Court or any Member of the Court, and subject to any order of the Court, conclude the speeches of the Parties on both the law and the facts.

7. Any amendments which the Applicants might desire to make to the submissions made by them on 19 May should be made at the conclusion of the Respondent's final address, but before the Respondent presented its final submissions.

The Court took the occasion to inform the Parties as follows:

1. The request of the Respondent for an inspection *in loco* would not be deliberated upon by the Court until after all evidence had been called and the addresses of the Parties had concluded.

2. All questions of law and fact concerned with the merits of the case would be reserved by the Court until after the hearing had been declared closed and the Court withdrew to consider its judgment.

He called upon the Agent for the Respondent.

Dr. VERLOREN VAN THEMAAT requested that Mr. de Villiers be allowed to address the Court on his Government's behalf.

The PRESIDENT called upon Mr. de Villiers.

Mr. de VILLIERS began the speech reproduced in the annex [1].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

Mr. de Villiers continued the speech repoduced in the annex [2].

The Court rose at 5.55 p.m.

[Signatures.]

THIRTY-SEVENTH PUBLIC HEARING (25 V 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon the Agent for the Respondent.

Mr. de VILLIERS continued the speech reproduced in the annex [3].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [4].

The Court rose at 12.55 p.m.

[Signatures.]

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[1] See **IX**, pp. 377-391.
[2] See **IX**, pp. 391-406.
[3] See **IX**, pp. 406-423.
[4] See **IX**, pp. 423-438.

5. Le défendeur aura ensuite la faculté de répondre aux observations que les demandeurs auront pu faire sur les dépositions.

6. Sous réserve des explications que la Cour pourra ultérieurement demander ou des questions que la Cour ou certains de ses membres pourront poser aux Parties et sous réserve de toute ordonnance éventuelle de la Cour, la réplique du défendeur constituera la fin des plaidoiries des Parties sur le droit et sur les faits.

7. Si les demandeurs désirent apporter des amendements aux conclusions déposées par eux le 19 mai, ils devront le faire après que le défendeur aura achevé sa dernière plaidoirie et avant qu'il présente ses conclusions finales.

La Cour saisit cette occasion pour faire connaître aux Parties:

1. que la Cour ne délibérera sur la requête du défendeur relative à une visite sur les lieux qu'après que tous les témoins et experts auront été entendus et que les Parties auront achevé leurs plaidoiries;

2. que la Cour réservera l'examen de tous les points de droit et de fait touchant au fond de l'affaire jusqu'à ce que la clôture de la procédure orale ait été prononcée et que la Cour se soit retirée pour délibérer.

Le Président donne la parole à l'agent du défendeur.

M. VERLOREN VAN THEMAAT demande que M. de Villiers soit autorisé à parler au nom de son gouvernement.

Le PRÉSIDENT donne la parole à M. de Villiers

M. de VILLIERS commence l'exposé reproduit en annexe [1].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [2].

L'audience est levée à 17 h 55

[Signatures.]

TRENTE-SEPTIÈME AUDIENCE PUBLIQUE (25 V 65, 10 h)

Présents: [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent du défendeur.

M. de VILLIERS continue l'exposé reproduit en annexe [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [4].

L'audience est levée à 12 h 55

[Signatures.]

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[1] Voir **IX**, p. 377-391.
[2] Voir **IX**, p. 391-406.
[3] Voir **IX**, p. 406-423.
[4] Voir **IX**, p. 423-438.

THIRTY-EIGHTH PUBLIC HEARING (26 V 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon the Agent for the Respondent.

Mr. de VILLIERS continued the speech reproduced in the annex [1].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [2].

The Court rose at 12.30 p.m.

[Signatures.]

THIRTY-NINTH PUBLIC HEARING (27 V 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and said that upon the adjournment of the Court the previous day the Agents of the Parties had seen him. A request had been made by the Respondent that the further hearing of the Oral Proceedings should be adjourned for a period of two weeks, in order to enable the Respondent to consider fully the effect of new matter stated to have been introduced by the Applicants late in the course of their oral reply, to prepare properly its oral argument in response thereto and to determine whether it would seek to tender evidence thereon. It had been stated that without the adjournment requested the Respondent would be placed under a handicap in engaging in the research deemed to be necessary, and that the adjournment was also necessary to permit the Agent for the Respondent to have consultations with his Government.

The request of the Respondent had been considered, and in the circumstances, the Agent for the Applicants making no objection, the Court would grant an adjournment until Tuesday, 8 June, at 3 p.m. It was to be understood that the Respondent would then be prepared to proceed with the further presentation of its case.

He called upon Mr. de Villiers.

Mr. de VILLIERS continued the speech reproduced in the annex [3].

The Court adjourned from 11.15 a.m. to 11.45 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [4].

The Court rose at 12.05 p.m.

[Signatures.]

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[1] See **IX**, pp. 438-454.
[2] See **IX**, pp. 454-462.
[3] See **IX**, pp. 462-476.
[4] See **IX**, pp. 476-481.

TRENTE-HUITIÈME AUDIENCE PUBLIQUE (26 V 65, 10 h)

Présents : [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent du défendeur.

M. de VILLIERS continue l'exposé reproduit en annexe [1].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

M. de VILLIERS continue l'exposé reproduit en annexe [2].

L'audience est levée à 12 h 30

[Signatures.]

TRENTE-NEUVIÈME AUDIENCE PUBLIQUE (27 V 65, 10 h)

Présents : [Voir audience du 15 III 65.]

Le PRÉSIDENT ouvre l'audience et déclare qu'après la clôture de la précédente audience il a reçu les agents des Parties. Le défendeur a demandé que les audiences soient suspendues pour deux semaines, afin de permettre d'examiner tous les aspects de la nouvelle question qu'il estime avoir été introduite par les demandeurs dans la dernière portée de leur réplique orale, de préparer convenablement sa réponse sur ce point et de déterminer s'il devra produire des témoins en la matière. Le défendeur a déclaré que, si cette suspension ne lui était pas accordée, il se trouverait dans une situation désavantageuse pour procéder aux recherches voulues et que l'ajournement serait également nécessaire pour permettre à l'agent du défendeur de consulter son gouvernement.

La requête du défendeur a été examinée ; étant donné les circonstances, l'agent des demandeurs ne faisant aucune objection, la Cour suspendra ses audiences jusqu'au mardi 8 juin à 15 heures. Il est entendu que le défendeur sera alors prêt à poursuivre sa plaidoirie.

Le Président donne la parole à M. de Villiers.

M. de VILLIERS continue l'exposé reproduit en annexe [3].

L'audience, suspendue à 11 h 15, est reprise à 11 h 45

M. de VILLIERS continue l'exposé reproduit en annexe [4].

L'audience est levée à 12 h 5

[Signatures.]

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[1] Voir **IX**, p. 438-454.
[2] Voir **IX**, p. 454-462.
[3] Voir **IX**, p. 462-476.
[4] Voir **IX**, p. 476-481.

FORTIETH PUBLIC HEARING (8 VI 65, 3 p.m.)

Present: [See hearing of 15 III 65.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS continued the speech reproduced in the annex [1].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

Mr. de VILLIERS continued the speech reproduced in the annex [2].
The Court rose at 6 p.m.

[Signatures.]

FORTY-FIRST PUBLIC HEARING (9 VI 65, 10 a.m.)

Present: [See hearing of 15 III 65.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS concluded the speech reproduced in the annex [3].
The PRESIDENT called upon Mr. Grosskopf.
Mr. GROSSKOPF began the speech reproduced in the annex [4].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. GROSSKOPF continued the speech reproduced in the annex [5].
The Court rose at 1 p.m.

[Signatures.]

FORTY-SECOND PUBLIC HEARING (10 VI 65, 10 a.m.)

Present: [See hearing of 15 III 65.]
The PRESIDENT opened the hearing and called upon Mr. Grosskopf.
Mr. GROSSKOPF concluded the speech reproduced in the annex [6].
The PRESIDENT called upon Mr. de Villiers.
Mr. de VILLIERS began the speech reproduced in the annex [7].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [8].
The Court rose at 12.55 p.m.

[Signatures.]

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[1] See **IX**, pp. 482-497.
[2] See **IX**, pp. 497-513.
[3] See **IX**, pp. 513-523.
[4] See **IX**, pp. 524-531.
[5] See **IX**, pp. 531-548.
[6] See **IX**, pp. 548-560.
[7] See **IX**, pp. 561-566.
[8] See **IX**, pp. 566-581.

QUARANTIÈME AUDIENCE PUBLIQUE (8 VI 65, 15 h)

Présents : [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS continue l'exposé reproduit en annexe [1].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [2].

L'audience est levée à 18 h

[Signatures.]

QUARANTE ET UNIÈME AUDIENCE PUBLIQUE (9 VI 65, 10 h)

Présents : [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS termine l'exposé reproduit en annexe [3].
Le PRÉSIDENT donne la parole à M. Grosskopf.
M. GROSSKOPF commence l'exposé reproduit en annexe [4].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

M. GROSSKOPF continue l'exposé reproduit en annexe [5].

L'audience est levée à 13 h

[Signatures.]

QUARANTE-DEUXIÈME AUDIENCE PUBLIQUE (10 VI 65, 10 h)

Présents : [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. Grosskopf.
M. GROSSKOPF termine l'exposé reproduit en annexe [6].
Le PRÉSIDENT donne la parole à M. de Villiers.
M. de VILLIERS commence l'exposé reproduit en annexe [7].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

M. de VILLIERS continue l'exposé reproduit en annexe [8].

L'audience est levée à 12 h 55

[Signatures.]

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[1] Voir **IX**, p. 482-497.
[2] Voir **IX**, p. 497-513.
[3] Voir **IX**, p. 513-523.
[4] Voir **IX**, p. 524-531.
[5] Voir **IX**, p. 531-548.
[6] Voir **IX**, p. 548-560.
[7] Voir **IX**, p. 561-566.
[8] Voir **IX**, p. 566-581.

FORTY-THIRD PUBLIC HEARING (11 VI 65, 10 a.m.)

Present: [See hearing of 15 III 65.]

The PRESIDENT opened the hearing and called upon Mr. de Villiers.

Mr. de VILLIERS continued the speech reproduced in the annex [1].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [2].

The Court rose at 1 p.m.

[Signatures.]

FORTY-FOURTH PUBLIC HEARING (14 VI 65, 3 p.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]

The PRESIDENT opened the hearing and announced that Judge Badawi was indisposed and would not be sitting during the week. He called upon Mr. de Villiers.

Mr. de VILLIERS continued the speech reproduced in the annex [3].

The Court adjourned from 4.20 p.m. to 4.45 p.m.

Mr. de VILLIERS continued the speech reproduced in the annex [4].

The Court rose at 5.55 p.m.

[Signatures.]

FORTY-FIFTH PUBLIC HEARING (15 VI 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]

The PRESIDENT opened the hearing and called upon Mr. de Villiers.

Mr. de VILLIERS concluded the speech reproduced in the annex [5].

The PRESIDENT called upon the Agent for the Respondent.

Dr. VERLOREN VAN THEMAAT began the speech reproduced in the annex [6].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Dr. VERLOREN VAN THEMAAT concluded the speech reproduced in the annex [7].

The PRESIDENT called upon Mr. de Villiers.

Mr. de VILLIERS began the speech reproduced in the annex [8].

The Court rose at 1 p.m.

[Signatures.]

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[1] See **IX**, pp. 581-596.
[2] See **IX**, pp. 596-611.
[3] See **IX**, pp. 611-627.
[4] See **IX**, pp. 627-642.
[5] See **IX**, pp. 642-658.
[6] See **X**, pp. 3-4.
[7] See **X**, pp. 4-11.
[8] See **X**, pp. 12-16.

QUARANTE-TROISIÈME AUDIENCE PUBLIQUE (11 VI 65, 10 h)

Présents : [Voir audience du 15 III 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS continue l'exposé reproduit en annexe [1].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

M. de VILLIERS continue l'exposé reproduit en annexe [2].

L'audience est levée à 13 h

[Signatures.]

QUARANTE-QUATRIÈME AUDIENCE PUBLIQUE (14 VI 65, 15 h)

Présents : [Voir audience du 15 III 65. M. Badawi, absent]
Le PRÉSIDENT ouvre l'audience et annonce que M. Badawi, souffrant, n'assistera pas aux audiences de la semaine. Il donne la parole à M. de Villiers.
M. de VILLIERS continue l'exposé reproduit en annexe [3].

L'audience, suspendue à 16 h 20, est reprise à 16 h 45

M. de VILLIERS continue l'exposé reproduit en annexe [4].

L'audience est levée à 17 h 55

[Signatures.]

QUARANTE-CINQUIÈME AUDIENCE PUBLIQUE (15 VI 65, 10 h)

Présents : [Voir audience du 15 III 65. M. Badawi, absent.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS termine l'exposé reproduit en annexe [5].
Le PRÉSIDENT donne la parole à l'agent du défendeur.
M. VERLOREN van THEMAAT commence l'exposé reproduit en annexe [6].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. VERLOREN van THEMAAT termine l'exposé reproduit en annexe [7].

Le PRÉSIDENT donne la parole à M. de Villiers.
M. de VILLIERS commence l'exposé reproduit en annexe [8].

L'audience est levée à 13 h

[Signatures.]

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[1] Voir **IX**, p. 581-596.
[2] Voir **IX**, p. 596-611.
[3] Voir **IX**, p. 611-627.
[4] Voir **IX**, p. 627-642.
[5] Voir **IX**, p. 642-648.
[6] Voir **X**, p. 3-4.
[7] Voir **X**, p. 4-11.
[8] Voir **X**, p. 12-16.

FORTY-SIXTH PUBLIC HEARING (16 VI 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Badawi, absent.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS continued the speech reproduced in the annex [1].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [2].

The Court rose at 12.55 p.m.

[Signatures.]

FORTY-SEVENTH PUBLIC HEARING (17 VI 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS continued the speech reproduced in the annex [3].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the annex [4].

The PRESIDENT said that it was to be understood that, for the convenience of both the Court and the Applicants, the Court would be informed on the previous day of the witness or expert that it was proposed to call on the following day.

Mr. de VILLIERS said that the first witness would be Dr. W. W. M. Eiselen.

The Court rose at 1 p.m.

[Signatures.]

FORTY-EIGHTH PUBLIC HEARING (18 VI 65, 10.05 a.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS concluded the speech reproduced in the annex [5].

The PRESIDENT requested that the Court be informed before the next hearing which of the witnesses or experts whose names had already been communicated to the Court would not now be called. It was understood that any further names which had not yet been determined upon would be communicated to the Court within a reasonable period of time.

He then indicated the procedure which would be followed for the hearing of witnesses and experts.

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[1] See **X**, pp. 17-32.
[2] See **X**, pp. 32-46.
[3] See **X**, pp. 46-61.
[4] See **X**, pp. 61-77.
[5] See **X**, pp. 77-87.

QUARANTE-SIXIÈME AUDIENCE PUBLIQUE (16 VI 65, 10 h)

Présents : [Voir audience du 15 III 65. M. Badawi, absent.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS continue l'exposé reproduit en annexe [1].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [2].

L'audience est levée à 12 h 55

[Signatures.]

QUARANTE-SEPTIÈME AUDIENCE PUBLIQUE (17 VI 65, 10 h)

Présents : [Voir audience du 15 III 65. M. Badawi, absent.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS continue l'exposé reproduit en annexe [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [4].
Le PRÉSIDENT déclare qu'il doit être entendu que, tant pour la commodité de la Cour que pour celle des demandeurs, la Cour sera informée un jour à l'avance du nom du témoin ou de l'expert que l'on se propose de faire entendre.
M. de VILLIERS indique que le premier témoin sera M. W. W. M. Eiselen.

L'audience est levée à 13 h

[Signatures.]

QUARANTE-HUITIÈME AUDIENCE PUBLIQUE (18 VI 65, 10 h 5)

Présents : [Voir audience du 15 III 65. M. Badawi, absent.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS termine l'exposé reproduit en annexe [5].
Le PRÉSIDENT demande que la Cour soit informée avant la prochaine audience du nom des témoins ou experts qui, bien que portés sur les listes présentées à la Cour, ne seront pas cités. Il est entendu que les noms non encore signalés seront communiqués à la Cour dans un délai raisonnable.

Le Président indique la procédure à suivre pour l'audition des témoins et experts.

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[1] Voir X, p. 17-32.
[2] Voir X, p. 32-46.
[3] Voir X, p. 46-61.
[4] Voir X, p. 61-77.
[5] Voir X, p. 77-87.

Witnesses waiting to be called might not, without the permission of the Court, be present in Court when any other witness was giving evidence. Any witness might remain in the Court after his evidence had been given unless the Court otherwise directed. This direction extended also to experts.

The witness or expert would take his place at the rostrum and would make the appropriate declaration provided for in Article 53 of the Rules of Court. Persons appearing in the capacity of both witness and expert would make both the declarations provided for therein. If the witness or expert spoke a language other than French or English, the interpreter supplied by the Respondent would make the declaration provided for in Article 58 of the Rules of Court. In the case of all questions, statements, and evidence in French or English, the interpretation would be made simultaneously into the other language by the Court's interpreters. In the case of statements which had to be interpreted into one of the Court's official languages by an interpreter supplied by the Respondent, the interpretation into the first official language would be made consecutively by the Respondent's interpreter. This translation would be interpreted simultaneously into the other official language by the Court's interpreters.

After the declarations provided for in the Rules of Court had been made, questions would be put to the witness or expert by Agent or Counsel for the Respondent. The Agent for the Applicants would then be given an opportunity to cross-examine if he so desired. Next would come any questions which the President and the Judges might desire to put. Lastly, the Respondent would have an opportunity to re-examine.

Article 60, paragraph 2, of the Rules of Court provided as follows: "A transcript of the evidence of each witness or expert shall be made available to him in order that mistakes may be corrected under the supervision of the Court."

One copy of the transcript of each witness' evidence would be made available to the witness as soon as possible after the evidence had been given. The witness would be asked to insert in the transcript corrections of any mistakes that might have occurred and return the signed corrected copy to the Registry within 24 hours, in order to facilitate any supervision that the Court might think it proper to exercise in respect of any corrections made. In the case of witnesses who used one of the Court's official languages, the transcript to be signed by them would be the one drawn up in the language in which they spoke. In the case of those who, as provided in paragraph 2 of Article 58 of the Rules of Court, made use of another language, it was the transcript of the translation arranged for by the Party concerned under the supervision of the Court which, as being the authentic text, would be corrected by the witness and signed by him.

Witnesses who were called should remain available for the Court, unless they were released on application made by the Respondent. It would be convenient if whoever was presenting the testimony of the witness to the Court would briefly state before the evidence was given, in summary form, the nature of the evidence to be given and the point or points to which it would be directed.

The Court began the hearing of the witnesses and experts [1].

[1] See X, pp. 88-90.

A moins d'y être autorisé par la Cour, un témoin qui n'aura pas encore été invité à témoigner ne pourra assister à l'audience tant qu'un autre témoin sera en train de déposer. Une fois sa déposition faite, il pourra rester dans la salle à moins que la Cour n'en décide autrement. Cela vaudra également pour les experts.

Le témoin ou l'expert prendra place au pupitre; il prononcera ensuite la déclaration appropriée prescrite par l'article 53 du Règlement de la Cour. Toute personne entendue à la fois comme expert et comme témoin fera les deux déclarations prescrites par ledit article. Si le témoin ou l'expert parle une autre langue que le français ou l'anglais, l'interprète fourni par le défendeur prendra l'engagement prévu à l'article 58 du Règlement. Lorsque le français ou l'anglais seront utilisés pour toutes les questions, déclarations et dépositions, l'interprétation simultanée sera assurée dans l'autre langue par les interprètes de la Cour. Lorsque les exposés devront être interprétés dans l'une des langues officielles de la Cour par l'interprète que fournira le défendeur, l'interprétation dans cette langue officielle sera faite selon la méthode consécutive par l'interprète du défendeur. La traduction de celui-ci sera interprétée simultanément dans l'autre langue officielle par les interprètes de la Cour.

Lorsque les déclarations prescrites par le Règlement auront été faites, l'agent ou le conseil du défendeur posera des questions au témoin ou à l'expert. L'agent des demandeurs se verra alors offrir la possibilité de procéder à un contre-interrogatoire s'il le désire. Il se peut qu'ensuite le Président et les juges souhaitent poser des questions. Enfin le défendeur aura la possibilité de poser des questions supplémentaires au témoin ou à l'expert.

L'article 60, paragraphe 2, du Règlement dispose: « Chaque témoin et expert reçoit communication du compte rendu de sa déposition, afin que, sous le contrôle de la Cour, il puisse corriger toutes erreurs. »

Chaque témoin recevra copie du compte rendu de sa déposition aussitôt que possible après qu'il aura témoigné. Il sera prié d'y apporter les corrections destinées à rectifier les erreurs qui auraient pu se produire et de renvoyer au Greffe l'exemplaire corrigé, muni de sa signature, dans les vingt-quatre heures, de façon à faciliter le contrôle que la Cour pourra juger approprié d'exercer sur les corrections. Lorsque le témoin emploiera l'une des langues officielles de la Cour, le compte rendu de sa déposition qu'il devra signer sera le compte rendu établi dans la langue dont il se sera servi. Lorsque le témoin aura employé une autre langue, ainsi qu'il est prévu à l'article 58, paragraphe 2, du Règlement, c'est la traduction établie à l'intention de la Partie intéressée sous le contrôle de la Cour qui constituera le texte authentique et en conséquence sera corrigée par les soins du témoin et signée par lui.

Les témoins entendus devront rester à la disposition de la Cour, à moins qu'il n'en soit décidé autrement sur la demande du défendeur. Il serait utile que la personne qui présentera des témoins à la Cour indique brièvement, avant chaque déposition, quelle en sera la nature et sur quels point ou points elle portera.

La Cour commence l'audition des témoins et experts [1].

[1] Voir **X**, p. 88-90.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [1].

The Court rose at 1 p.m.

[Signatures.]

FORTY-NINTH PUBLIC HEARING (21 VI 65, 3 p.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]

The PRESIDENT opened the hearing and requested the Deputy-Registrar to read letters of 16 and 20 June 1965 received from the Agent for the Government of South Africa and the Agent for the Governments of Ethiopia and Liberia.

The DEPUTY-REGISTRAR read the letters reproduced in the Annex [2].

The PRESIDENT said that the Court desired to indicate to both Parties that in all matters touching the public proceedings, any submissions or contentions or reservations made or sought to be made by either Party, including objections to evidence or relevance of evidence, should be made in open Court and not by correspondence to the Registry.

The Court continued the hearing of the witnesses and experts [3].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

The Court continued the hearing of the witnesses and experts [4].

The Court rose at 6.05 p.m.

[Signatures.]

FIFTIETH PUBLIC HEARING (22 VI 65, 3 p.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]

The Court continued the hearing of the witnesses and experts [5].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

The Court continued the hearing of the witnesses and experts [6].

The PRESIDENT said that the Court desired to put certain questions to the Parties.

These questions bore upon the fact that the Applicants relied upon a certain norm and/or standards as the basis for interpreting compliance with Article 2 (2). 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

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[1] See **X**, pp. 90-100.
[2] See **XII**, Part IV.
[3] See **X**, pp. 100-111.
[4] See **X**, pp. 111-124.
[5] See **X**, pp. 124-139.
[6] See **X**, pp. 139-154.

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [1].

L'audience est levée à 13 h

[Signatures.]

QUARANTE-NEUVIÈME AUDIENCE PUBLIQUE (21 VI 65, 15 h)

Présents: [Voir audience du 15 III 65. M. Badawi, absent.]

Le PRÉSIDENT ouvre l'audience et invite le Greffier adjoint à donner lecture d'une lettre de l'agent du Gouvernement sud-africain en date du 16 juin 1965 et d'une lettre de l'agent des Gouvernements éthiopien et libérien en date du 20 juin 1965.

Le GREFFIER ADJOINT lit les lettres reproduites en annexe [2].

Le PRÉSIDENT déclare que la Cour désire indiquer aux deux Parties que, pour tout ce qui concerne la procédure publique, toutes les conclusions, prétentions ou réserves qu'une Partie exprime ou désire exprimer, y compris celles qui visent des objections à l'égard de certains moyens de preuve ou de la pertinence de certains moyens de preuve, doivent être présentées en audience publique et non pas par lettre adressée au Greffe.

La Cour continue l'audition des témoins et experts [3].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

La Cour continue l'audition des témoins et experts [4].

L'audience est levée à 18 h 5

[Signatures.]

CINQUANTIÈME AUDIENCE PUBLIQUE (22 VI 65, 15 h)

Présents: [Voir audience du 15 III 65. M. Badawi, absent.]

La Cour continue l'audition des témoins et experts [5].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

La Cour continue l'audition des témoins et experts [6].

Le PRÉSIDENT déclare que la Cour désire poser certaines questions aux Parties.

Ces questions ont trait au fait que les demandeurs se fondent sur une certaine norme et/ou sur certains « standards » en vue d'interpréter l'application de l'article 2, alinéa 2. Pour sa part, le défendeur conteste l'existence de cette norme ou de ces « standards » et fonde son argumentation sur cette assertion que la preuve d'une violation par le défendeur de l'article 2, alinéa 2, ne peut être faite que s'il est établi que, dans l'exercice

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[1] Voir **X**, p. 90-100.
[2] Voir **XII**, Partie. IV.
[3] Voir **X**, p. 100-111.
[4] Voir **X**, p. 111-124.
[5] Voir **X**, p. 124-139.
[6] Voir **X**, p. 139-154.

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.

The questions which the Court desired to put to the Parties were the following:

Assuming the Court were to come to the conclusion that there had not been established any such legal norm or standards and were also to come to the conclusion that the interpretation sought to be placed upon Article 2 (2) of the Mandate by the Respondent was not the proper interpretation to be placed upon that Article, or did not exhaust the meaning thereof,

Question 1. Do the Parties contend that the Court is bound to adjudicate the dispute between the Parties exclusively upon 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. 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?

Question 3. In particular, do the Parties contend that it is not open to the Court to interpret paragraph 2, sub-paragraph 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 had discharged its obligations under that article and adjudge between the Parties accordingly?

Argument on the legal issues having been completed, it would appear advisable that these questions should be answered as soon as possible. Since the Court would adjourn at midday tomorrow, it would be convenient to interpose the answers to these questions before the resumption of hearing evidence, on Wednesday next, 30 June. The Applicants would be called upon first to give their answers, to be followed by the Respondent.

The Court rose at 6 p.m.

[Signatures.]

FIFTY-FIRST PUBLIC HEARING (23 VI 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]
The Court continued the hearing of the witnesses and experts [1].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

The Court continued the hearing of the witnesses and experts [2].

The Court rose at 12.40 p.m.

[Signatures.]

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[1] See **X**, pp. 154-170.
[2] See **X**, pp. 170-182.

des pouvoirs à lui conférés par l'article 2 du Mandat, il a agi de mauvaise foi ou dans un dessein autre que celui de donner effet à l'article 2, alinéa 2, du Mandat, et que l'article doit être interprété en conséquence.

Les questions que la Cour désire poser aux Parties sont les suivantes:

A supposer que la Cour parvienne à la double conclusion que l'existence de cette norme ou de ces « standards » juridiques n'a pas été établie et que l'interprétation que le défendeur a cherché à donner de l'article 2, alinéa 2, du Mandat est mal fondée ou incomplète,

1. Les Parties soutiennent-elles que la Cour est tenue de statuer sur le différend entre les Parties uniquement sur la base de leurs thèses telles qu'elles les ont respectivement présentées et des interprétations qu'elles ont respectivement cherché à donner de l'article 2, alinéa 2, du Mandat?

2. Les Parties soutiennent-elles qu'il n'est pas permis à la Cour de donner sa propre interprétation de l'article, eu égard à toutes les considérations de droit pertinentes, et de statuer en conséquence sur le différend entre les Parties?

3. En particulier, les Parties soutiennent-elles qu'il n'est pas permis à la Cour d'interpréter l'article 2, alinéa 2, du Mandat de manière à examiner et à apprécier tous les faits, circonstances et conditions pertinents, tels qu'ils lui ont été présentés dans le dossier définitif de l'affaire, en vue de déterminer si le défendeur s'est acquitté de ses obligations aux termes dudit article, et à statuer en conséquence sur le différend entre les Parties?

Les plaidoiries sur les points de droit étant achevées, il semble opportun que des réponses soient apportées à ces questions dans les meilleurs délais. Etant donné que la Cour doit ajourner ses audiences à partir du lendemain, il serait commode que ces réponses soient données avant que les dépositions reprennent, c'est-à-dire au début de l'audience qui se tiendra le mercredi 30 juin. A cette fin, la Cour donnera la parole aux demandeurs et immédiatement ensuite au défendeur.

L'audience est levée à 18 h

[Signatures.]

CINQUANTE ET UNIÈME AUDIENCE PUBLIQUE (23 VI 65, 10 h)

Présents: [Voir audience du 15 III 65. M. Badawi, absent.]

La Cour continue l'audition des témoins et experts [1].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

La Cour continue l'audition des témoins et experts [2].

L'audience est levée à 12 h 40

[Signatures.]

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[1] Voir **X**, p. 154-170.
[2] Voir **X**, p. 170-182.

FIFTY-SECOND PUBLIC HEARING (30 VI 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]

The PRESIDENT opened the hearing and called upon the Agent for the Applicants to reply to the questions put by the Court on 22 June.

Mr. GROSS made the speech reproduced in the annex [1].

The PRESIDENT called upon the Agent for the Respondent.

Dr. VERLOREN VAN THEMAAT asked that Mr. de Villiers be allowed to address the Court.

The PRESIDENT called upon Mr. de Villiers.

Mr. de VILLIERS began the speech reproduced in the annex [2].

The Court adjourned from 11.20 a.m. to 12-noon

Mr. de VILLIERS continued the speech reproduced in the annex [3].

The Court rose at 1 p.m.

[Signatures.]

FIFTY-THIRD PUBLIC HEARING (1 VII 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]

The PRESIDENT opened the hearing and called upon Mr. de Villiers.

Mr. de VILLIERS concluded the speech reproduced in the annex [4].

The Court adjourned from 11.25 a.m. to 11.45 a.m.

The PRESIDENT called upon the Agent for the Applicants.

Mr. GROSS requested an opportunity to comment on the reply of the Respondent to the Court's questions.

The PRESIDENT said that the Court would hear the comments of the Applicants at once, and that the Respondent would have a right of reply.

Mr. GROSS made the speech reproduced in the annex [5].

The PRESIDENT called upon Mr. de Villiers.

Mr. de VILLIERS made the speech reproduced in the annex [6].

The Court continued the hearing of the witnesses and experts [7].

The Court rose at 1 p.m.

[Signatures.]

FIFTY-FOURTH PUBLIC HEARING (2 VII 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]

The Court continued the hearing of the witnesses and experts [8].

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[1] See X, pp. 183-188.
[2] See X, pp. 188-198.
[3] See X, pp. 198-211.
[4] See X, pp. 211-228.
[5] See X, pp. 228-233.
[6] See X, pp. 233-237.
[7] See X, pp. 238-242.
[8] See X, pp. 242-253.

CINQUANTE-DEUXIÈME AUDIENCE PUBLIQUE (30 VI 65, 10 h)

Présents: [Voir audience du 15 III 65. M. Badawi, absent.]
Le PRÉSIDENT ouvre l'audience et invite l'agent des demandeurs à répondre aux questions posées par la Cour le 22 juin.
M. GROSS prononce l'exposé reproduit en annexe [1].
Le PRÉSIDENT donne la parole à l'agent du défendeur.
M. VERLOREN van THEMAAT prie le Président de bien vouloir donner la parole à M. de Villiers.
Le PRÉSIDENT donne la parole à M. de Villiers.
M. de VILLIERS commence l'exposé reproduit en annexe [2].

L'audience, suspendue à 11 h 20, est reprise à 12 h

M. de VILLIERS continue l'exposé reproduit en annexe [3].

L'audience est levée à 13 h

[Signatures.]

CINQUANTE-TROISIÈME AUDIENCE PUBLIQUE (1 VII 65, 10 h)

Présents: [Voir audience du 15 III 65. M. Badawi, absent.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS termine l'exposé reproduit en annexe [4].

L'audience, suspendue à 11 h 25, est reprise à 11 h 45

Le PRÉSIDENT donne la parole à l'agent des demandeurs.
M. GROSS désire présenter des observations sur la réponse du défendeur aux questions de la Cour.
Le PRÉSIDENT déclare que la Cour entendra immédiatement les observations des demandeurs et que le défendeur aura le droit d'y répondre.

M. GROSS prononce l'exposé reproduit en annexe [5].
Le PRÉSIDENT donne la parole à M. de Villiers.
M. de VILLIERS prononce l'exposé reproduit en annexe [6].
La Cour continue l'audition des témoins et experts [7].

L'audience est levée à 13 h

[Signatures.]

CINQUANTE-QUATRIÈME AUDIENCE PUBLIQUE (2 VII 65, 10 h)

Présents: [Voir audience du 15 III 65. M. Badawi, absent.]
La Cour continue l'audition des témoins et experts [8].

[1] Voir X, p. 183-188.
[2] Voir X, p. 188-198.
[3] Voir X, p. 198-211.
[4] Voir X, p. 211-228.
[5] Voir X, p. 228-233.
[6] Voir X, p. 233-237.
[7] Voir X, p. 238-242.
[8] Voir X, p. 242-253.

The Court adjourned from 11.25 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [1].

The Court rose at 1 p.m.

[Signatures.]

FIFTY-FIFTH PUBLIC HEARING (5 VII 65, 3 p.m.)

Present: [See hearing of 15 III 65. Judges Badawi and Gros absent.]
The Court continued the hearing of the witnesses and experts [2].

The Court adjourned from 4.20 p.m. to 4.45 p.m.

The Court continued the hearing of the witnesses and experts [3].

The Court rose at 6 p.m.

[Signatures.]

FIFTY-SIXTH PUBLIC HEARING (6 VII 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]
The Court continued the hearing of the witnesses and experts [4].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [5].

The Court rose at 1.05 p.m.

[Signatures.]

FIFTY-SEVENTH PUBLIC HEARING (7 VII 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]
The Court continued the hearing of the witnesses and experts [6].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

The Court continued the hearing of the witnesses and experts [7].

The Court rose at 1 p.m.

[Signatures.]

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[1] See **X**, pp. 253-265.
[2] See **X**, pp. 265-280.
[3] See **X**, pp. 280-295.
[4] See **X**, pp. 295-309.
[5] See **X**, pp. 309-325.
[6] See **X**, pp. 325-340.
[7] See **X**, pp. 340-355.

L'audience, suspendue à 11 h 25, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [1].

L'audience est levée à 13 h

[Signatures.]

CINQUANTE-CINQUIÈME AUDIENCE PUBLIQUE (5 VII 65, 15 h)

Présents : [Voir audience du 15 III 65. MM. Badawi et Gros, absents.]
La Cour continue l'audition des témoins et experts [2].

L'audience, suspendue à 16 h 20, est reprise à 16 h 45

La Cour continue l'audition des témoins et experts [3].

L'audience est levée à 18 h

[Signatures.]

CINQUANTE-SIXIÈME AUDIENCE PUBLIQUE (6 VII 65, 10 h)

Présents : [Voir audience du 15 III 65. M. Badawi, absent.]
La Cour continue l'audition des témoins et experts [4].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [5].

L'audience est levée à 13 h 5

[Signatures.]

CINQUANTE-SEPTIÈME AUDIENCE PUBLIQUE (7 VII 65, 10 h)

Présents : [Voir audience du 15 III 65. M. Badawi, absent.]
La Cour continue l'audition des témoins et experts [6].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

La Cour continue l'audition des témoins et experts [7].

L'audience est levée à 13 h

[Signatures.]

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[1] Voir X, p. 253-265.
[2] Voir X, p. 265-280.
[3] Voir X, p. 280-295.
[4] Voir X, p. 295-309.
[5] Voir X, p. 309-325.
[6] Voir X, p. 325-340.
[7] Voir X, p. 340-355.

FIFTY-EIGHTH PUBLIC HEARING (8 VII 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]
The Court continued the hearing of the witnesses and experts [1].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [2].
The Court rose at 1 p.m.

[Signatures.]

FIFTY-NINTH PUBLIC HEARING (9 VII 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]
The Court continued the hearing of the witnesses and experts [3].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

The Court continued the hearing of the witnesses and experts [4].
The Court rose at 1.05 p.m.

[Signatures.]

SIXTIETH PUBLIC HEARING (12 VII 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judge Badawi absent.]
The Court continued the hearing of the witnesses and experts [5].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

The Court continued the hearing of the witnesses and experts [6].

The Court adjourned from 1 p.m. to 3 p.m.

The Court continued the hearing of the witnesses and experts [7].
The Court rose at 4.05 p.m.

[Signatures.]

SIXTY-FIRST PUBLIC HEARING (13 VII 65, 10 a.m.)

Present: [See hearing of 15 III 65. Judges Badawi and Spiropoulos absent.]
The Court continued the hearing of the witnesses and experts [8].

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[1] See **X**, pp. 355-370.
[2] See **X**, pp. 370-387.
[3] See **X**, pp. 387-406.
[4] See **X**, pp. 406-426.
[5] See **X**, pp. 427-446.
[6] See **X**, pp. 446-466.
[7] See **X**, pp. 466-479.
[8] See **X**, pp. 479-497.

CINQUANTE-HUITIÈME AUDIENCE PUBLIQUE (8 VII 65, 10 h)

Présents : [Voir audience du 15 III 65. M. Badawi, absent.]
La Cour continue l'audition des témoins et experts [1].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [2].

L'audience est levée à 13 h

[Signatures.]

CINQUANTE-NEUVIÈME AUDIENCE PUBLIQUE (9 VII 65, 10 h)

Présents : [Voir audience du 15 III 65. M. Badawi, absent.]
La Cour continue l'audition des témoins et experts [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

La Cour continue l'audition des témoins et experts [4].

L'audience est levée à 13 h 5

[Signatures.]

SOIXANTIÈME AUDIENCE PUBLIQUE (12 VII 65, 10 h)

Présents : [Voir audience du 15 III 65. M. Badawi, absent.]
La Cour continue l'audition des témoins et experts [5].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

La Cour continue l'audition des témoins et experts [6].

L'audience, suspendue à 13 h, est reprise à 15 h

La Cour continue l'audition des témoins et experts [7].

L'audience est levée à 16 h 5

[Signatures.]

SOIXANTE ET UNIÈME AUDIENCE PUBLIQUE (13 VII 65, 10 h)

Présents : [Voir audience du 15 III 45. MM. Badawi et Spiropoulos, absents.]
La Cour continue l'audition des témoins et experts [8].

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[1] Voir **X**, p. 355-370.
[2] Voir **X**, p. 370-387.
[3] Voir **X**, p. 387-406.
[4] Voir **X**, p. 406-426.
[5] Voir **X**, p. 427-446.
[6] Voir **X**, p. 446-466.
[7] Voir **X**, p. 466-479.
[8] Voir **X**, p. 479-497.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [1].

The Court adjourned from 1 p.m. to 3 p.m.

The Court continued the hearing of the witnesses and experts [2].

The Court adjourned from 4.10 p.m. to 4.55 p.m.

The Court continued the hearing of the witnesses and experts [3].

The Court rose at 6.15 p.m.

[Signatures.]

SIXTY-SECOND PUBLIC HEARING (14 VII 65, 10.05 a.m.)

Present: [See hearing of 15 III 65. Judges Badawi and Spiropoulos absent.]

The Court continued the hearing of the witnesses and experts [4].

The PRESIDENT said that the Court would adjourn until 3 p.m. on 20 September, unless it were otherwise ordered and the Parties notified in the meantime.

The Court rose at 10.50 a.m.

[Signatures.]

SIXTY-THIRD PUBLIC HEARING (20 IX 65, 3 p.m.)

Present: President Sir Percy SPENDER; *Vice-President* WELLINGTON KOO; *Judges* SPIROPOULOS, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS; *Judges* ad hoc, Sir Louis MBANEFO, van WYK; *Deputy-Registrar* AQUARONE.

The PRESIDENT opened the hearing.

Referring to the sudden and unexpected death during the Court's recess of Judge Badawi, he placed on record the Court's tribute to one who had given most distinguished service to the Court. Judge Badawi had been elected a Member of the Court in 1946, and had continued as a Member thereof until the time of his death. He had been, during the years 1955 to 1958, Vice-President of the Court. Prior to his becoming a judge of the Court he had rendered outstanding services to his country, having occupied the position of Chief Legal Adviser to the Egyptian Government between 1926 and 1940, subsequent to which he had been Minister of Finance, senator and Minister of Foreign Affairs. He had been the Egyptian delegate to several international conferences. Special mention might be made of his work in the establishment of the United Nations, when he had been Chairman for his country's delegation and

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[1] See X, pp. 497-513.
[2] See X, pp. 513-528.
[3] See X, pp. 528-548.
[4] See X, pp. 548-558.

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [1].

L'audience, suspendue à 13 h, est reprise à 15 h

La Cour continue l'audition des témoins et experts [2].

L'audience, suspendue à 16 h 10, est reprise à 16 h 55

La Cour continue l'audition des témoins et experts [3].

L'audience est levée à 18 h 15

[Signatures.]

SOIXANTE-DEUXIÈME AUDIENCE PUBLIQUE (14 VII 65, 10 h 5)

Présents: [Voir audience du 15 III 65. MM. Badawi et Spiropoulos, absents.]

La Cour continue l'audition des témoins et experts [4].

Le PRÉSIDENT déclare que la Cour suspendra ses audiences jusqu'au 20 septembre à 15 h, sauf décision contraire notifiée aux Parties.

L'audience est levée à 10 h 50

[Signatures.]

SOIXANTE-TROISIÈME AUDIENCE PUBLIQUE (20 IX 65, 15 h)

Présents: sir Percy SPENDER, *Président;* M. WELLINGTON KOO, *Vice-Président;* M. SPIROPOULOS, sir Gerald FITZMAURICE, MM. KORETSKY, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS, *Juges;* sir Louis MBANEFO, M. van WYK, *Juges* ad hoc; M. AQUARONE, *Greffier adjoint.*

Le PRÉSIDENT ouvre l'audience et tient, au nom de la Cour, à rendre hommage à la mémoire d'un juge éminent, M. Badawi, décédé de manière soudaine et inattendue pendant les vacances judiciaires. Elu en 1946, M. Badawi est resté membre de la Cour jusqu'à sa mort, après en avoir été vice-président de 1955 à 1958. Avant son élection, il a rendu de remarquables services à son pays de 1926 à 1940 comme conseiller juridique principal du Gouvernement et au cours des années suivantes comme ministre des Finances, comme sénateur et comme ministre des Affaires étrangères. Il a représenté l'Egypte à plusieurs conférences internationales. Il convient de rappeler tout spécialement le rôle qu'il a joué dans la création des Nations Unies en tant que président de la délégation de son pays et en tant que président d'un important comité chargé de la rédaction du Statut de la Cour. Au service de la Cour, où son savoir et sa sagesse seront très regrettés et où son absence créera un vide diffi-

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[1] Voir **X**, p. 497-513.
[2] Voir **X**, p. 513-528.
[3] Voir **X**, p. 528-548.
[4] Voir **X**, p. 548-558.

President of an important committee which had dealt with the establishment of the Statute of this Court. His services to the Court had been those of a jurist of great distinction, and his knowledge and wisdom would be greatly missed and not easy to replace. His death was a very sorrowful event for all who had the privilege of knowing him, and particularly his colleagues on the Court, for he had been a man who not only enjoyed their confidence, but had a special place in their affections. The Court extended its deep sympathy to Madame Badawi and the members of Judge Badawi's family in their great personal sorrow.

The Court stood for one minute of silence as a tribute to Judge Badawi's memory

The PRESIDENT announced that Judge Winiarski was, on doctor's orders, obliged to rest for a few days, but expected to be able to resume his place later in the week.

He expressed the regret of the Court at the unfortunate accident which prevented Mr. de Villiers from being present to conduct the case on behalf of the Respondent, and wished him a speedy recovery from his injury. The Court had also learned with regret that ill health had compelled Dr. verLoren van Themaat to return to his country. He had, over very many months in The Hague, represented his country with quiet distinction and courtesy. The Court hoped his return to South Africa would contribute to an improvement in his health.

The Court would now resume the hearing of the witnesses and experts.

The Court resumed the hearing of the witnesses and experts [1].

The Court adjourned from 3.55 p.m. to 4.15 p.m.

The Court continued the hearing of the witnesses and experts [2].

The Court rose at 6 p.m.

[Signatures.]

SIXTY-FOURTH PUBLIC HEARING (21 IX 65, 3 p.m.)

Present: [See hearing of 20 IX 65. Judge Padilla Nervo absent.]

The Court continued the hearing of the witnesses and experts [3].

The Court adjourned from 4.20 p.m. to 4.45 p.m.

The Court continued the hearing of the witnesses and experts [4].

The Court rose at 6 p.m.

[Signatures.]

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[1] See **XI**, pp. 3-12.
[2] See **XI**, pp. 12-34.
[3] See **XI**, pp. 35-51.
[4] See **XI**, pp. 51-67.

cile à combler, il a fait preuve de hautes qualités de juriste. Sa disparition a été très douloureusement ressentie par tous ceux qui avaient le privilège de le connaître et en particulier par ses collègues de la Cour, dont il avait su gagner non seulement la confiance mais aussi l'amitié. A Mme Badawi et à la famille du défunt, la Cour exprime ses plus sincères condoléances.

La Cour observe une minute de silence à la mémoire de M. Badawi

Le PRÉSIDENT annonce que M. Winiarski doit, sur l'ordre de son médecin, prendre quelques jours de repos mais espère être en mesure de reprendre sa place sur le siège avant la fin de la semaine.

Le Président exprime les regrets de la Cour à l'occasion du malencontreux accident qui empêche M. de Villiers de continuer à présenter l'affaire pour le compte du défendeur. La Cour a également appris avec tristesse que des raisons de santé ont obligé M. verLoren van Themaat à retourner dans son pays. Pendant les nombreux mois qu'il a passés à La Haye, il a représenté son gouvernement avec une distinction et une courtoisie discrètes. La Cour souhaite que son retour en Afrique du Sud contribue à l'amélioration de sa santé.

Le Président annonce que la Cour va reprendre l'audition des témoins et experts.

La Cour reprend l'audition des témoins et experts [1].

L'audience, suspendue à 15 h 55, est reprise à 16 h 15

La Cour continue l'audition des témoins et experts [2].

L'audience est levée à 18 h

[Signatures.]

SOIXANTE-QUATRIÈME AUDIENCE PUBLIQUE (21 IX 65, 15 h)

Présents : [Voir audience du 20 IX 65. M. Padilla Nervo, absent.]

La Cour continue l'audition des témoins et experts [3].

L'audience, suspendue à 16 h 20, est reprise à 16 h 45

La Cour continue l'audition des témoins et experts [4].

L'audience est levée à 18 h

[Signatures.]

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[1] Voir **XI**, p. 3-12.
[2] Voir **XI**, p. 12-34.
[3] Voir **XI**, p. 35-51.
[4] Voir **XI**, p. 51-67.

SIXTY-FIFTH PUBLIC HEARING (22 IX 65, 10 a.m.)

Present: [See hearing of 20 IX 65.]
The Court continued the hearing of the witnesses and experts [1].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

The Court continued the hearing of the witnesses and experts [2].
The Court rose at 1 p.m.

[Signatures.]

SIXTY-SIXTH PUBLIC HEARING (23 IX 65, 10 a.m.)

Present: [See hearing of 20 IX 65. Judge Padilla Nervo absent.]
The Court continued the hearing of the witnesses and experts [3].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

The Court continued the hearing of the witnesses and experts [4].
The Court rose at 12.55 p.m.

[Signatures.]

SIXTY-SEVENTH PUBLIC HEARING (24 IX 65, 10 a.m.)

Present: President Sir Percy SPENDER; *Vice-President* WELLINGTON KOO; *Judges* WINIARSKI, SPIROPOULOS, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS; *Judges* ad hoc Sir Louis MBANEFO, van WYK; *Deputy-Registrar* AQUARONE.
The Court continued the hearing of the witnesses and experts [5].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [6].
The Court rose at 1 p.m.

[Signatures.]

SIXTY-EIGHTH PUBLIC HEARING (27 IX 65, 3 p.m.)

Present: [See hearing of 24 IX 65.]
The Court continued the hearing of the witnesses and experts [7].

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[1] See **XI**, pp. 67- 81.
[2] See **XI**, pp. 82- 96.
[3] See **XI**, pp. 96-110.
[4] See **XI**, pp. 110-125.
[5] See **XI**, pp. 125-141.
[6] See **XI**, pp. 141-157.
[7] See **XI**, pp. 157-174

SOIXANTE-CINQUIÈME AUDIENCE PUBLIQUE (22 IX 65, 10 h)

Présents : [Voir audience du 20 IX 65.]
La Cour continue l'audition des témoins et experts [1].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

La Cour continue l'audition des témoins et experts [2].

L'audience est levée à 13 h

[Signatures.]

SOIXANTE-SIXIÈME AUDIENCE PUBLIQUE (23 IX 65, 10 h)

Présents : [Voir audience du 20 IX 65. M. Padilla Nervo, absent.]
La Cour continue l'audition des témoins et experts [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

La Cour continue l'audition des témoins et experts [4].

L'audience est levée à 12 h 55

[Signatures.]

SOIXANTE-SEPTIÈME AUDIENCE PUBLIQUE (24 IX 65, 10 h)

Présents : sir Percy SPENDER, *Président ;* M. WELLINGTON KOO, *Vice-Président ;* MM. WINIARSKY, SPIROPOULOS, sir Gerald FITZMAURICE, MM. KORETSKY, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS, *Juges ;* sir Louis MBANEFO, M. van WYK, *Juges* ad hoc ; M. AQUARONE, *Greffier adjoint.*
La Cour continue l'audition des témoins et experts [5].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [6].

L'audience est levée à 13 h

[Signatures.]

SOIXANTE-HUITIÈME AUDIENCE PUBLIQUE (27 IX 65, 15 h)

Présents : [Voir audience du 24 IX 65.]
La Cour continue l'audition des témoins et experts [7].

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[1] Voir **XI**, p. 67- 81.
[2] Voir **XI**, p. 82- 96.
[3] Voir **XI**, p. 96-110.
[4] Voir **XI**, p. 110-125.
[5] Voir **XI**, p. 125-141.
[6] Voir **XI**, p. 141-157.
[7] Voir **XI**, p. 157-174.

The Court adjourned from 4.20 p.m. to 4.40 p.m.

The Court continued the hearing of the witnesses and experts [1].

The Court rose at 6.05 p.m.

[Signatures.]

SIXTY-NINTH PUBLIC HEARING (28 IX 65, 10 a.m.)

Present: [See hearing of 24 IX 65.]
The Court continued the hearing of the witnesses and experts [2].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [3].

The Court rose at 12.50 p.m.

[Signatures.]

SEVENTIETH PUBLIC HEARING (29 IX 65, 10 a.m.)

Present: [See hearing of 24 IX 65.]
The Court continued the hearing of the witnesses and experts [4].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [5].

The Court rose at 1 p.m.

[Signatures.]

SEVENTY-FIRST PUBLIC HEARING (30 IX 65, 10 a.m.)

Present: [See hearing of 24 IX 65.]
The Court continued the hearing of the witnesses and experts [6].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [7].

The Court rose at 1 p.m.

[Signatures.]

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[1] See **XI**, pp. 174-191.
[2] See **XI**, pp. 191-206.
[3] See **XI**, pp. 206-219.
[4] See **XI**, pp. 219-234.
[5] See **XI**, pp. 234-250.
[6] See **XI**, pp. 250-267.
[7] See **XI**, pp. 267-284.

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

La Cour continue l'audition des témoins et experts [1].

L'audience est levée à 18 h 5

[Signatures.]

SOIXANTE-NEUVIÈME AUDIENCE PUBLIQUE (28 IX 65, 10 h)

Présents : [Voir audience du 24 IX 65.]

La Cour continue l'audition des témoins et experts [2].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [3].

L'audience est levée à 12 h 50

[Signatures.]

SOIXANTE-DIXIÈME AUDIENCE PUBLIQUE (29 IX 65, 10 h)

Présents : [Voir audience du 24 IX 65.]

La Cour continue l'audition des témoins et experts [4].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [5].

L'audience est levée à 13 h

[Signatures.]

SOIXANTE ET ONZIÈME AUDIENCE PUBLIQUE (30 IX 65, 10 h)

Présents : [Voir audience du 24 IX 65.]

La Cour continue l'audition des témoins et experts [6].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [7].

L'audience est levée à 13 h

[Signatures.]

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[1] Voir **XI**, p. 174-191.
[2] Voir **XI**, p. 191-206.
[3] Voir **XI**, p. 206-219.
[4] Voir **XI**, p. 219-234.
[5] Voir **XI**, p. 234-250.
[6] Voir **XI**, p. 250-267.
[7] Voir **XI**, p. 267-284.

SEVENTY-SECOND PUBLIC HEARING (1 X 65, 10 a.m.)

Present: [See hearing of 24 IX 65.]
The Court continued the hearing of the witnesses and experts [1].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [2].
The Court rose at 1 p.m.

[Signatures.]

SEVENTY-THIRD PUBLIC HEARING (4 X 65, 3 p.m.)

Present: President Sir Percy SPENDER; *Vice-President* WELLINGTON KOO; *Judges* WINIARSKI, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS; *Judges* ad hoc Sir Louis MBANEFO, van WYK; *Deputy-Registrar* AQUARONE.

The PRESIDENT opened the hearing and announced that Judge Spiropoulos, under doctor's orders, would be unable to sit for a few days.

The Court continued the hearing of witnesses and experts [3].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

The Court continued the hearing of the witnesses and experts [4].
The Court rose at 6 p.m.

[Signatures.]

SEVENTY-FOURTH PUBLIC HEARING (5 X 65, 10 a.m.)

Present: [See hearing of 4 X 65.]
The Court continued the hearing of the witnesses and experts [5].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [6].
The Court rose at 1 p.m.

[Signatures.]

SEVENTY-FIFTH PUBLIC HEARING (6 X 65, 10 a.m.)

Present: [See hearing of 4 X 65.]
The Court continued the hearing of the witnesses and experts [7].

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[1] See **XI**, pp. 284-298.
[2] See **XI**, pp. 298-315.
[3] See **XI**, pp. 315-332.
[4] See **XI**, pp. 332-348.
[5] See **XI**, pp. 349-366.
[6] See **XI**, pp. 366-383.
[7] See **XI**, pp. 383-403.

SOIXANTE-DOUZIÈME AUDIENCE PUBLIQUE (1 X 65, 10 h)

Présents : [Voir audience du 24 IX 65.]
La Cour continue l'audition des témoins et experts [1].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [2].

L'audience est levée à 13 h

[Signatures.]

SOIXANTE-TREIZIÈME AUDIENCE PUBLIQUE (4 X 65, 15 h)

Présents : sir Percy SPENDER, *Président ;* M. WELLINGTON KOO, *Vice-Président ;* M. WINIARSKI, sir Gerald FITZMAURICE, MM. KORETSKY, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS, *Juges ;* sir Louis MBANEFO, M. van WYK, *Juges* ad hoc ; M. AQUARONE, *Greffier adjoint.*

Le PRÉSIDENT ouvre l'audience et annonce que, sur l'ordre de son médecin, M. Spiropoulos devra s'abstenir de siéger pendant quelques jours.

La Cour continue l'audition des témoins et experts [3].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

La Cour continue l'audition des témoins et experts [4].

L'audience est levée à 18 h

[Signatures.]

SOIXANTE-QUATORZIÈME AUDIENCE PUBLIQUE (5 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]
La Cour continue l'audition des témoins et experts [5].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [6].

L'audience est levée à 13 h

[Signatures.]

SOIXANTE-QUINZIÈME AUDIENCE PUBLIQUE (6 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]
La Cour continue l'audition des témoins et experts [7].

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[1] Voir **XI**, p. 284-298.
[2] Voir **XI**, p. 298-315.
[3] Voir **XI**, p. 315-332.
[4] Voir **XI**, p. 332-348.
[5] Voir **XI**, p. 349-366.
[6] Voir **XI**, p. 366-383.
[7] Voir **XI**, p. 383-403.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [1].

The Court rose at 1 p.m.

[Signatures.]

SEVENTY-SIXTH PUBLIC HEARING (7 X 65, 10 a.m.)

Present: [See hearing of 4 X 65.]
The Court continued the hearing of the witnesses and experts [2].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [3].

The Court rose at 1 p.m.

[Signatures.]

SEVENTY-SEVENTH PUBLIC HEARING (8 X 65, 10 a.m.)

Present: [See hearing of 4 X 65.]
The Court continued the hearing of the witnesses and experts [4].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [5].

The Court rose at 1 p.m.

[Signatures.]

SEVENTY-EIGHTH PUBLIC HEARING (11 X 65, 3 p.m.)

Present: [See hearing of 4 X 65.]
The Court continued the hearing of the witnesses and experts [6].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

The Court continued the hearing of the witnesses and experts [7].

The Court rose at 6 p.m.

[Signatures.]

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[1] See **XI**, pp. 403-421.
[2] See **XI**, pp. 421-440.
[3] See **XI**, pp. 440-458.
[4] See **XI**, pp. 458-473.
[5] See **XI**, pp. 473-486.
[6] See **XI**, pp. 487-502.
[7] See **XI**, pp. 502-517.

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [1].

L'audience est levée à 13 h

[Signatures.]

SOIXANTE-SEIZIÈME AUDIENCE PUBLIQUE (7 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]
La Cour continue l'audition des témoins et experts [2].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [3].

L'audience est levée à 13 h

[Signatures.]

SOIXANTE-DIX-SEPTIÈME AUDIENCE PUBLIQUE (8 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]
La Cour continue l'audition des témoins et experts [4].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [5].

L'audience est levée à 13 h

[Signatures.]

SOIXANTE-DIX-HUITIÈME AUDIENCE PUBLIQUE (11 X 65, 15 h)

Présents : [Voir audience du 4 X 65.]
La Cour continue l'audition des témoins et experts [6].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

La Cour continue l'audition des témoins et experts [7].

L'audience est levée à 18 h

[Signatures.]

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[1] Voir **XI**, p. 403-421.
[2] Voir **XI**, p. 421-440.
[3] Voir **XI**, p. 440-458.
[4] Voir **XI**, p. 458-473.
[5] Voir **XI**, p. 473-486.
[6] Voir **XI**, p. 487-502.
[7] Voir **XI**, p. 502-517.

SEVENTY-NINTH PUBLIC HEARING (12 X 65, 10 a.m.)

Present: [See hearing of 4 X 65.]
The Court continued the hearing of the witnesses and experts [1].

The Court adjourned from 11.25 a.m. to 11.45 a.m.

The Court continued the hearing of the witnesses and experts [2].
The Court rose at 1 p.m.

[Signatures.]

EIGHTIETH PUBLIC HEARING (13 X 65, 10 a.m.)

Present: [See hearing of 4 X 65.]
The Court continued the hearing of the witnesses and experts [3].

The Court adjourned from 11.25 a.m. to 11.45 a.m.

The Court continued the hearing of the witnesses and experts [4].
The Court rose at 1 p.m.

[Signatures.]

EIGHTY-FIRST PUBLIC HEARING (14 X 65, 10 a.m.)

Present: [See hearing of 4 X 65.]
The Court continued the hearing of the witnesses and experts [5].

The Court adjourned from 11.25 a.m. to 11.45 a.m.

The Court continued the hearing of the witnesses and experts [6].
The Court rose at 1 p.m.

[Signatures.]

EIGHTY-SECOND PUBLIC HEARING (15 X 65, 10 a.m.)

Present: [See hearing of 4 X 65.]
The Court continued the hearing of the witnesses and experts [7].

The Court adjourned from 11.25 a.m. to 11.45 a.m.

The Court continued the hearing of the witnesses and experts [8].
The Court rose at 12.40 p.m.

[Signatures.]

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[1] See **XI**, pp. 517-532.
[2] See **XI**, pp. 532-545.
[3] See **XI**, pp. 545-562.
[4] See **XI**, pp. 562-579.
[5] See **XI**, pp. 579-597.
[6] See **XI**, pp. 597-612.
[7] See **XI**, pp. 612-629.
[8] See **XI**, pp. 629-643.

SOIXANTE-DIX-NEUVIÈME AUDIENCE PUBLIQUE (12 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]
La Cour continue l'audition des témoins et experts [1].

L'audience, suspendue à 11 h 25, est reprise à 11 h 45

La Cour continue l'audition des témoins et experts [2].

L'audience est levée à 13 h

[Signatures.]

QUATRE-VINGTIÈME AUDIENCE PUBLIQUE (13 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]
La Cour continue l'audition des témoins et experts [3].

L'audience, suspendue à 11 h 25, est reprise à 11 h 45

La Cour continue l'audition des témoins et experts [4].

L'audience est levée à 13 h

[Signatures.]

QUATRE-VINGT-UNIÈME AUDIENCE PUBLIQUE (14 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]
La Cour continue l'audition des témoins et experts [5].

L'audience, suspendue à 11 h 25, est reprise à 11 h 45

La Cour continue l'audition des témoins et experts [6].

L'audience est levée à 13 h

[Signatures.]

QUATRE-VINGT-DEUXIÈME AUDIENCE PUBLIQUE (15 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]
La Cour continue l'audition des témoins et experts [7].

L'audience, suspendue à 11 h 25, est reprise à 11 h 45

La Cour continue l'audition des témoins et experts [8].

L'audience est levée à 12 h 40

[Signatures.]

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[1] Voir **XI**, p. 517-532.
[2] Voir **XI**, p. 532-545.
[3] Voir **XI**, p. 545-562.
[4] Voir **XI**, p. 562-579.
[5] Voir **XI**, p. 579-597.
[6] Voir **XI**, p. 597-612.
[7] Voir **XI**, p. 612-629.
[8] Voir **XI**, p. 629-643.

EIGHTY-THIRD PUBLIC HEARING (18 x 65, 3 p.m.)

Present: [See hearing of 4 x 65.]
The Court continued the hearing of the witnesses and experts [1].

The Court adjourned from 4.20 p.m. to 4.45 p.m.

The Court continued the hearing of the witnesses and experts [2].
The Court rose at 6 p.m.

[Signatures.]

EIGHTY-FOURTH PUBLIC HEARING (19 x 65, 10 a.m.)

Present: [See hearing of 4 x 65.]
The Court continued the hearing of the witnesses and experts [3].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court continued the hearing of the witnesses and experts [4].
The Court rose at 12.50 p.m.

[Signatures.]

EIGHTY-FIFTH PUBLIC HEARING (20 x 65, 10 a.m.)

Present: [See hearing of 4 x 65.]
The Court continued the hearing of the witnesses and experts [5].

The Court adjourned from 11.25 a.m. to 11.45 a.m.

The Court continued the hearing of the witnesses and experts [6].
The Court rose at 1 p.m.

[Signatures.]

EIGHTY-SIXTH PUBLIC HEARING (21 x 65, 10 a.m.)

Present: [See hearing of 4 x 65.]
The Court continued the hearing of the witnesses and experts [7].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

The Court concluded the hearing of the witnesses and experts [8].
The Court rose at 12.50 p.m.

[Signatures.]

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[1] See **XI**, pp. 643-661.
[2] See **XI**, pp. 661-677.
[3] See **XI**, pp. 677-694.
[4] See **XI**, pp. 694-708.
[5] See **XII**, pp. 3-20.
[6] See **XII**, pp. 20-35.
[7] See **XII**, pp. 35-52.
[8] See **XII**, pp. 52-66.

QUATRE-VINGT-TROISIÈME AUDIENCE PUBLIQUE (18 X 65, 15 h)

Présents : [Voir audience du 4 X 65.]
La Cour continue l'audition des témoins et experts [1].

L'audience, suspendue à 16 h 20, est reprise à 16 h 45

La Cour continue l'audition des témoins et experts [2].

L'audience est levée à 18 h

[Signatures.]

QUATRE-VINGT-QUATRIÈME AUDIENCE PUBLIQUE (19 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]
La Cour continue l'audition des témoins et experts [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

La Cour continue l'audition des témoins et experts [4].

L'audience est levée à 12 h 50

[Signatures.]

QUATRE-VINGT-CINQUIÈME AUDIENCE PUBLIQUE (20 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]
La Cour continue l'audition des témoins et experts [5].

L'audience, suspendue à 11 h 25, est reprise à 11 h 45

La Cour continue l'audition des témoins et experts [6].

L'audience est levée à 13 h

[Signatures.]

QUATRE-VINGT-SIXIÈME AUDIENCE PUBLIQUE (21 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]
La Cour continue l'audition des témoins et experts [7].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

La Cour termine l'audition des témoins et experts [8].

L'audience est levée à 12 h 50

[Signatures.]

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[1] Voir **XI**, p. 643-661.
[2] Voir **XI**, p. 661-677.
[3] Voir **XI**, p. 677-694.
[4] Voir **XI**, p. 694-708.
[5] Voir **XII**, p. 3-20.
[6] Voir **XII**, p. 20-35.
[7] Voir **XII**, p. 35-52.
[8] Voir **XII**, p. 52-66.

EIGHTY-SEVENTH PUBLIC HEARING (26 X 65, 3 p.m.)

Present: [See hearing of 4 X 65.]

The PRESIDENT opened the hearing and called upon the Agent for the Respondent.

Mr. BOTHA asked the President to call upon Mr. Muller.

The PRESIDENT called upon Mr. Muller.

Mr. MULLER began the speech reproduced in the Annex [1].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

Mr. MULLER concluded the speech reproduced in the Annex [2].

The PRESIDENT called upon Mr. de Villiers.

Mr. de VILLIERS began the speech reproduced in the Annex [3].

The Court rose at 6 p.m.

[Signatures.]

EIGHTY-EIGHTH PUBLIC HEARING (27 X 65, 10 a.m.)

Present: [See hearing of 4 X 65.]

The PRESIDENT opened the hearing and called upon Mr. de Villiers.

Mr. de VILLIERS concluded the speech reproduced in the Annex [4].

The PRESIDENT called upon Mr. van Rooyen.

Mr. van ROOYEN began the speech reproduced in the Annex [5].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. van ROOYEN continued the speech reproduced in the Annex [6]

The Court rose at 1 p.m.

[Signatures.]

EIGHTY-NINTH PUBLIC HEARING (28 X 65, 10 a.m.)

Present: [See hearing of 4 X 65.]

The PRESIDENT opened the hearing and called upon Mr. van Rooyen.

Mr. van ROOYEN concluded the speech reproduced in the Annex [7].

The PRESIDENT called upon Mr. van Heerden.

Mr. van HEERDEN began the speech reproduced in the Annex [8].

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[1] See **XII**, pp. 67-82.
[2] See **XII**, pp. 82-85.
[3] See **XII**, pp. 86-97.
[4] See **XII**, pp. 97-106.
[5] See **XII**, pp. 107-113.
[6] See **XII**, pp. 113-130.
[7] See **XII**, pp. 130-139.
[8] See **XII**, pp. 140-145.

QUATRE-VINGT-SEPTIÈME AUDIENCE PUBLIQUE (26 X 65, 15 h)

Présents : [Voir audience du 4 X 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent du défendeur.

M. BOTHA prie le Président de bien vouloir donner la parole à M. Muller.

Le PRÉSIDENT donne la parole à M. Muller.

M. MULLER commence l'exposé reproduit en annexe [1].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

M. MULLER termine l'exposé reproduit en annexe [2].

Le PRÉSIDENT donne la parole à M. de Villiers.

M. de VILLIERS commence l'exposé reproduit en annexe [3].

L'audience est levée à 18 h

[Signatures.]

QUATRE-VINGT-HUITIÈME AUDIENCE PUBLIQUE (27 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.

M. de VILLIERS termine l'exposé reproduit en annexe [4].

Le PRÉSIDENT donne la parole à M. van Rooyen.

M. van ROOYEN commence l'exposé reproduit en annexe [5].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

M. van ROOYEN continue l'exposé reproduit en annexe [6].

L'audience est levée à 13 h

[Signatures.]

QUATRE-VINGT-NEUVIÈME AUDIENCE PUBLIQUE (28 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. van Rooyen.

M. van ROOYEN termine l'exposé reproduit en annexe [7].

Le PRÉSIDENT donne la parole à M. van Heerden.

M. van HEERDEN commence l'exposé reproduit en annexe [8].

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[1] Voir **XII**, p. 67-82.
[2] Voir **XII**, p. 82-85.
[3] Voir **XII**, p. 86-97.
[4] Voir **XII**, p. 97-106.
[5] Voir **XII**, p. 107-113.
[6] Voir **XII**, p. 113-130.
[7] Voir **XII**, p. 130-139.
[8] Voir **XII**, p. 140-145.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. van HEERDEN continued the speech reproduced in the Annex [1].
The Court rose at 12.55 p.m.

[Signatures.]

NINETIETH PUBLIC HEARING (29 X 65, 10 a.m.)

Present: [See hearing of 4 X 65.]
The PRESIDENT opened the hearing and called upon Mr. van Heerden.
Mr. van HEERDEN concluded the speech reproduced in the Annex [2].
The PRESIDENT called upon Mr. Muller.
Mr. MULLER began the speech reproduced in the Annex [3].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. MULLER continued the speech reproduced in the Annex [4].
The Court rose at 1 p.m.

[Signatures.]

NINETY-FIRST PUBLIC HEARING (1 XI 65, 3 p.m.)

Present: [See hearing of 4 X 65.]
The PRESIDENT opened the hearing and called upon Mr. Muller.
Mr. MULLER concluded the speech reproduced in the Annex [5].
The PRESIDENT called upon Mr. de Villiers.
Mr. de VILLIERS began the speech reproduced in the Annex [6].

The Court adjourned from 4.20 p.m. to 4.45 p.m.

Mr. de VILLIERS continued the speech reproduced in the Annex [7].
The Court rose at 6 p.m.

[Signatures.]

NINETY-SECOND PUBLIC HEARING (2 XI 65, 10 a.m.)

Present: [See hearing of 4 X 65.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS continued the speech reproduced in the Annex [8].

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[1] See **XII**, pp. 145-164.
[2] See **XII**, pp. 164-168.
[3] See **XII**, pp. 169-181.
[4] See **XII**, pp. 181-198.
[5] See **XII**, pp. 198-211.
[6] See **XII**, pp. 212-215.
[7] See **XII**, pp. 215-230.
[8] See **XII**, pp. 230-245.

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. van HEERDEN continue l'exposé reproduit en annexe [1].

L'audience est levée à 12 h 55

[Signatures.]

QUATRE-VINGT-DIXIÈME AUDIENCE PUBLIQUE (29 X 65, 10 h)

Présents : [Voir audience du 4 X 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. van Heerden.
M. van HEERDEN termine l'exposé reproduit en annexe [2].
Le PRÉSIDENT donne la parole à M. Muller.
M. MULLER commence l'exposé reproduit en annexe [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. MULLER continue l'exposé reproduit en annexe [4].

L'audience est levée à 13 h

[Signatures.]

QUATRE-VINGT-ONZIÈME AUDIENCE PUBLIQUE (1 XI 65, 15 h)

Présents : [Voir audience du 4 X 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. Muller.
M. MULLER termine l'exposé reproduit en annexe [5].
Le PRÉSIDENT donne la parole à M. de Villiers.
M. de VILLIERS commence l'exposé reproduit en annexe [6].

L'audience, suspendue à 16 h 20, est reprise à 16 h 45

M. de VILLIERS continue l'exposé reproduit en annexe [7].

L'audience est levée à 18 h

[Signatures.]

QUATRE-VINGT-DOUZIÈME AUDIENCE PUBLIQUE (2 XI 65, 10 h)

Présents : [Voir audience du 4 X 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS continue l'exposé reproduit en annexe [8].

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[1] Voir **XII**, p. 145-164.
[2] Voir **XII**, p. 164-168.
[3] Voir **XII**, p. 169-181.
[4] Voir **XII**, p. 181-198.
[5] Voir **XII**, p. 198-211.
[6] Voir **XII**, p. 212-215.
[7] Voir **XII**, p. 215-230.
[8] Voir **XII**, p. 230-245.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS continued the speech reproduced in the Annex [1].

The Court rose at 1 p.m.

[Signatures.]

NINETY-THIRD PUBLIC HEARING (3 XI 65, 10 a.m.)

Present: [See hearing of 4 X 65.]
The PRESIDENT opened the hearing and called upon Mr. de Villiers.
Mr. de VILLIERS concluded the speech reproduced in the Annex [2].
The PRESIDENT called upon Mr. Rabie.
Mr. RABIE began the speech reproduced in the Annex [3].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. RABIE continued the speech reproduced in the Annex [4].

The Court rose at 12.55 p.m.

[Signatures.]

NINETY-FOURTH PUBLIC HEARING (4 XI 65, 10 a.m.)

Present: [See hearing of 4 X 65.]
The PRESIDENT opened the hearing and called upon Mr. Rabie.
Mr. RABIE concluded the speech reproduced in the Annex [5].
The PRESIDENT called upon Mr. Grosskopf.
Mr. GROSSKOPF began the speech reproduced in the Annex [6].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. GROSSKOPF continued the speech reproduced in the Annex [7].

The Court rose at 1 p.m.

[Signatures.]

NINETY-FIFTH PUBLIC HEARING (5 XI 65, 10 a.m.)

Present: [See hearing of 4 X 65.]
The PRESIDENT opened the hearing and called upon Mr. Grosskopf.
Mr. GROSSKOPF concluded the speech reproduced in the Annex [8].
The PRESIDENT called upon Mr. de Villiers.
Mr. de VILLIERS began the speech reproduced in the Annex [9].

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[1] See **XII**, pp. 245-261.
[2] See **XII**, pp. 261-269.
[3] See **XII**, pp. 270-275.
[4] See **XII**, pp. 276-288.
[5] See **XII**, pp. 288-293.
[6] See **XII**, pp. 294-303.
[7] See **XII**, pp. 303-319.
[8] See **XII**, pp. 319-325.
[9] See **XII**, pp. 326-336.

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS continue l'exposé reproduit en annexe [1].

L'audience est levée à 13 h

[Signatures.]

QUATRE-VINGT-TREIZIÈME AUDIENCE PUBLIQUE (3 XI 65, 10 h)

Présents : [Voir audience du 4 X 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.
M. de VILLIERS termine l'exposé reproduit en annexe [2].
Le PRÉSIDENT donne la parole à M. Rabie.
M. RABIE commence l'exposé reproduit en annexe [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. RABIE continue l'exposé reproduit en annexe [4].

L'audience est levée à 12 h 55

[Signatures.]

QUATRE-VINGT-QUATORZIÈME AUDIENCE PUBLIQUE (4 XI 65, 10 h)

Présents : [Voir audience du 4 X 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. Rabie.
M. RABIE termine l'exposé reproduit en annexe [5].
Le PRÉSIDENT donne la parole à M. Grosskopf.
M. GROSSKOPF commence l'exposé reproduit en annexe [6].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. GROSSKOPF continue l'exposé reproduit en annexe [7].

L'audience est levée à 13 h

[Signatures.]

QUATRE-VINGT-QUINZIÈME AUDIENCE PUBLIQUE (5 XI 65, 10 h)

Présents : [Voir audience du 4 X 65.]
Le PRÉSIDENT ouvre l'audience et donne la parole à M. Grosskopf.
M. GROSSKOPF termine l'exposé reproduit en annexe [8].
Le PRÉSIDENT donne la parole à M. de Villiers.
M. de VILLIERS commence l'exposé reproduit en annexe [9].

[1] Voir **XII**, p. 245-261.
[2] Voir **XII**, p. 261-269.
[3] Voir **XII**, p. 270-275.
[4] Voir **XII**, p. 276-288.
[5] Voir **XII**, p. 288-293.
[6] Voir **XII**, p. 294-303.
[7] Voir **XII**, p. 303-319.
[8] Voir **XII**, p. 319-325.
[9] Voir **XII**, p. 326-336.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS concluded the speech reproduced in the Annex [1].

The PRESIDENT, before calling upon the Agent for the Respondent to address the Court, asked the Agent for the Applicants whether he made any application to amend the final submissions he had already made to the Court.

Mr. GROSS said that he did not.

The PRESIDENT called upon Mr. Botha, Agent for the Respondent, to state the final submissions of the Respondent.

Mr. BOTHA made the speech reproduced in the Annex [2].

The PRESIDENT said that the further proceedings had been indicated in the statement which he had made on behalf of the Court on 24 May 1965. That involved and was confined to the Applicants being at liberty to make comment upon the evidence of the witnesses and experts, and the Respondent, on the other hand, being at liberty to make its reply on such comments on such evidence which is made by the Applicants. It was clearly understood that this did not involve any additional main speeches on the part of either side but would be confined strictly to the terms set out in paragraphs 4 and 5 of the Court's directive of 24 May.

He asked the Agent for the Applicants whether he would be prepared to proceed with his comments upon the evidence of the witnesses and experts on 8 November at 3 o'clock.

Mr. GROSS said that the Applicants would be prepared to do so, but that if the Court should see fit to permit commencement of the comment on the following morning it might result in a saving of time for the convenience of the Court.

The PRESIDENT said that, if an extra day would help Mr. Gross to shorten and confine his observations, the Court would be quite prepared to allow him to commence on the morning of 9 November at 10 o'clock.

The Court rose at 12.40 p.m.

[Signatures.]

NINETY-SIXTH PUBLIC HEARING (9 XI 65, 10 a.m.)

Present: [See hearing of 4 X 65.]

The PRESIDENT opened the hearing and called upon the Agent for the Applicants.

Mr. GROSS began the speech reproduced in the Annex [3].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. GROSS continued the speech reproduced in the Annex [4].

The Court rose at 1 p.m.

[Signatures.]

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[1] See **XII**, pp. 336-347.
[2] See **XII**, pp. 348.
[3] See **XII**, pp. 349-362.
[4] See **XII**, pp. 362-375.

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS termine l'exposé reproduit en annexe [1].

Le PRÉSIDENT, avant de donner la parole à l'agent du défendeur, demande à l'agent des demandeurs s'il souhaite modifier les conclusions finales qu'il a déjà présentées à la Cour.

M. GROSS répond négativement.

Le PRÉSIDENT invite M. Botha, agent du défendeur, à présenter les conclusions finales du défendeur.

M. BOTHA prononce l'exposé reproduit en annexe [2].

Le PRÉSIDENT rappelle que la suite de la procédure a été indiquée dans la déclaration qu'il a faite au nom de la Cour le 24 mai 1965. Les demandeurs auront la faculté de présenter des observations sur les dépositions des témoins et experts et devront se borner à cela; le défendeur aura de son côté la faculté de répondre aux observations sur les dépositions qui auront été faites par les demandeurs et devra se borner à cela. Il doit être clairement entendu que cela n'autorisera aucune des Parties à présenter un nouvel exposé principal et que l'on devra s'en tenir strictement aux termes des paragraphes 4 et 5 des instructions données par la Cour le 24 mai.

Le Président demande à l'agent des demandeurs s'il serait en mesure de présenter ses observations sur les dépositions des témoins et des experts le 8 novembre à 15 h.

M. GROSS déclare que les demandeurs seront prêts mais que, s'ils étaient autorisés à ne commencer que le matin suivant, cela pourrait faire gagner du temps à la Cour.

Le PRÉSIDENT déclare que, si un délai supplémentaire d'un jour doit permettre à M. Gross de raccourcir et limiter ses observations, la Cour l'autorisera volontiers à commencer le 9 novembre à 10 h.

L'audience est levée à 12 h 40

[Signatures.]

QUATRE-VINGT-SEIZIÈME AUDIENCE PUBLIQUE (9 XI 65, 10 h)

Présents : [Voir audience du 4 X 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à l'agent des demandeurs.

M. GROSS commence l'exposé reproduit en annexe [3].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

M. GROSS continue l'exposé reproduit en annexe [4].

L'audience est levée à 13 h

[Signatures.]

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[1] Voir **XII**, p. 336-347.
[2] Voir **XII**, p. 348.
[3] Voir **XII**, p. 349-362.
[4] Voir **XII**, p. 362-375.

NINETY-SEVENTH PUBLIC HEARING (10 XI 65, 10 a.m.)

Present: [See hearing of 24 IX 65.]

The PRESIDENT opened the hearing and called upon Mr. Gross.

Mr. GROSS continued the speech reproduced in the Annex [1].

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Mr. de VILLIERS said that the Respondent had presented the facts partly in the form of oral testimony and partly in the form of argument. As far as the Respondent was concerned, there would be no objection whatsoever to the Agent for the Applicants dealing with the new material in both respects, whether it could technically be classified as evidence or not.

The PRESIDENT said that was a matter entirely for Mr. Gross. As the documents in question had been put in subsequent to the oral testimony, such comments as he cared to make on them would be regarded as within his right to comment.

Mr. GROSS concluded the speech reproduced in the Annex [2].

The PRESIDENT asked the Agent for the Respondent whether he would be ready to proceed on the following day.

Mr. BOTHA said that Respondent's counsel would welcome one full day in order to complete the preparation of their comments.

The PRESIDENT said that the next hearing would be held at 10 a.m. on 12 November.

The Court rose at 12 p.m.

[Signatures.]

NINETY-EIGHTH PUBLIC HEARING (12 XI 65, 10 a.m.)

Present: [See hearing of 24 IX 65.]

The PRESIDENT opened the hearing and said that he wished to put a question to Mr. de Villiers for clarification before he commenced his address upon the comments made by the Applicants.

The Parties would recall that on 24 May, when certain procedure had been laid down, it had been stated that the request of the Respondent for an inspection *in loco* would not be deliberated upon by the Court until all evidence had been called and the addresses of the Parties had concluded. That point of time was about to arrive, and the question he would ask was in relation to the proposal itself, which had been divided into a number of parts, the first part being divided into two sub-parts. Was the proposal for inspection an indivisible proposal, or was it a separate proposal in relation to each particular part or sub-part?

Mr. de VILLIERS said that it had not been intended to be indivisible as far as the Court's possible decisions in regard thereto might be concerned; in particular, the invitation in respect of a possible inspection in South West Africa and a possible limited visit to South Africa had not been made conditional upon the Court visiting any other part of Africa.

The Respondent had emphasized that it considered it advisable for

[1] See **XII**, pp. 375-390.

[2] See **XII**, pp. 390-393.

QUATRE-VINGT-DIX-SEPTIÈME AUDIENCE PUBLIQUE (10 XI 65, 10 h)

Présents : [Voir audience du 24 IX 65.]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. Gross.

M. GROSS continue l'exposé reproduit en annexe [1].

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

M. de VILLIERS déclare que le défendeur a présenté les faits en partie dans les dépositions et en partie dans ses plaidoiries. Il ne voit pour sa part nulle objection à ce que l'agent des demandeurs examine les nouveaux documents sous ces deux rapports, qu'il soit techniquement possible ou non de les ranger dans la même catégorie que les dépositions.

Le PRÉSIDENT déclare qu'il appartient à M. Gross d'en décider. Comme les documents dont il s'agit ont été présentés à la suite des dépositions, les observations que M. Gross voudra formuler à leur sujet seront considérées comme conformes à son droit de présenter des commentaires.

M. GROSS termine l'exposé reproduit en annexe [2].

Le PRÉSIDENT demande à l'agent du défendeur s'il est prêt à reprendre la parole le lendemain.

M. BOTHA déclare que le conseil du défendeur serait heureux de disposer d'une journée entière afin d'achever la préparation de son exposé.

Le PRÉSIDENT déclare que la prochaine audience se tiendra le 12 novembre à 10 h.

L'audience est levée à 12 h

[Signatures.]

QUATRE-VINGT-DIX-HUITIÈME AUDIENCE PUBLIQUE (12 XI 65, 10 h)

Présents : [Voir audience du 24 IX 65.]

Le PRÉSIDENT ouvre l'audience et annonce que, avant que M. de Villiers ne commence son exposé sur les observations faites par les demandeurs, il désire lui demander certains éclaircissements.

Les Parties se souviennent que le 24 mai, en faisant connaître la procédure adoptée, la Cour a indiqué qu'elle ne délibérerait sur la requête du défendeur relative à une visite sur les lieux qu'après que tous les témoins et experts auraient été entendus et que les Parties auraient achevé leurs plaidoiries. Ce moment va bientôt arriver et la question que le Président désire poser a trait à la proposition dont il s'agit, proposition divisée en plusieurs parties dont la première est elle-même divisée en deux sections. La proposition relative à une visite sur les lieux est-elle indivisible ou chacune de ses parties ou sections correspond-elle à une proposition distincte?

M. de VILLIERS déclare que cette proposition n'a pas été conçue comme indivisible quant aux décisions que la Cour pourrait prendre à son sujet; en particulier, l'invitation relative à une visite éventuelle du Sud-Ouest africain et à une visite limitée éventuelle de l'Afrique du Sud n'était pas subordonnée à la visite d'une autre région d'Afrique.

Le défendeur a souligné, motifs à l'appui, qu'il serait à son avis opportun,

[1] Voir **XII**, p. 375-390.

[2] Voir **XII**, p. 390-393.

the reasons it had given for the Court, if it decided to go to South West Africa and possibly South Africa also, to see some other parts of Africa, and it had been submitted very strongly that it was the Respondent's attitude that, for the reasons given, a decision to go to South West Africa alone, or to South West Africa and South Africa alone, would in the circumstances be unwise and possibly prejudicial to the position of the Respondent. However, those had been purely submissions made to the Court, and not conditions intended to tie the hands of the Court in any way.

The PRESIDENT asked the Agent for the Applicants whether there was any comment which he desired to make which he had not already made.

Mr. GROSS said he thought not.

The PRESIDENT called upon Mr. de Villiers.

Mr. de VILLIERS began the speech reproduced in the Annex [1].

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. de VILLIERS continued the speech reproduced in the Annex [2].

The Court rose at 1 p.m.

[Signatures.]

NINETY-NINTH PUBLIC HEARING (15 XI 65, 3 p.m.)

Present: [See hearing of 24 IX 65. Sir Louis Mbanefo absent.]

The PRESIDENT opened the hearing and announced that Judge Sir Louis Mbanefo was unable to sit that day. He called upon Mr. de Villiers.

Mr. de VILLIERS continued the speech reproduced in the Annex [3].

The Court adjourned from 4.20 p.m. to 4.40 p.m.

Mr. de VILLIERS concluded the speech reproduced in the Annex [4].

The PRESIDENT said that before closing the present phase of the proceedings, he wished to convey to Agents and counsel for the Parties the thanks of the Court for the assistance they had given it in their presentation of their respective cases. Through many months they had, with care, courtesy and efficiency, presented the views of their respective Governments. Members of the Court and the representatives of the Parties had grown used to seeing one another, and when the voices of advocacy in these cases were stilled and questions from the judges were no more, he expected they would often remember one another.

These cases were of great importance, not only for the States directly involved. With the vast amount of evidence and documentation and with the number of issues to be determined, they were, he did not doubt, the heaviest that had been submitted to this Court or its predecessor. Certainly they were the most protracted. The Court was indebted to the Agents and counsel on both sides who, over a long period of time, had addressed their arguments to it. If, as counsel on both sides had been kind enough to say, the Court has been patient, that was not only what

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[1] See **XII**, pp. 394-408.
[2] See **XII**, pp. 408-423.
[3] See **XII**, pp. 423-438.
[4] See **XII**, pp. 438-453.

si la Cour décidait d'aller au Sud-Ouest africain et éventuellement en Afrique du Sud, qu'elle visitât d'autres régions d'Afrique et il a indiqué très clairement, motifs à l'appui, qu'il estimait qu'une décision d'aller seulement au Sud-Ouest africain, ou seulement au Sud-Ouest africain et en Afrique du Sud, serait en l'occurrence peu sage et pourrait être préjudiciable à la position du défendeur. Toutefois, il s'agissait seulement là d'arguments présentés à la Cour et non de conditions destinées à la lier en quoi que ce fût.

Le PRÉSIDENT demande à l'agent des demandeurs s'il désire présenter des observations qu'il n'aurait pas encore faites.

M. GROSS répond négativement.

Le PRÉSIDENT donne la parole à M. de Villiers.

M. de VILLIERS commence l'exposé reproduit en annexe [1].

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

M. de VILLIERS continue l'exposé reproduit en annexe [2].

L'audience est levée à 13 h

[Signatures.]

QUATRE-VINGT-DIX-NEUVIÈME AUDIENCE PUBLIQUE (15 XI 65, 15 h)

Présents : [Voir audience du 24 IX 65. Sir Louis Mbanefo, absent.]

Le PRÉSIDENT ouvre l'audience et annonce que sir Louis Mbanefo n'assistera pas à l'audience. Il donne la parole à M. de Villiers.

M. de VILLIERS continue l'exposé reproduit en annexe [3].

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

M. de VILLIERS termine l'exposé reproduit en annexe [4].

Le PRÉSIDENT déclare que, avant de clore la présente phase de la procédure, il désire, au nom de la Cour, remercier les agents et conseils des Parties du concours qu'ils lui ont prêté en présentant leurs thèses. Pendant de nombreux mois, ils ont exposé avec soin, courtoisie et efficacité les vues de leurs gouvernements. Les membres de la Cour et les représentants des Parties ont pris l'habitude de se voir et, lorsque leurs voix se seront tues, ils penseront encore souvent les uns aux autres.

Ces affaires sont d'une grande importance, et point seulement pour les Etats directement intéressés. Si l'on considère l'ampleur du dossier et de la documentation ainsi que le nombre des questions à trancher, on ne peut douter qu'elles soient les plus lourdes dont la Cour actuelle et sa devancière aient été saisies. Ce sont certainement les plus longues. La Cour est reconnaissante aux agents et conseils des deux Parties, qui, pendant des mois, lui ont exposé leurs arguments. Si, comme les représentants des deux Parties ont bien voulu le dire, la Cour a fait preuve

[1] Voir **XII**, p. 394-408.
[2] Voir **XII**, p. 408-423.
[3] Voir **XII**, p. 423-438.
[4] Voir **XII**, p. 438-453.

was properly due to Agents and counsel who appeared before it, but was also the very essence of the judicial function. Haste in judgment was destructive of justice.

On behalf of the Court he wished Agents and counsel full enjoyment of the recess from their labours which was now theirs. He asked the Agents to hold themselves at the disposal of the Court to furnish any additional information which the Court might require. Subject to this and to any order or direction which the Court might hereafter make, he then declared the oral proceedings closed. The Court would communicate with the Agents in the usual way and would notify them in due time of any public sitting to be held for the delivery of judgment or for any other purpose.

The Court rose at 5.50 p.m.

[Signatures.]

HUNDREDTH PUBLIC HEARING (29 XI 65, 3 p.m.)

Present: [See hearing of 24 IX 65.]

The PRESIDENT stated that the Court was assembled to give its decision on the request made by the Respondent on 30 March 1965, during the course of the oral proceedings in the *South West Africa* cases, whereby it had been proposed that the Court should make an inspection *in loco*.

On 24 May 1965, when it had ruled on the further procedure to be followed in the *South West Africa* cases in relation to the facts, the Court had informed the Parties that the request of the Respondent for an inspection *in loco* would not be deliberated upon until after all evidence had been called and the addresses of the Parties had been concluded.

The Court had now deliberated upon the request, and made the Order of 29 November 1965.

The PRESIDENT read the text of the Order.

The Court rose at 3.10 p.m.

[Signatures.]

YEAR 1966

FIRST PUBLIC HEARING (21 III 66, 3 p.m.)

Present: President Sir Percy SPENDER; *Vice-President* WELLINGTON KOO; *Judges* WINIARSKI, SPIROPOULOS, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, BUSTAMANTE Y RIVERO, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS, AMMOUN; *Deputy-Registrar* AQUARONE.

The PRESIDENT opened the sitting and said that the Court, which was then engaged in its deliberations on the South West Africa cases between Ethiopia and South Africa and Liberia and South Africa, had interrupted its work on those cases in order to hold a public sitting for the purpose of installing a newly elected Judge.

On 16 November 1965 the General Assembly and the Security Council of the United Nations had elected M. Fouad Ammoun of Lebanon to fill

de patience, ce n'est point seulement que cela est dû aux agents et conseils qui plaident devant elle; cela est aussi de l'essence même de la fonction judiciaire. Tout jugement hâtif est fatal à la justice.

Au nom de la Cour, le Président souhaite aux agents et conseils de profiter pleinement d'un repos bien gagné. Il prie les agents de se tenir à la disposition de la Cour pour fournir à celle-ci les renseignements complémentaires dont elle pourrait avoir besoin. Sous cette réserve et sous réserve de toute ordonnance ou directive éventuelle de la Cour, il déclare close la procédure orale. La Cour communiquera avec les agents de la manière habituelle et les avertira en temps voulu de toute audience publique qu'elle déciderait de tenir pour la lecture de l'arrêt ou pour toute autre fin.

L'audience est levée à 17 h 50

[Signatures.]

CENTIÈME AUDIENCE PUBLIQUE (29 XI 65, 15 h)

Présents: [Voir audience du 24 IX 65.]

Le PRÉSIDENT annonce que la Cour se réunit pour rendre sa décision sur la demande présentée par le défendeur le 30 mars 1965, au cours de la procédure orale dans les affaires du *Sud-Ouest africain*, et tendant à ce que la Cour procède à une visite sur les lieux.

Le 24 mai 1965, en faisant connaître ses décisions sur la procédure à suivre dans les affaires du *Sud-Ouest africain* au sujet des points de fait, la Cour a informé les Parties qu'elle ne délibérerait sur la requête du défendeur relative à une visite sur les lieux qu'après que tous les témoins et experts auraient été entendus et que les Parties auraient achevé leurs plaidoiries.

Après en avoir délibéré, la Cour rend une ordonnance en date du 29 novembre 1965.

Le PRÉSIDENT lit le texte de l'ordonnance.

L'audience est levée à 15 h 10

[Signatures.]

ANNÉE 1966

PREMIÈRE AUDIENCE PUBLIQUE (21 III 66, 15 h)

Présents: sir Percy SPENDER, *Président;* M. WELLINGTON KOO, *Vice-Président;* MM. WINIARSKI, SPIROPOULOS, sir Gerald FITZMAURICE, MM. KORETSKY, TANAKA, BUSTAMANTE Y RIVERO, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS, AMMOUN, *Juges;* M. AQUARONE, *Greffier adjoint.*

Le PRÉSIDENT ouvre l'audience et déclare que la Cour, qui poursuit son délibéré sur les affaires du *Sud-Ouest africain* entre l'Ethiopie et l'Afrique du Sud, le Libéria et l'Afrique du Sud, a interrompu ses travaux pour tenir une audience publique au cours de laquelle elle installera un juge nouvellement élu.

Le 16 novembre 1965, l'Assemblée générale et le Conseil de sécurité des Nations Unies ont élu M. Fouad Ammoun (Liban) au poste laissé

the vacancy created by the death on 4 August 1965 of Judge Badawi. Judge Ammoun, who was present on the Bench, was ready to take up his duties as a Member of the Court but before doing so he was required by Article 20 of the Statute of the Court to make a solemn declaration in open Court that he would exercise his powers impartially and conscientiously. He called upon Judge Ammoun to make the declaration.

The Court rose

Judge AMMOUN made the declaration.

The Court sat

The PRESIDENT placed on record the declaration made by Judge Ammoun and declared him duly installed as a Judge of the Court.

The PRESIDENT said that Judge Ammoun, not having been a member of the Court at the time when the arguments of the Parties were presented to the Court in the *South West Africa* cases, would not be able to participate in the work of the Court on those cases.

There being no other matter to come before the Court at that time, he declared the sitting closed.

The Court rose at 3.05 p.m.

[Signatures.]

SECOND PUBLIC HEARING (18 VII 66, 3 p.m.)

Present: President Sir Percy SPENDER; *Vice-President* WELLINGTON KOO; *Judges* WINIARSKI, SPIROPOULOS, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS; *Judges* ad hoc Sir Louis MBANEFO, van WYK; *Registrar* AQUARONE.

Also present:
For the Government of Ethiopia:
H.E. Dr. Tesfaye GEBRE-EGZY
The Honourable Ernest A. GROSS, member of the New York Bar,
as Agents;

The Honourable Edward R. MOORE, Under Secretary of State of Liberia,
Mr. Keith HIGHET, member of the New York Bar,
Mr. Frank G. DAWSON, member of the New York Bar,
as Counsel.

For the Government of Liberia:
H.E. Mr. Nathan BARNES,
The Honourable Ernest A. GROSS, member of the New York Bar,
as Agents;

The Honourable Edward R. MOORE, Under Secretary of State of Liberia,
as Agent and Counsel;

Mr. Keith HIGHET, member of the New York Bar,
Mr. Frank G. DAWSON, member of the New York Bar,
as Counsel.

vacant par le décès de M. Badawi survenu le 4 août 1965. M. Ammoun est prêt à assumer ses fonctions en tant que membre de la Cour mais l'article 20 du Statut de la Cour exige qu'avant de le faire il prenne en séance publique l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience. Il invite M. Ammoun à prononcer sa déclaration.

Les juges se lèvent

M. AMMOUN prononce sa déclaration.

Les juges s'assoient

Le PRÉSIDENT donne officiellement acte à M. Ammoun de l'engagement pris par lui et le déclare dûment installé comme juge à la Cour. Il ajoute que M. Ammoun n'ayant pas siégé au moment où les Parties ont présenté leur argumentation à la Cour dans les affaires du *Sud-Ouest africain*, il ne sera pas en mesure de prendre part aux travaux de la Cour dans lesdites affaires.

La Cour n'étant saisie d'aucune autre question en état d'être traitée, le Président déclare l'audience levée.

L'audience est levée à 15 h 5

[Signatures.]

DEUXIÈME AUDIENCE PUBLIQUE (18 VII 66, 15 h)

Présents: sir Percy SPENDER, *Président*, M. WELLINGTON KOO, *Vice-Président;* MM. WINIARSKI, SPIROPOULOS, sir Gerald FITZMAURICE, MM. KORETSKY, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS, *Juges;* sir Louis MBANEFO, M. van WYK, *Juges* ad hoc; M. AQUARONE, *Greffier.*

Présents également:
Pour le Gouvernement éthiopien:
S. Exc. M. Tesfaye GEBRE-EGZY,
L'honorable Ernest A. GROSS, membre du barreau de New York,
comme agents;

L'honorable Edward R. MOORE, sous-secrétaire d'Etat du Libéria,

M. Keith HIGHET, membre du barreau de New York,
M. Frank G. DAWSON, membre du barreau de New York,
comme conseils.

Pour le Gouvernement libérien:
S. Exc. M. Nathan BARNES,
L'honorable Ernest A. GROSS, membre du barreau de New York,
comme agents;

L'honorable Edward R. MOORE, sous-secrétaire d'Etat du Libéria,
comme agent et conseil;

M. Keith HIGHET, membre du barreau de New York,
M. Frank G. DAWSON, membre du barreau de New York,
comme conseils.

For the Government of South Africa:

Dr. J. P. verLoren van THEMAAT, S.C., Professor of International Law at the University of South Africa and Consultant to the Department of Foreign Affairs,

Mr. R. MCGREGOR, Deputy Chief State Attorney,

Mr. R. F. BOTHA, Department of Foreign Affairs and Advocate of the Supreme Court of South Africa,

as Agents;

Mr. D. P. de VILLIERS, S.C., member of the South African Bar,

Mr. G. van R. MULLER, S.C., member of the South African Bar,

Dr. P. J. RABIE, S.C., member of the South African Bar,

Mr. E. M. GROSSKOPF, member of the South African Bar,

Dr. H. J. O. van HEERDEN, member of the South African Bar,

Mr. P. R. van ROOYEN, member of the South African Bar,

as Counsel;

Mr. H. J. ALLEN, Department of Bantu Administration and Development,

Mr. H. HEESE, Department of Foreign Affairs and Advocate of the Supreme Court of South Africa,

as Advisers.

The PRESIDENT opened the hearing and stated that the Court had met to deliver its Judgment in the South West Africa cases brought before the Court on 4 November 1960 by Applications of the Governments of Ethiopia and Liberia against the Government of South Africa.

The PRESIDENT read the English text of the Judgment and called upon the Registrar to read its operative provision in French.

The REGISTRAR read the French text of the operative provision.

The PRESIDENT stated that he had appended a Declaration to the Judgment. Judge Morelli and Judge *ad hoc* van Wyk appended Separate Opinions, Vice-President Wellington Koo, Judges Koretsky, Tanaka, Jessup, Padilla Nervo, Forster and Judge *ad hoc* Sir Louis Mbanefo appended Dissenting Opinions.

In order that the decision of the Court should be made known as soon as possible, and because of the delay which would have been involved had the reading of the Judgment been postponed until it and the Separate and Dissenting Opinions were printed, it had been considered advisable to read the Judgment from a roneoed text which contained the Separate and Dissenting Opinions in the original language only. The normal printed edition, which would be published in approximately seven weeks' time, would contain both the English and French texts of the Separate and Dissenting Opinions.

The Court rose at 5 p.m.

(Signed) Percy C. SPENDER,
President.

(Signed) S. AQUARONE,
Registrar.

Pour le Gouvernement sud-africain :

M. J. P. VERLOREN van THEMAAT, S.C., professeur de droit international à l'Université d'Afrique du Sud, consultant auprès du département des Affaires étrangères,

M. R. MCGREGOR, *Chief State Attorney* adjoint,

M. R. F. BOTHA, du département des Affaires étrangères, avocat à la Cour suprême d'Afrique du Sud,

comme agents ;

M. D. P. de VILLIERS, S.C., membre du barreau d'Afrique du Sud,
M. G. van R. MULLER, S.C., membre du barreau d'Afrique du Sud,
M. P. J. RABIE, S.C., membre du barreau d'Afrique du Sud,
M. E. M. GROSSKOPF, membre du barreau d'Afrique du Sud,
M. H. J. O. van HEERDEN, membre du barreau d'Afrique du Sud,
M. P. R. van ROOYEN, membre du barreau d'Afrique du Sud,

comme conseils ;

M. H. J. ALLEN, du département de l'Administration et du Développement bantous,

M. H. HEESE, du département des Affaires étrangères, avocat à la Cour suprême d'Afrique du Sud,

comme conseillers.

Le PRÉSIDENT déclare l'audience ouverte et dit que la Cour se réunit pour rendre son arrêt dans les affaires du *Sud-Ouest africain*, introduites devant la Cour le 4 novembre 1960 par requêtes des Gouvernements de l'Ethiopie et du Libéria contre le Gouvernement de l'Afrique du Sud.

Le PRÉSIDENT donne lecture du texte anglais de l'arrêt et invite le Greffier à donner lecture du dispositif en français.

Le GREFFIER lit en français le dispositif de l'arrêt.

Le PRÉSIDENT déclare qu'il a joint à l'arrêt une déclaration. M. Morelli, juge, et M. van Wyk, juge *ad hoc*, y ont joint les exposés de leur opinion individuelle. M. Wellington Koo, Vice-Président, MM. Koretsky, Tanaka, Jessup, Padilla Nervo et Forster, juges, et sir Louis Mbanefo, juge *ad hoc*, y ont joint les exposés de leur opinion dissidente.

Afin que la décision de la Cour soit connue le plus tôt possible et en raison des retards qui seraient intervenus si le prononcé avait dû être remis jusqu'à l'achèvement de l'impression de l'arrêt et des opinions individuelles et dissidentes, il a été jugé opportun de procéder à la lecture de l'arrêt sur un texte polycopié, où les opinions individuelles et dissidentes ne figurent que dans leur langue originale. L'édition imprimée ordinaire, qui sortira de presse sept semaines plus tard environ, contiendra les textes français et anglais des opinions individuelles et dissidentes.

L'audience est levée à 17 h

Le Président,
(Signé) Percy C. SPENDER,
Le Greffier,
(Signé) S. AQUARONE.

ANNEX TO THE MINUTES

ANNEXE AUX PROCÈS-VERBAUX

1. STATEMENT BY MR. GROSS

AGENT FOR THE GOVERNMENTS OF ETHIOPIA AND LIBERIA
AT THE PUBLIC HEARING OF 18 MARCH 1965

Mr. President and honourable Members of the Court, appearance for the second phase of the South West Africa cases is attended by that special sense of responsibility and of honour with which any advocate must be imbued when pleading at the bar of the High Court of the nations. It has likewise been a source of pride and of honour to have been associated with my colleague Agents, His Excellency Ambassador Tesfaye Gebre-Egzy of Ethiopia and His Excellency Ambassador Nathan Barnes of Liberia. Ambassador Tesfaye and Ambassador Barnes are in Court today and, with your permission, Mr. President, may I have the honour to introduce Ambassador Barnes to make a very brief statement?

2. STATEMENT BY MR. BARNES

AGENT OF THE GOVERNMENTS OF ETHIOPIA AND LIBERIA AT THE PUBLIC HEARING OF 18 MARCH 1965

Mr. President and honourable Members of the Court, it is with profound appreciation that His Excellency Dr. Tesfaye, Agent of Ethiopia, and I welcome the opportunity and privilege of paying our respects to this honourable Court at the commencement of oral proceedings in the South West Africa cases.

The honourable President of the Court, in his opening address on Monday, called to mind that this is the twentieth anniversary year of the United Nations, of which this Court is the judicial organ. The United Nations, we believe, represents the co-operative partnership of nations for the establishment of a common human ideal in terms of peace, social justice and higher standards for all, and over the years, from its inception, this world Organization has striven to respond to the demands and realities of our world. And it is in this year, Mr. President, that issues of profound importance to the history and meaning of the rule of law are presented to this honourable Court for adjudication.

It is because the Governments of Ethiopia and Liberia have an abiding respect for the rule of law that they appear before this Court, the highest institution in international law, as Applicants in these proceedings—proceedings, Sir, which are of the highest interest and significance to the advancement of the welfare of the people of South West Africa.

Mr. President, it is with a deep sense of honour that the Governments of Ethiopia and Liberia are exercising their responsibilities as members of the community of nations in instituting these proceedings before this honourable Court.

Thank you, Mr. President.

3. ARGUMENT OF MR. GROSS

AGENT FOR THE GOVERNMENTS OF ETHIOPIA AND LIBERIA
AT THE PUBLIC HEARING OF 18 MARCH 1965

Mr. President, with your permission I should like to introduce my associates, who appear with me as counsel in these proceedings: the Honourable Edward R. Moore, Under Secretary of State of Liberia, and Mr. Keith Highet, a member of the Bar of the State of New York, in the United States of America.

I speak for all my colleagues, as well as for myself, when I say that the satisfaction of appearing before the Court is enriched by the knowledge that this lengthy litigation, consequent upon an even longer protracted dispute, now reaches its climax, with culmination in sight.

Our sense of responsibility is quickened also by awareness that seldom in the history of judicial administration can there have been involved legal issues, the determination of which more profoundly will affect the "material moral well-being and the social progress" of a multitude of individual human persons. These individuals, whose vital interests are at issue and at stake in these proceedings, are, of course, those individual persons who, in the Mandate for South West Africa, "made at Geneva on the 17th day of December, 1920", are described collectively as the "inhabitants of the territory subject to the present Mandate". In these Oral Proceedings, as in the written pleadings, we shall refer to Ethiopia and Liberia as the "Applicants", and to the Republic of South Africa either as the "Mandatory" or as the "Respondent".

The history-making import of the pending cases requires little elaboration. The Applicants have not sought judicial recourse in order to requite a narrow material or selfish interest peculiar to themselves. They seek recourse to this honourable Court which, under the plan of the Mandate, furnishes—and I quote from the Judgment of 1962—furnishes "the final bulwark of protection . . . against possible abuse or breaches of the Mandate". The Applicants' legal interest encompasses nothing less than observance by the Respondent of the totality of its legal obligations under the "sacred trust" of the Mandate.

These obligations were freely undertaken when the Mandate was "conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa"; and when His Britannic Majesty, for and on behalf of the Respondent, "agreed to accept the Mandate" and undertook, in its terms, "to exercise it on behalf of the League of Nations", in accordance with the provisions of the Mandate.

Mr. President, the Applicants are deeply sensible of the fact that the legal interests which they assert in these proceedings are not uniquely their own, and that the legal interests of a wider community, of which they form a part, also are deeply involved.

As this honourable Court observed in its Judgment of 21 December 1962 on the Preliminary Objections phase of these proceedings:

> "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". (*I.C.J. Reports 1962*, p. 345.)

This fact, of course, does not modify or circumscribe the legal nature of the Applicants' interest in effecting compliance with the mandate obligations. On the contrary, Mr. President, we submit that it serves to endow their legal interest with an added dimension of significance to the organized international community.

The Applicants, along with Respondent, are Parties to the Charter of the United Nations, the twentieth anniversary of whose birth is being marked even while this High Court hears the Parties to these proceedings.

The institution by the Applicants of the cases at bar, in which they seek a solution by judicial settlement of the long-continued dispute which has arisen between them and Respondent, corresponds to their rights under the Mandate and their obligations under the United Nations Charter.

Mr. President, Members of the honourable Court, I refer to the purposes of the Charter, according to which all Members of the Organization are pledged to adjust or settle international disputes "in conformity with the principles of justice and international law" (Art. 1). Mr. President, the public record of the events and circumstances attending the dispute which has so long engaged the attention of the United Nations itself, as well as of this honourable Court, is too long and too full a record to warrant extensive discussion here. In their written pleadings, the Applicants have set out a year-by-year chronological summary of these relevant events and circumstances during the 18-year period 1946-1963, in which this dispute has been pending, and for the settlement of which negotiations have been unavailing.

The negotiations between the Parties to these proceedings have been conducted in and through the United Nations, its committees and its organs, by means of actions and processes conformable to the purpose and structure of that Organization. No more orderly, appropriate, or feasible course could have been followed by the Applicants in their persevering efforts to seek a settlement of the legal issues in dispute between them and Respondent. Such negotiations have been marked by repeated references to this honourable Court of legal issues basic to the dispute. The Advisory Opinions consequent upon such references have been accepted by the Applicants in, and through the agency of, the United Nations, of which all Parties to these proceedings have been, and are, Members.

Negotiations being fruitless, the Applicants instituted these proceedings by Applications filed with the Registrar of this honourable Court and dated 4 November 1960.

In its Judgment of 21 December 1962, the Court held that the Applicants—

> "have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members". (*I.C.J. Reports 1962*, p. 333.)

In 1950, in the course of its Advisory Opinion of that year, this honourable Court introduced an analysis of the legal issues then before the Court, with the comment:

> "It is now contended on behalf of the Union Government that this Mandate has lapsed, because the League has ceased to exist. This contention [said the Court] is based on a misconception of the legal situation created by Article 22 of the Covenant and by the Mandate itself."

I end the quote from the unanimous opinion of the Court in 1950, unanimous on this aspect of the case.

The same contention is now being pressed by Respondent, notwithstanding the Court's holding in the 1950 Opinion, two supervening Advisory Opinions by this honourable Court, confirmatory and interpretative thereof, and the 1962 Judgment, from which a relevant passage has been quoted.

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

A new generation of inhabitants of the Territory has been born since Respondent first denied its obligations under the Mandate, at the same time retaining the rights derived from the Mandate. Such a posture twice has been commented upon by this honourable Court.

In 1950, the Court in its Advisory Opinion said:

> "The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." (*I.C.J. Reports 1950*, p. 133.)

And, in the 1962 Judgment, this honourable Court quoted the foregoing passage, which I have just read from the 1950 Opinion, and added, at page 329 of the 1962 Judgment:

> "The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations."

Thus the Court described the foundation of the rights of the Mandatory.

The Court likewise held that the Applicants, and other States similarly situated, and again I quote from the Judgment, at page 338:

> "continue to have the right to invoke the compulsory jurisdiction of the Court . . . That right continues to exist for as long as Respondent holds on to the right to administer the Territory under the Mandate."

Thus also, Judge Bustamante, in his separate opinion in the 1962 proceedings, commented upon the special and lofty purpose for which the Mandate was entrusted to the Respondent, and the learned judge pointed out, *inter alia:*

> "The function of a Mandatory is a *responsibility* rather than a right . . . it is for the Mandatory to refuse the trust if it cannot bear the burden . . . An international Mandate is, by its very nature, temporary and of indeterminate duration . . . The corollary to the two foregoing paragraphs [said the learned Judge] is that an inter-

> national Mandate, through which tutelage is exercised, does not and can never imply a transfer of sovereignty to the Mandatory or the annexation of the mandated territory by the tutelary State. [And the learned Judge concludes by saying] It is only at the conclusion of the Mandate that the people can choose for itself between independence or incorporation in the administering State." (*I.C.J. Reports 1962*, p. 357.)

The foregoing views, which I have cited, of this honourable Court and of learned judges, reflect and define the character of the Mandate itself, which the Court has characterized in its own words as:

> "a new international institution, the primary, overriding purpose of which is to promote 'the well-being and development' of the people of the territory under Mandate". (*I.C.J. Reports 1962*, p. 329.)

In the light of the high intentions of the founders of the mandates system, and of the weight, dignity and legal significance of the prescription of the "sacred trust of civilization", asserted abuse and breaches of the Mandate, which have included, and continued to include, denial to the inhabitants of the Territory of the supervisory safeguards and protection of the organized international community, as well as the unilateral imposition by Respondent of policies and practices which are a subject of this litigation, raise legal issues of a nature which impel recourse to this honourable Court as the appropriate and, indeed, sole means of a just and peaceful solution.

Mr. President, it may be convenient to this honourable Court if I now summarize the plan or scheme of argument which the Applicants intend, with the Court's permission, to place before the Court in support of their several submissions.

For purposes of clarity of presentation, the Applicants will, with the Court's permission, divide their argument into what may be described as two phases. The first phase will be concerned essentially with legal issues in dispute between the Parties, incorporating only such elements of facts as are conceived by the Applicants to be inseparably related with, or directly germane to, the legal issues which arise for consideration.

According to the Applicants' understanding, Mr. President, Respondent will then be accorded an opportunity to comment upon the legal issues thus presented, together with any others it may consider pertinent to its case. In any event, following the conclusion of the first, what might generally be called "legal phase", of the proceedings, with such right of rebuttal or rejoinder as the honourable Court and the President may see fit to allow, the Applicants then would present to the Court, with its permission, questions of fact, inferences to be drawn therefrom, and considerations which may be germane to such questions of fact or inference.

The first, or legal phase, of the Applicants' argument then, if it please the honourable Court, will consist of the following four parts:

Part A. A summary introduction of the legal issues, together with inseparably related factual considerations. The legal issues thus summarized will concern, one, Respondent's obligations to submit to international supervision (set out in the Reply at **IV**, pp. 520-552), and secondly, the legal issues concerned with Respondent's obligations toward the inhabitants of the Territory (set out in the Reply at **IV**, pp. 476-518).

Following the conclusion of such summary, which I shall have the honour to endeavour to present to the Court, we will then present Part B of the first phase, or legal phase, of the Oral Proceedings.

Part B will involve a discussion to be presented by my colleague, Mr. Moore, of the nature and purposes of the mandates system, read in the light of relevant events, transactions and undertakings attending its formation, as well as those events and transactions which occurred during the period when the League of Nations was being dissolved and the United Nations was formed and commenced operations. Discussion of these matters appears to the Applicants to comprise both background to, and foundation of, conclusions with regard to legal issues arising in these proceedings.

Mr. President, following the presentation of Part B, the nature, background of the Mandate, and of the events of 1945-1949, we will come, with the Court's permission, to Part C of the legal phase of these proceedings.

Part C, if the Court please, will involve a discussion of the legal issues relevant to the Respondent's obligations to submit to international supervision and to judicial protection against alleged abuse or breaches of the Mandate. These are, of course, the obligations which, in the words of the 1950 Advisory Opinion, "relate to the machinery for implementation".

Finally, Part D of this legal phase of the Oral Proceedings will endeavour to deal with the legal issues relevant to Respondent's obligations toward the inhabitants of the Territory. Again, in the words of the 1950 Opinion, such obligations relate "to the administration of the Territory" and correspond "to the sacred trust of civilization referred to in Article 22 of the Covenant".

With your permission, Mr. President, I turn now to Part A, the first of the four parts of the Applicants' opening statement, which I have just endeavoured to describe.

PART A

The Applicants seek remedies appropriate to the enforcement of the two groups or kinds of international obligations which were assumed by Respondent under the Mandate, and which were described by the Court in 1950 as follows:

> "One kind was directly related to the administration of the Territory, and corresponded to the sacred trust of civilization referred to in Article 22 of the Covenant."

That is from the 1950 Opinion, page 133.

The Court went on to say that this first group of obligations is "defined in Article 22 of the Covenant and in Articles 2 to 5 of the Mandate".

The second group of obligations, in the words of the 1950 Opinion, is—

> "related to the machinery for implementation and were closely linked to the supervisory functions of the League of Nations—particularly the obligation of the Union of South Africa to submit to the supervision and control of the Council of the League and the obligation to render to it annual reports in accordance with Article 22 of the Covenant and Article 6 of the Mandate".

That is from page 136 of the 1950 Opinion.

With respect to the first of these groups of obligations, that is to say, those related to the administration of the Territory and corresponding to the sacred trust, the Court held in the 1950 Advisory Opinion that—

> "These obligations represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon." (*I.C.J Reports 1950*, p. 133.)

In the 1962 proceedings, as the Court points out in its Judgment, Respondent not merely conceded, but, in fact, *argued*, and I quote from the Court's Opinion:

> "argued that the rights and obligations under the Mandate in relation to the administration of the territory of South West Africa being of an objective character still exist . . .". (*I.C.J. Reports 1962*, pp. 332-333.)

This was, as the Applicants understand it, an alternative argument—I have just quoted from the Court's characterization of the argument.

In the present phase of the proceedings, however, Respondent has reversed or abandoned this argument, alternative or otherwise, and now seeks to make nugatory the Court's unanimous holding in 1950 that Respondent's obligations toward the inhabitants of the Territory remain in effect. By virtue of a so-called "alternative" argument, newly introduced at this phase of the proceedings, and which will be examined more fully, Respondent now urges the Court to hold that the Mandate *as a whole* has lapsed. Such demise would, of course, carry with it the first group of obligations, along with those comprising the second group, relating to international supervision and reporting.

If I may, Mr. President, I should now like to turn to a summary consideration to be elaborated in Part D of Respondent's obligations towards the inhabitants of the Territory, in terms of the legal issues affecting this group of rights and obligations.

If it please the Court, I turn to a summary of the Applicants' arguments in support of its contention that Respondent has violated, and is violating, its legal obligations as defined in Article 22 of the Covenant of the League of Nations and in Article 2, paragraph 2; Article 2, paragraph 1; Articles 4, 6, and 7, paragraph 1, *inter alia*, of the Mandate. I mis-spoke, Mr. President, I would omit reference, with the Court's permission, to the obligations in the paragraphs relating to implementation, I would delete references, with your permission, Mr. President, from my comments with respect to Article 6 and Article 7, paragraph 1. I am confining myself, at this stage, with the Articles 2 to 5 of the Mandate, and Article 22 of the Covenant.

These obligations, as the Court said in the Advisory Opinion of 1950, which I have quoted,

> "represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain." (*I.C.J. Reports 1950*, p. 133.)

The Applicants' submissions in respect of Respondent's obligations toward the inhabitants of the Territory are, of course, posited on rejection

of Respondent's newly advanced contention that the Mandate has totally lapsed as an international institution.

The Applicants' central contentions can be stated in concise and simple form:

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

2. The incompatibility of apartheid with the Mandate, in terms of Article 2 thereof, is judicially determinable on the basis of objective legal criteria.

The first of these propositions, to wit, that the policy of apartheid, as practised in South West Africa, is repugnant to the obligations under Article 2, paragraph 2, of the Mandate, necessarily involves a definition of that term, or "separate development" in Respondent's currently preferred usage. If I am not mistaken, the interchangeability of the terms "apartheid" and "separate development" is not disputed.

The Applicants do not use the terms "apartheid" or "separate development" as words, but as defined acts with a legal consequence.

The Applicants present to this honourable Court the policy and practice of apartheid as it is, and as it has been, in the daily lives of the individual persons who comprise the collectivity of the inhabitants of the Territory.

The Applicants define apartheid, for the purposes of these proceedings, as a policy and practice under which:

> "the status, rights, duties, opportunities and burdens of the population are determined and allotted arbitrarily on the basis of race, color and tribe, in a pattern which ignores the needs and capacities of the groups and individuals affected, and subordinates the interests and rights of the great majority of the people to the preferences of a minority".

I have just quoted from page 108 **(I)** of the Memorials.

Respondent seeks to explain and justify the policy of apartheid on the basis of its so-called "ultimate goal". As will be made clear at the stage of these proceedings which will deal primarily with facts, such a professed goal is hypothetical, contingent and indeterminate as to time or method of accomplishment.

In the Applicants' respectful submission, this honourable Court, for reasons which will be made clear at an appropriate phase of these proceedings, should not be asked to take account of so uncertain and unpredictable, hypothetical and contingent future state of affairs in appraising the legal significance of Respondent's actual and present policies and practices.

As is made clear in the Reply, at **IV**, pages 312 and following, the concept of "homelands", "Bantustans", or other forms of expression, by which Respondent describes the ambiguous aim of territorial apartheid, or partition: such concept is unviable, vaguely sketched and dependent upon the so-called "White" economy. Moreover, the society of the modern core of the Territory, the southern sector or Police Zone, whether it be characterized as multi-racial, or in whatever form one may please, speaking of it as a fact of economic life, the present general pattern is to be continued indefinitely or interminably so far as the present record shows. I will reserve elaboration of details to support these contentions for the later stage, Mr. President; I mention them now because, in my

respectful submission, it is impossible to deal with the legal issues underlying the rights of the inhabitants of the Territory without considering, if only briefly, the Applicants' theories, or contentions at least, with respect to the nature of the practices and policies with which those legal issues are vitally concerned.

The world and life of the Territory with which these cases deal is the world and life of the present, in the forty-fifth year of the Mandate. The policy of apartheid is a present fact with an ascertainable shape and demonstrable consequences which are incompatible with the promotion of the welfare and progress of the inhabitants of the Territory.

All the foregoing matters will be elaborated more fully at a later stage of these proceedings, when the Parties will be dealing with essentially fact issues. It is necessary, however, with the Court's permission, in the present context, to note that the legal inferences and legal conclusions appropriately to be drawn from the policy of apartheid, in terms of Respondent's obligations under Article 2 of the Mandate, should—and, in the Applicants' respectful submission, must—take into account the nature and extent of Respondent's measures of implementation of that policy.

If I may be permitted to cite one illuminating example briefly at this stage and then pass on to more strictly legal considerations, I should like, with your permission Mr. President, to refer to the educational policy applied by Respondent in the territory of South West Africa. In view of the Applicants' purpose in the present context merely to advert to issues of law, I shall avoid an extended analysis, but it may be of assistance to the Court briefly to cite at this point the example of apartheid in the educational field in the light of the axiomatic proposition that the wheel of society turns upon education as its hub from which radiate all aspects of economic, political and cultural life of any social system. Consistently with Respondent's doctrine that rights, duties, burdens and opportunities are to be allotted officially upon the basis of membership in a group rather than in the light of individual capacities or potentials, Respondent's educational policies in the Territory proceed from the premise (and I use Respondent's expression) that "non-Europeans", wherever they may reside in the Territory, should receive and be limited to, educational opportunities commensurate with their intended future status in the political and economic life of the Territory.

The most complete and forthright exposition of Respondent's premises and objectives in respect of so-called "Bantu" education in the Territory may be found in the Counter-Memorial, at Book VII, at **III**, pages 527-530.

Mr. President and honourable Members of the Court, in commencing what is indicated to be a rather lengthy proceeding before this honourable Court, may I take the liberty of saying that characterizations by adjectives and adverbs of Respondent's policy will be avoided by the Applicants as much as is humanly possible. We rest our case, as I will demonstrate, upon centrally decisive and undisputed facts largely on the basis of laws and administrative practices, public records and statements of Respondent's highest officials, most of which statements are quoted by Respondent itself.

I have referred, Mr. President, to the forthright and complete exposition of Respondent's premises and objectives in respect of Bantu education in the Territory set forth, in its own words, in the Counter-Memorial, Book VII, at **III**, pages 527-530.

Respondent's exposition of what it terms the "motivation" of its policy must be read in the light of the fact that the so-called non-White population of the economically developed core of the Territory—the Police Zone, or southern sector, which comprises at least 50 per cent. of the total area of the Territory—is composed of a population of which some 73,000 are so-called Whites, some 140,000 (in round figures) are so-called Natives, and some 24,000 (again in round figures) are so-called Coloureds or Basters.

The Applicants respectfully call these sections of the Counter-Memorial to the Court's attention, that is to say the sections appearing in Book VII at **III**, pages 527-530, inasmuch as they embody not only the decisively relevant aspects of the education policy pursued in the Territory, but, *in the Applicants' conception*, embody also decisively relevant aspects of the premises of apartheid generally and, in our view, clearly reveal the consequences of that policy upon the individuals whose welfare and progress are at stake. I forbear from quoting from these sections in deference to the objective of discussing at this stage of the Oral Proceedings essentially legal issues and confining my remarks to inseparably related factual issues as briefly as they can be stated fairly. These sections in the Counter-Memorial, which I forbear from quoting at this stage but will respectfully call to the Court's attention again, these sections in the Counter-Memorial likewise underly and confirm the submission of the Applicants that the legal issue joined between the Parties in respect of the irreconcilability of the policy and practice of apartheid with the obligations of Article 2, paragraph 2, of the Mandate hinges on no disputed facts.

Respondent, ignoring the explanation in the Memorials as to the Applicants' reasons for citing extensive factual material in its pleadings, erroneously asserts, and I quote from the Rejoinder:

> "It is difficult to imagine the purpose for which this material is introduced unless Applicants consider that there is an issue of fact to be determined between the Parties. And the only basic factual issue [says Respondent] in this regard is the one relating to Respondent's motive or state of mind." (**V**, p. 107.)

Respondent's appraisal, Mr. President, is wrong in each of its parts and as a whole.

That there is no "issue of fact to be determined between the Parties" on any decisively relevant aspect of these cases, has been made clear in the Reply and is here reaffirmed. The Applicants, as I have said, rest their case with respect to Respondent's violations of its obligations toward the inhabitants of the Territory on the basis of Respondent's own formulations of the policy of apartheid, and on a basis of laws and regulations and practices spread upon the public record. The Applicants, of course, take sharp issue with the premises upon which Respondent's policy is based, as well as with the inferences and legal conclusions which Respondent seeks to draw from its admitted, factual, policies.

As is made clear in the Reply, moreover, the Applicants' legal conclusions are based upon public statements of Respondent's highest officials quoted in the Applicants' written pleadings, and upon Respondent's measures of implementation of its policy, the existence and nature of which are undisputed. All of this was stated in the Reply at **IV**, pages 262 and following. Without conceding the relevance of facts

contained in Respondent's pleadings, including the Oral Proceedings, the facts—as distinct from inferences which may be drawn therefrom—are not contested by the Applicants except as otherwise indicated, specifically or by implication, in the Applicants' written pleadings or in the Oral Proceedings.

Mr. President, the second part of the statement from the Rejoinder which I have quoted, that is, that "the only basic factual issue . . . is the one relating to Respondent's motive or state of mind", is rejected by the Applicants as a wholly erroneous rendering of the Applicants' contentions, either as to fact or as to law.

In its Counter-Memorial, Respondent stated, incorrectly, that the Applicants base their case on the charge that Respondent has exercised its powers under the Mandate "in bad faith". (I quote from the Counter-Memorial, **II**, Book I, at page 2.) The Applicants sought to make clear in the Reply that Respondent had misinterpreted the import of the Applicants' submissions and, indeed, that such misinterpretation might be attributable to Respondent's fallacious contention concerning the limited scope and content of its legal obligations under Article 2 of the Mandate. We tried to make this clear in the Reply, at **IV**, page 255 and following.

Respondent's repetition of the same error in the Rejoinder, accordingly, is difficult to explain in so far as it attributes any such intention of pleading to the Applicants, and it may reflect some anxiety on its part to avoid the application of objective criteria as a measure of its legal obligations under Article 2. However that may be, the fact undisputedly is that the Applicants do not make an issue, have not sought to make an issue, and do not intend to make an issue of good or bad faith in the premises.

Notwithstanding the fact that this honourable Court has affirmed its competence to adjudicate the merits of the dispute between Applicants and Respondent, including issues which have arisen under Article 2, paragraph 2, of the Mandate, Respondent insists that there exists no basis for a judicial determination of asserted breaches of Respondent's legal obligations thereunder.

As originally summarized in the Counter-Memorial in Book IV **(II)**, and fully developed in the Rejoinder **(V)**, Respondent has presented two basic legal contentions in this regard.

The first, set out in the Rejoinder, **V**, at pages 143 and following, is that, given the nature of the obligations of Article 2, paragraph 2, of the Mandate, "although the obligations under the Article were of a legal nature, the Court was not intended to possess jurisdiction in regard to alleged breaches thereof". That is from the Rejoinder, **V**, at page 146.

Respondent's contention that disputes concerning the application or interpretation of Article 2, paragraph 2, of the Mandate, and, by implication, Article 22 of the Covenant of the League are not justiciable, attributes to the authors of the mandates system a denial to the inhabitants of the Territory of judicial protection of the rights comprised in what this honourable Court described in 1950 as "the very essence of the sacred trust of civilization".

Acceptance of Respondent's contention that these rights are not justiciable—disputes concerning these rights are not justiciable—would lead to the anomalous result that protection by this Court of rights and obligations going to the very essence of the Mandate would be subject

to administrative supervision alone, whereas rights of lesser stature, and of narrower material import, in Articles 3 to 5 of the Mandate, would be subject both to administrative supervision and to judicial protection. This would be the anomalous result which would inescapably flow from Respondent's contention that the obligations under Article 2, paragraph 2, of the Mandate are not justiciable, whereas rights and obligations under Articles 3 to 5 are.

The final bulwark of judicial protection against breaches or abuse of the Mandate—as this honourable Court in its 1962 Judgment described its function under the Mandate—would accordingly be available only for the protection of rights of lesser stature and significance than those embodied in Article 2, which the Court has said are of the essence of this sacred trust.

Respondent's ascription to the founders of the mandates system of an intention thus to circumscribe protection of the sacred trust could, it is submitted, be justified only by incontrovertible explicit evidence, coupled with imperative considerations of logic. Respondent's contention is in the teeth of the express language of Article 22 of the Covenant and Article 2 of the Mandate, neither of which provisions embody any such limitation or circumscription expressly or by implication. Further consideration will be given to this legal issue of interpretation in Part D of this phase of the Oral Proceedings.

In their written pleadings, the Applicants have sought to demonstrate that disputes concerning the interpretation and application of Article 2, paragraph 2, of the Mandate are justiciable (may I refer to our Reply at **IV**, pages 483 and following).

Such disputes, it is respectfully submitted, are justiciable and in accordance with, and on the basis of, international custom, as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations, and judicial decisions and teachings of qualified publicists of the various nations. In short, Mr. President, justiciability of disputes concerning the interpretation and application of Article 22 of the Covenant and Article 2, paragraph 2, of the Mandate is supported by reference to the application of Article 38, paragraph 1, of the Statute of this honourable Court.

The existence of an international legal norm of what the Applicants describe as *"non-separation" or "non-discrimination"*, for the sake of convenience of description, the existence of such an international legal norm as defined and described by the Applicants in the Reply, at **IV**, page 493, is established, in our respectful submission, by sources and authorities of the nature referred to in Article 38 of the Statute of the Court. Part D of this phase of the Oral Proceedings will treat of the considerations upon which we base this contention.

In essence, in this summarization, the Applicants' submission is that the interpretation and application of international legal obligations undertaken by States in relation to the rights, welfare or progress of individuals, are to be measured and governed by a generally accepted legal norm, which prohibits official allotment of status, rights, duties, privileges or burdens upon the basis of membership in a group, class or race, rather than on the basis of individual merit, capacity or potential.

Such a legal norm, moreover, is generally accepted by the nations as a minimum norm of official policy and practice on the part of governments. With regard to relevant international obligations, such legal norm

likewise is accepted virtually universally as a standard for interpretation and application of international obligations with respect to the relevant area; numerous examples are cited in the Reply at **IV**, pages 491-510. In the light of the fact, Mr. President, that such legal norm is a minimum one, in our submission, the Applicants submit that it *a fortiori* provides objective criteria governing the interpretation and application of an international undertaking such as that embodied in Article 2, paragraph 2, of the Mandate, that is to say, the promotion of the welfare and progress of the individual inhabitants of the territory *"to the utmost"*.

The Applicants, in their Reply, refer to certain authorities as showing that obligations of a scope and nature comparable, in certain general respects, to those embodied in Article 22 of the Covenant and Article 2 of the Mandate, are justiciable. Among such authorities is cited the celebrated decision of the United States Supreme Court in *Brown* v. *The Board of Education*, 347 *United States Reports* 483, decided in 1954.

Considerations of a legal nature underlying the *Brown* case, germane to legal issues joined between the Parties to these proceedings, may be summarized briefly as follows, with your permission, Sir. As stated in the Reply, the *Brown* case, among others cited in the Reply, confirms the fact that judicial tribunals, both domestic and international,

> "have often derived their judgments from sources, and upon the basis of considerations, which Respondent would characterize as 'social, ethnological, economic and political' . . . It is, of course, in the highest traditions of courts in all civilized systems to draw upon humane, moral and political standards in deriving the sources of law."

I take the quote from pages 485 and 487 of our Reply **(IV)** and would add only on this point that the fact that social, ethnological, economic and political considerations underlying disputes of a legal nature normally may provide more, rather than less, reasons for courts to deal with disputes between men, or nations, because these are the type of disputes which are most likely to threaten civil order or international peace.

Secondly, the *Brown* case, among others, illuminates, and again I quote from the Reply,

> "the judicially perceived necessity to interpret broadly-formulated, constitutional-type obligations, on the basis of current standards, rather than on the basis of the presumed 'intentions of the parties' at the time the obligations were conferred and accepted".

This I quote from page 515 of our Reply **(IV)**.

This aspect of the case of *Brown* v. *The Board of Education*, among others, is relevant to Respondent's contention, in its pleadings, that the scope and content of its obligations under Article 2, paragraph 2, should be measured essentially on the basis of standards prevailing in 1920, when the Mandate was conferred. I confess that the Applicants see, in a certain statement by the Respondent, that this is inferred or implied; other statements appear to imply to the contrary. To the extent that any doubt may arise or linger with respect to the precise meaning of Respondent's intention in this respect, I cite the *Brown* case to lay at rest any doubt on the score of valid method of interpreting a constitutional-type document in *ratione temporis*.

The history of the *Brown* case itself vividly illustrates the error of Respondent's contention, if indeed that be its contention. In that case, as pointed out in the Reply, at **IV**, page 514, the Supreme Court of the

United States reversed the 1896 decision, by the same Court, in *Plessy* v. *Ferguson*, on the basis of change and experience during the intervening period, including what the Court termed "psychological knowledge" (this is quoted in our Reply at **IV**, page 487).

Finally, the Applicants cite the *Brown* case, among others, in support of their submission that, and I quote again from our Reply,

> "obligations are not deprived of a legal character merely by reason of being formulated in general terms, nor do Courts hesitate to exercise their judicial functions even when issues, in Respondent's phrase also fall within 'the realm of politics'. Nor do courts fear [again in Respondent's phrase] 'to venture onto one or other of ... [the] terrains' of 'social, ethnological, economic and political considerations', even in complex and controversial issues, in which individual human rights are asserted against governmental action or policy."

I have just quoted from our Reply at **IV**, page 515.

The *Brown* case, among many others, shows that legal disputes in which such considerations are relevant or decisive, are justiciable and that such disputes can be, and are, adjudicated by courts of law in most if not all societies.

That such obligations are of a legal character is conceded by Respondent, explicitly with regard to Article 2, paragraph 2, of the Mandate, and implicitly with regard to Article 22 of the Covenant. I refer to the Rejoinder, at **V**, pages 19 and 20 among other pages.

The Applicants, as has been said, cite in their pleadings numerous judicial authorities, as well as scholarly writers, confirming that the judicial process in civil law systems, as well as other systems, draws upon humane, moral, political and scientific standards as sources of law, and does so particularly where legal rights and duties are broadly formulated. This discussion appears in our Reply at **IV**, pages 485-491. Thus, reference is made in the Reply to the doctrines of *abus de droit, bonnes moeurs* and *ordre public*.

Respondent's commentary on the *Brown* case does not advert to the aspects of the case which are referred to above, so far as I am aware, and which alone are relevant to issues in these proceedings. I refer to Respondent's commentary, for example, at page 71 of the Rejoinder **(VI)**. Instead, Respondent seems to limit its discussion or commentary on the *Brown* case to, what in the Applicants' view, is the totally irrelevant proposition that the United States is assertedly mono-cultural, whereas the mandated territory is assertedly multicultural. Whether or not the purported distinction is a true one the Applicants cannot say, as neither term is defined nor, it is submitted, so far as we can see, is definable in any meaningful sense relevant here.

The Applicants are aware, and do not suggest otherwise, that decisions of domestic tribunals are peculiarly suited to, and reflect, conditions and traditions particular to their own societies. Such conditions and traditions may be multi-cultural, multi-lingual, or multi-racial, or mono-cultural, mono-lingual, or mono-racial, or all or any of these, and more, in combination. The Applicants do not intend to comment upon, nor do they believe that this honourable Court would wish to enquire into, much less pass upon, practices or policies which regulate the affairs of any sovereign State or society other than that which is subject of complaint in the cases at bar.

Whether Canada or India, merely as random examples, are or are not multi-racial or mono-cultural societies, or whether they maintain or should maintain or should not maintain, for example, separate schools for separate cultural or linguistic groups, is unknown to the Applicants and is none of their concern.

The significance of the *Brown* case to these proceedings consists not in the ruling of the Supreme Court, but lies in the universal applicability of much of the reasoning upon the basis of which that Court arrived at its unanimous finding, and I have attempted to refer to the Court the three respects in which that universally applicable reasoning seems relevant to the cases at bar.

The Supreme Court of the United States, as has been noted, took account of what it termed "psychological knowledge" along with other contemporary and authoritative learning. Upon the basis of such modern authority, to use the Supreme Court's term, the Supreme Court found that officially sanctioned separation of Negro school children, at least in the United States, and I quote from the Opinion, "from others of similar age and qualifications because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone". This is quoted in our Reply at IV, page 487.

In the light of this finding, applicable to the United States, the Supreme Court concluded that, "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal".

Mr. President, and Members of this honourable Court, the Applicants do not suggest that the considerations which motivated the decision in the *Brown* case govern these proceedings. Such considerations underlying its reasoning, however, seem to warrant the following conclusion on the reason of the thing.

If it can be appropriately held anywhere, in any society, mono- or multi-racial or cultural, that equal facilities, if separate, generate social and personal evils of the type to which the Supreme Court referred, it goes beyond the point of reason, in Applicants' respectful submission, to deny that facilities which are both separate *and* unequal can generate no lesser social and personal evils in every society where they occur, including South West Africa. A heavy burden, accordingly, must fall upon Respondent, charged with the duty to promote to the utmost the welfare and progress of the individual inhabitants of this Territory, a heavy burden must indeed fall upon the Respondent to show that such welfare and progress is promoted by educational facilities in the Territory, which are by any objective standard, as we shall endeavour to show in the fact phase of these proceedings, unequal as well as separate.

In the Applicants' submission such welfare and progress of the inhabitants is thwarted by such policy and practice, as we shall attempt to show.

Mr. President, at our moment of recess I was concluding this particular point by saying that in their written pleadings the Applicants set out extensively the reasons, precedents and authorities demonstrating that not only legal obligations of the scope and nature of Article 2, paragraph 2, and Article 22 of the Covenant, are justiciable, but that, in addition, objectively determinable legal norms and standards exist, on the basis of which the obligations embodied in such provisions can and, in our respectful submission, should be adjudged by this honourable Court.

Such legal norms and standards, as I said, will be fully discussed in Part D of this phase of the Oral Proceedings.

These norms and standards, as I have already said, would apply *a fortiori* to an obligation to "promote to the utmost" rights which include the right of the inhabitants to be free from the restrictive, oppressive and other consequences of the policy and practice of apartheid, as described in our written pleadings, which will be presented to the Court at a later stage when we turn to discussion of the essential facts.

Respondent's second argument—the first being, as the honourable Court will recall, that the dispute is not justiciable in terms of Article 2 of the Mandate—alternative to its first, is set out at V, pages 157 to 174 of the Rejoinder. Respondent's alternative contention falls for consideration only if the Court rejects Respondent's first contention. Respondent's alternative contention is, in effect, that unreviewable discretionary powers over the Territory are vested in the Respondent in terms of Article 2, paragraph 2, of the Mandate, subject only to the question whether such powers are exercised by the Mandatory "in good or bad faith".

The Applicants submit that the question at issue is not the subjective motivation of a particular government, or of a group within a government, or of a single official, or of a single department of a government. The only sense in which a subjective test of good faith could be relevant to the motives of individuals who, severally and collectively, and from time to time, form the executive, legislative and judicial branches of any government, would be by application of the universally accepted principle that an individual or an entity is legally presumed to intend the reasonably foreseeable consequences of his, or its, actions.

Any other measure of Respondent's obligations under Article 2 of the Mandate, in terms of good or bad faith, would necessarily confront this honourable Court, or an administrative supervisory authority, with the task of judging the Mandatory's conscience, rather than its conduct. If such a legal yardstick were to be the measure of Respondent's obligations under Article 2, paragraph 2, of the Mandate, the Applicants themselves would be at a loss to determine what manner of evidence of breach would be relevant, save perhaps explicit and unrepudiated admissions by Respondent's highest officials, that their policies were, indeed, directed toward an illicit purpose. For this reason, the Applicants perceive little difference in practical or legal effect between Respondent's two alternative contentions, and hence conclude that to describe an obligation so limited as one of a legal nature, is little more than a play on words.

The policy and practice of apartheid, in the Applicants' submission, are in violation of the terms of the Mandate, not subjectively determined in accordance with so-called good or bad faith tests, or motivation, but as objectively interpreted in accordance with generally accepted standards fully set forth in our Reply, as has been noted.

The Applicants, in Part D of this phase of the Oral Proceedings, will endeavour to analyse in detail the legal premises, reasoning and conclusions relevant to Respondent's two alternative contentions, which I have summarized.

Now, Mr. President, with your permission and that of the honourable Court, I would like to turn to a consideration of the legal issues relating to Respondent's obligations to submit to international supervision. This,

of course, is the second group of obligations, in terms of the Advisory Opinion of 1950, and are those relating to measures of implementation. These too will be considered more fully in Part C of this phase of the Oral Proceedings.

The key to the just, prompt and orderly solution of the problems generated by Respondent's alleged violations of its obligations towards the inhabitants of the Territory, is to be found in, and through, the processes of international administrative supervision which, as this Court has held, is the "normal security" embodied in the Covenant, and in the Mandate, for the protection of the sacred trust. The Applicants will set out, at a later stage of these proceedings, the facts, and related considerations, which make clear, in our respectful submission, the practical necessity for administrative supervision. Such practical necessity, as we believe will emerge clearly from the facts, reinforces and confirms the legal considerations supporting the Applicants' submission, that administrative supervision is of the essence of the Mandate and must continue so long as the Mandate itself endures.

Respondent once more requests the Court, as Respondent did in 1962, to reverse the 1950 Advisory Opinion on the ground that, had certain facts been known to the Court in 1950, and I quote from Respondent's pleadings:

> "It seems inconceivable that it could have arrived at its conclusions regarding an obligation on Respondent's part to submit to United Nations supervision." (II, p. 148.)

This proposition which, for the sake of convenience, Applicants describe as the "new facts contention", will be analysed in Part B of this phase of the Oral Proceedings, along with the background of facts, events and transactions, which occurred during the period 1945-1949.

We believe that analysis of the new facts contention, or re-analysis, if I may put it that way Mr. President, will demonstrate that the contention is unsubstantial and that, in any event, it is in the teeth of the Court's finding in 1962 that: "All important facts were stated or referred to in the proceedings before the Court in 1950." (*I.C.J. Reports 1962*, p. 334.)

It suffices at this point to note that acceptance of Respondent's contention concerning lapse of administrative supervision would make nugatory the Court's explicit holding in the 1950 Opinion that:

> "The General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it." (*I.C.J. Reports 1950*, p. 137.)

Respondent's submission concerning the lapse of administrative supervision also requests reconsideration and revision of the holding of the Court in 1962 that "the Mandate as a whole is still in force" (*I.C.J. Reports 1962*, p. 335).

Now, with respect to Respondent's first alternative contention.

Mr. President, it is difficult to say whether greater violence is done to the Court's prior holdings by force of Respondent's first alternative contention, viz., that administrative supervision has lapsed, leaving the balance of the Mandate intact, or by the second alternative contention,

viz., that the Mandate as a whole has lapsed. These are, of course, the two alternative contentions in this phase of the case.

Respondent's first alternative contention, that supervisory jurisdiction of administrative nature has lapsed, without collapsing the Mandate as a whole, would, *inter alia*, leave intact the compromissory clause of Article 7 of the Mandate. Its second alternative contention, that the Mandate as a whole has lapsed, would, however, erase Article 7, along with the rest of the Mandate.

Both contentions, it is respectfully submitted, do lethal violence to major premises underlying the 1962 Judgment. One such premise was formulated by the Court as follows:

> "The administrative supervision by the League constituted a normal security to ensure full performance by the Mandatory of the sacred trust toward the inhabitants of the mandated territory, but the specially assigned role of the Court was even more essential, since it was to serve as the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate." (*I.C.J. Reports 1962*, p. 336.)

It would follow from Respondent's first alternative contention, according to which administrative supervision—the normal security—has fallen away, that the Applicants, and other States similarly situated, would be left with no protection against possible abuse or breaches of the Mandate, except by means of recourse to this honourable Court, a right which, in any event, is vital and indispensable. Judicial protection, which the mandate institution envisages as the final bulwark, in the Court's words, would thus become the first and only bulwark, inasmuch as judicial supervision, by reason of default of administrative supervision, would perforce take the place of the normal security.

Of the many conjectural possibilities concerning the intentions of the authors of the Mandate, or of the parties thereto, or of the League of Nations, or the United Nations, one of the least likely must have been an intent to impose upon the Court the burdensome tasks woven into the fabric of day-to-day supervision over the Mandate.

Respondent's first alternative contention thus is incompatible with a proper and effective inter-relationship between administrative supervision and judicial protection, and this must be so, unless the Applicants completely misconceive the practical and legal effect of the first alternative contention. The true nature of this inter-relationship is manifest from the opinions of learned judges in the 1962 proceedings, as well as from the Judgment of the Court itself.

Reference already has been made to the Court's holding with respect to the nexus between administrative supervision as a normal security and judicial protection as a final bulwark.

The same relationship likewise was noted by the honourable President of the Court and Judge Sir Gerald Fitzmaurice, in their joint dissenting opinion in 1962.

Thus, in discussing the securities set out in Article 22 of the Covenant of the League of Nations, the learned judges said, *inter alia*, that:

> ". . . the chief security or safeguard consisted in the provision made for reporting, and for the supervisory functions to be exercised by the Permanent Mandates Commission and the League Council". (*I.C.J. Reports 1962*, p. 480.)

And the learned judges, in another context, described Articles 6 and 7: ". . . as designed portions of a coherent and integrated whole . . ." (*I.C.J. Reports 1962*, p. 553.)

Judge van Wyk, in his dissenting opinion, likewise analysed the relationship between Articles 6 and 7 of the Mandate, in the following terms:

> "There is a vast difference between Articles 6 and 7 . . . The provisions of the one [i.e., Article 6] are to be found in the Covenant of the League itself and constitute one of the securities specifically embodied in the Covenant for the performance of the sacred trust of civilization referred to therein, whereas Article 7 does not appear in the Covenant and is not one of the securities for the performance of the sacred trust.
>
> From the above it follows that if there was implied or tacit agreement relative to the continued application of any provision contained in the Mandate Declaration which depended on the continued existence of the League for its fulfilment, such agreement would much sooner relate to the provisions of Article 6 (that is, paragraph 7 of Article 22) than to Article 7 of the Mandate Declaration." (*I.C.J. Reports 1962*, p. 606.)

This honourable Court twice has held that, as a matter of law, Article 7 is in force: "just as the Mandate as a whole is still in force" and that:

> "There could be no question of lack of consent on the part of the Respondent as regards this transfer to this Court of the Respondent's obligation under Article 7 of the Mandate . . ." (*I.C.J. Reports 1962*, p. 335.)

It is submitted that, in view of the relationship between Articles 6 and 7, it is thus implicit in this honourable Court's holding and in views expressed by learned judges that if, and since, Article 7 has been held by the Court to be in effect, it would seem that Article 6, by reason, logic and practical necessity, should also be concluded to have remained in effect.

With your permission now, Mr. President, I turn to a summation of the *major legal premises of the respective Parties addressed to the issues* posed by Respondent's contention that administrative supervision has lapsed, and Applicants' counter-contention that the United Nations has replaced the League of Nations in terms of Article 6 and of Article 22 of the Covenant and the first paragraph of Article 7 of the Mandate.

Respondent's two major premises may be summarized concisely, as we understand them, as follows:

(1) In assuming the Mandate, the obligation undertaken by Respondent "was not one to submit to 'international supervision' " but, rather, "to submit to the specific supervision of particular League organs". (**II**, p. 144.)

Respondent's second major premise, as we understand it, is that:

(2) When the League dissolved and the United Nations came into existence, the latter did not decide to assume supervisory authority over the Mandate, nor did Respondent consent to submit to supervision by the United Nations.

These, as we understand, are the two propositions of Respondent.

Each of these propositions rests upon analysis and interpretation of instruments, events, transactions and undertakings, during the period of the formation of the mandates system, as well as during the period of

the dissolution of the League and the commencement of operations of the United Nations.

Interpretation of such instruments, events and so forth, will be presented by my colleague, Mr. Moore, next following in presenting Part B of this phase of the Oral Proceedings.

It appears to be common cause between the Parties that supervision, or the right of recourse to supervision, is normal and essential in any situation in which control and benefit are separated, that is to say, in which one person, or entity, exercises a power over property or other interests, while another is entitled to the benefits thereof. This, of course, is the essential underlying concept of trust, or *tutelle*, in all legal systems, of which the Applicants are aware.

The Parties, nevertheless, reach differing, if not contrasting conclusions regarding the applicability of this legal concept to the Mandate.

As far as we are aware, Mr. President, Respondent does not address itself directly to the *rationale* of prior Court decisions, or, to the extent that it does so, seems to misapply the Court's premises and conclusions. Respondent appears to contend that, in the formulation of this particular sacred trust, a basic obligation to submit to supervision was not intended to survive the dissolution of the specific organ mentioned in the trust instrument, and that the obligations to submit to international supervision accordingly lapsed with the demise of the tutelary.

The Applicants, on the contrary, contend that, unless the right of international supervision continues to reside *somewhere*, so long as Respondent retains rights under the Mandate the "very essence of the Mandate", in the Court's words in 1962, would be excluded. The premise upon which the Applicants base their contention that the United Nations replaced the League of Nations as the supervisory organ, and that Respondent did in fact manifest its consent thereto, will be elaborated in Part C of this phase of the Oral Proceedings, which I am now venturing to summarize.

The Applicants' premises and contentions touching this matter are addressed to the mandate institution as it was conceived and as it actually is, a novel international institution, endowed with essential attributes which have been defined and described, and indeed fully adumbrated, by this honourable Court. Respondent's premises and contentions, on the contrary, relate to a so-called "mandate" of a wholly different nature, one that never was. Intricate and ingenious though many of Respondent's legal arguments may be, they seem to the Applicants to rest upon unreal legal foundations. This has rather complicated the Applicants' task of refutation, because it has seemed to us, with respect, that the basic contentions of the respective Parties, as well as their major premises, circle in different orbits.

The starting point of an analysis of Respondent's premise that the mandate obligation was limited to supervision by a specific organ must be an examination of the nature and purposes of the mandates system. The history of that system, as I have said, Mr. President, will be analysed by my associate, Mr. Moore, in Part B of this phase of the proceedings, and this history constitutes the very foundation upon which must be based relevant inferences, arguments and legal conclusions in relation to the intentions of the authors of the Covenant and of the Mandate itself.

On the basis of these considerations, which will be set forth in some detail, it seems to the Applicants inescapably clear that the obligation

of international accountability was regarded by the authors of the mandates system as a basic and integral feature of that system, and that this feature stamped the system with its novel character as a new international institution, created to assure the welfare and progress of certain dependent peoples as a "sacred trust of civilization".

In the words of the honourable President of the Court and Judge Sir Gerald Fitzmaurice, in their joint dissenting opinion in 1962:

> ". . . an obligation to report was regarded as being of the essence, as a necessary part of *any* Mandate System that was to fulfil the objects stated in Article 22" (*I.C.J. Reports 1962*, p. 522).

Respondent's method of analysis seems to obscure the fact that, in the context of its first alternative contention regarding lapse of administrative supervision without collapse of the Mandate as a whole, in its discussion of its first alternative contention, Respondent largely ignores an interpretation of the Mandate which is the very foundation of Respondent's second alternative contention, to wit, that the Mandate as a whole has lapsed.

In connection with the development of its second alternative contention Respondent of course posits, and we believe correctly posits, the premise that international supervision was indeed a basic legal obligation inherent in and integral to the mandates system. In the context of the first alternative contention, which leaves the rest of the Mandate alive, as we understand it, Respondent does not refute the Applicants' major thesis which is, with respect, the same as that of the Court's, namely that international supervision is the very heart of the mandates system and that, in the words of this honourable Court of 1962, which I quoted a few minutes ago, to exclude the obligation of international supervision "would be to exclude the very essence of the Mandate", in the Court's words.

Respondent's argument in support of its first alternative contention, accordingly, is incomplete in our view, inasmuch as the argument ignores a major premise which, to say the least, is worthy of discussion in that context. Respondent proceeds, instead, by a process of what seems to us to be logical fragmentation or shredding, to interpret Article 6 in the light of an institution endowed with attributes essentially different from those of the Mandate now before this honourable Court.

Respondent similarly draws what to Applicants appears to be an unreal distinction between an interpretation of Article 6 based upon some general principle of international law and one based upon intention of the Parties.

Mr. President, the Applicants never have sought to show a general principle of international law as governing the Mandate, other than general and applicable principles of treaty interpretation.

The Applicants' actual argument on this point is based upon the proposition, which we understand to have been established by this honourable Court, that the Mandate, although an agreement, also is an institution, which created and introduced new international regulations particular to itself. This proposition, with respect, appears to be established in the 1950 Advisory Opinion, which described the Mandate as an institution, and I quote, "regulated by international rules" and, to the same effect, the Court held: "The international rules regulating the Mandate constituted an international status for the Territory . . ."—that is at page 132 of the Advisory Opinion.

Interpretation of Article 6 of the Mandate, as is true of all its other provisions, is to be based upon both the international regulations governing the mandate institutions, *and* the relevant principles of treaty interpretation, soundly applied in the light of the international rules thus regulating the Mandate.

Respondent attacks as "judicial legislation" application by the Court of the so-called "principle of effectiveness" in relation to the question whether Article 6 and Article 7, paragraph 1, express a basic legal rule of international supervision, or whether such provisions are limited, by their literal terms, to a specific and defunct organ.

Respondent's reasoning that this would constitute judicial legislation —the application of the principle of effectiveness—appears, with all respect, to beg the question. Such a course of interpretation could be said to be "judicial legislation" only if there had been an intent to limit Article 6 and Article 7, paragraph 1, to their explicit and literal terms, which is the point in issue. Ascertainment of the intention of the parties to an agreement is obviously a normal and a legitimate use of judicial power. Proper application of the principle of effectiveness to the Mandate makes clear that an interpretation which would exclude the essence of the Mandate would itself constitute an extreme form of so-called "judicial legislation" indeed.

In the written pleadings Respondent has set out in summary form certain principles of interpretation and of implication relevant to the ascertainment of the common intent of parties to a treaty—I refer to Book II of the Counter-Memorial, **II,** page 110 and following. The correct application of such principles to the interpretation of the Covenant, of the Mandate and of the events and transactions during the period commencing in 1945 will be elaborated in Part C of this phase of the Oral Proceedings.

I turn now, with your permission, Mr. President, to a summary consideration of Article 7, paragraph 1, of the Mandate. The intention of the authors of the mandates system to establish an obligation of international supervision as a basic and integral element of the Mandate is confirmed by considering the consequences which would flow from a lapse of Article 7, paragraph 1, of the Mandate, so long as Respondent retains rights under the Mandate. Article 7, paragraph 1, which requires consent of the supervisory organ in terms "for any modification of the terms of the Mandate", is inextricably linked with Article 6, as well as with the second paragraph of Article 7 itself.

The 1950 Advisory Opinion noted the legal and practical inter-relationship between Articles 6 and 7, paragraph 1, in the following words:

> "Article 7 of the Mandate, in requiring the consent of the Council of the League of Nations for any modification of its terms, brought into operation for this purpose the same organ which was invested with powers of supervision in respect of the administration of the Mandates."

That is from page 141 of the 1950 Opinion. It is indeed necessary that the *same organ* be vested with both powers. The "consent" to which Article 7, paragraph 1, refers, obviously must be an *informed* consent. Only the same organ entitled to receive "full information with regard to the territory", in the words of Article 6, *could* be in a position to exercise

an informed judgment in respect of proposals for modification of the terms of the Mandate.

Respondent in its written pleadings does not consider the consequences which would flow from lapse of Article 7, paragraph 1, so long as it retains its rights under the Mandate. Respondent merely argues, so far as we are aware, with respect to Article 7, paragraph 1, that the 1950 Advisory Opinion erroneously held, in reply to question *(c)* of that Opinion, that—

> ". . . the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa, and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations".

That is from page 144 of the 1950 Opinion and, as I recall, there was no dissent from that reply to question *(c)*.

Acceptance of Respondent's contention that Article 7, paragraph 1, has lapsed, would necessarily create one of two intolerable situations: either the Mandate would be frozen in its present form in perpetuity, inasmuch as there would be no supervisory organ in existence to consent to its modification, or Respondent would have the right unilaterally to modify its terms without the consent of any supervisory organ. The latter alternative would of course carry with it the power unilaterally to destroy the international status of the Territory, thus annexing it both in law and in fact. We submit therefore that the consequences which would flow from a lapse of Article 7, paragraph 1, confirm the essential nature of the retention of international supervision as a legal conclusion.

Now, Mr. President, turning to Respondent's second alternative contention, which I shall attempt briefly to summarize, Respondent's contention that the Mandate as a whole has lapsed of course would eliminate the compromissory clause as one of the casualties. This honourable Court twice has held that this clause nevertheless possesses full legal effect. Respondent, so far as Applicants are aware, has not advanced any asserted "new facts" calling for reconsideration of the Court's holding in this respect, but merely a new form of argument.

Respondent in 1962 contended that the asserted lapse of administrative supervision had brought about the lapse of the Mandate, but only as a treaty or convention. Respondent then assumed, apparently, as the 1962 Judgment pointed out, and indeed, in fact, argued, and I quote from the Judgment:

> ". . . that the rights and obligations under the Mandate in relation to the administration of the territory of South West Africa being of an objective character still exist . . ."

I have referred to this before—it is at pages 332-333 of the 1962 Judgment.

The proposition that the Mandate is a treaty or convention, being common cause between the Parties, did not arise pertinently for argument in the written pleadings or in the Oral Proceedings, as distinguished from its continued existence as a treaty or a convention following the dissolution of the League.

The 1962 Judgment held that the Mandate is a treaty or convention, and that it survives as such. Respondent, nonetheless, now contends by

its second alternative submission that the Mandate as a whole has lapsed *both* as a treaty or convention, and in a "real", or "objective", or indeed any other sense as well. Respondent, accordingly, repeats its rejected contention as to the survival of the Mandate as a treaty, and reverses, or repeals, its contention as to the survival of the Mandate in a "real" or "objective" sense. As I have said before, it matters little for the purpose in this context whether such argument was made by Respondent as an alternative argument or not.

Respondent's new form of argument no doubt is attributable to the Court's holding in 1962 that Article 7, the compromissory clause, has survived with full force and effect. Respondent's present argument is, of course, a new form of addressing itself to a basic issue previously before the Court, and decided by it.

The Applicants submit respectfully that it should *not* be presumed that the Court would have reached a different conclusion had Respondent's new form of argument been advanced to the Court at an earlier stage.

The new form of argument is based upon factual and other considerations all of which were available to the Court, or known to it, in 1950 and again in 1962. Each time, the Court held that the Mandate had not lapsed.

The Court, in 1962, held that:

> "The validity of Article 7, in the Court's view, was not affected by the dissolution of the League, just as the Mandate as a whole is still in force for the reasons stated above." (*I.C.J. Reports 1962*, p. 335.)

Respondent's new form of argument, moreover, could not be sustained unless the Court should find, both—

(1) that Article 6 and Article 7, paragraph 1, both totally lapsed as a matter of law, rather than that they merely became inoperative, and

(2) that the 1962 Judgment was wrong in holding that the right of judicial protection survived the demise of the League.

In other words, the logic of Respondent's contention leads to the anomalous conclusion that the 1962 Judgment really settled and decided nothing, except that of according to the Applicants the opportunity of presenting to this honourable Court arguments concerning the interpretation and application of a mandate which does not exist.

The essentiality of judicial protection was a major issue joined in the preliminary objections phase of these proceedings. That the issue was settled by the 1962 Judgment is conceded by Respondent, although the Court's judgment is attributed, in Respondent's circumlocution, to "the Majority Members".

Respondent admits that its arguments in support of the lapse of the compromissory clause of Article 7, along with the Mandate: ". . . involve a reconsideration of issues dealt with in the Preliminary Objections proceedings . . .". That is from page 174 **(II)** of the Counter-Memorial, Book II.

Although Respondent's argument in support of its second alternative contention that the Mandate as a whole has lapsed proceeds from a sound point of departure, that is, the nature, origin and purposes of the mandates system, and draws the sound inference therefrom that international supervision was conceived as a basic obligation, as an essential

and integral element of the system, the more logical conclusion following Respondent's correct premises in this context would no doubt have been Respondent's abandonment of its first alternative contention. The premises which Respondent reserves exclusively for its second alternative contention are decisively relevant to its first one as well. And this appears clearly, in our respectful view, from Respondent's own formulation of the matter, as follows, in its Rejoinder:

> "... as soon as the premise is accepted or assumed that accountability is essential for the existence of the Mandate, then an enquiry whether the Mandate could and did survive the dissolution of the League cannot be divorced from an enquiry whether accountability, as prescribed in the Mandate, could and did survive such dissolution: the two aspects of the enquiry then form one integral whole, and neither aspect can be answered separately from the other".

That is on page 74 of the Rejoinder, **(V)**.

With this cogent formulation the Applicants express full concurrence. The difficulty is that Respondent applies this formula only when it suits its purpose to do so, that is to say, in respect of its second alternative contention, whereas the Applicants apply Respondent's formulation without reserve.

Now, I turn, with your permission, Mr. President, to the legal issues involved in the replacement of the League by the United Nations. This will be covered more fully in Part C of this phase of the Oral Proceedings, and I would endeavour, for the sake of the Court's convenience, to attempt to summarize them briefly at this point.

Mr. President, I have endeavoured to summarize the premises and contentions supporting the Applicants' submission that a duty to submit to international supervision was embedded in the Covenant and in the Mandate, as part of their essence, and that it must be presumed to have been the common intention of the parties to those instruments that international supervision should continue so long as the mandate itself endures.

With your permission, Mr. President, I turn now to a brief summary of the arguments, which will be more fully presented in Part C of this phase of the proceedings, and which, as I have said, underly the Applicants' contention that the United Nations has replaced the League as the supervisory organ in terms of Article 6 and Article 7, paragraph 1, of the Mandate.

The Applicants' submissions in this respect reflect the law of the case as determined by this honourable Court in the 1950 Advisory Opinion. In that Opinion the Court held:

> "... that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it".

That is the end of the quote from page 137 of the 1950 Advisory Opinion.

The questions whether the United Nations had replaced the League as supervisory organ and whether Respondent had manifested its consent to such replacement were fully discussed by Respondent in the 1962 proceedings.

It was, of course, in support of this argument that Respondent adduced its so-called "new facts" contention to justify reversal of the 1950 Advisory Opinion.

The Court in 1962 did not expressly hold that the United Nations General Assembly has replaced the League Council as the supervisory organ, inasmuch as that issue did not arise directly and pertinently for explicit decision in that form. However, the Court's holding, and I quote, "that the Mandate as a whole is still in force", coupled with its finding that "all important facts were stated or referred to in the proceedings before the Court in 1950" renders it clear beyond doubt, in the Applicants' respectful submission, that the Court in 1962, at the minimum, reaffirmed the *rationale* of the 1950 Advisory Opinion in respect of the survival of Article 6 and of Article 7, paragraph 1, along with the inseparably interrelated provision for judicial protection accorded under Article 7, the second paragraph, of the Mandate.

Under Respondent's premise, that is, that of a limited original obligation to report to a specific supervisory organ, the disappearance of such an organ without more would necessarily have ended the obligation. It would legally follow from such a premise that a wholly new undertaking would have been necessary to amend the original agreement in a material and, indeed, essential respect. It likewise would follow that an amendment of such a nature would have to be established by evidence so unequivocally clear as to permit of no other reasonable conclusion. These propositions, which are laboured at some length in Respondent's pleadings, are quite self-evident in the Applicants' respectful view. The difficulty with these propositions, on the basis of the Applicants' major premises, is that they are irrelevant because they proceed from a false premise regarding the essential nature of the Mandate which is before the Court.

In the light of the irrelevance of these propositions, in the Applicants' point of view, the Applicants do not think it necessary to make extensive and detailed argument to support the conclusion that the events and transactions during the relevant period do indeed permit of no other conclusion than that, had a wholly new agreement been necessary to amend the Mandate in an essential respect at that time, such a new agreement was, in fact, concluded among all the parties to those transactions and events. Although the Applicants do not deem it necessary or appropriate to make an extensive argument to support such a proposition, because of our view of the correct major premise which we submit to the Court and upon which we base our case and rely, it would nevertheless be demonstrable in our view that such a conclusion, even one based upon a false premise of the necessity for explicit showing of an unequivocally clear, affirmative agreement to accept the supervision of the new organ, and all these elements, would appear to be consistent as a conclusion with what this honourable Court had to say in the 1950 Advisory Opinion concerning these same events and transactions; in particular, the Court's explicit finding that the Respondent's "declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate . . ." as well as the Court's finding in 1950 that the League resolution of 18 April 1946, in favour of which Respondent voted, and I quote again from the Opinion, "presupposes that the supervisory functions exercised by the League would be taken over by the United Nations". And that is at page 137 of the 1950 Advisory Opinion.

However, Mr. President, whatever conclusions might be reached in respect of the degree or quality of truth necessary to demonstrate a new amendment under the false premise from which Respondent proceeds, a different set of considerations, we submit, is applicable if one proceeds from the premise that the obligation of international accountability is an essential and integral element of the Mandate and that it must survive so long as the Mandate itself endures. It would follow from this premise, upon which the Applicants rest, that the only remaining question—although an important one indeed—would be whether the function of supervision passed to the nearest equivalent of the League, to wit, the United Nations. If not, these Articles would not have lapsed, but would have become inoperative for lack of a supervisory organ with capacity to replace the League Council. In such a case, and pending establishment of an international administrative organ, if any, the only continuing method for insuring international supervision over the sacred trust would be that of judicial protection, as a first and only recourse, rather than as the "final bulwark".

The answer to the question whether Articles 6 and 7, paragraph 1, of the Mandate became inoperable, or whether the United Nations replaced the League as the supervisory organ, hinges upon both a legal analysis of the "international rules" regulating the Mandate, *and* upon ascertainment of the intentions of the parties with respect to the events and transactions which transpired during the period when the League was dissolved and the United Nations began operations.

With respect to the international rules regulating the Mandate, the Applicants have never conceived, nor do they do so now, that the United Nations acquired title to the League's supervisory power over mandates by virtue of some general international legal principle of devolution or succession, *aliunde* the mandate.

It is true that the phrase "automatic succession" is employed on one occasion in the Applicants' written pleadings, and that is in the written observations. The Applicants regret any misleading impression which may have been created by the use of that phrase. As Respondent itself points out, no concept of "legal succession" was advanced in the Oral Proceedings by the Applicants, nor in the Applicants' Reply and, as Respondent correctly says, any suggestion of automatic succession is, indeed, "largely academic". (V, p. 154.)

I welcome this opportunity to clear up this matter, lest it remain as a source of confusion or doubt to this honourable Court.

Reference to "succession" in the Applicants' pleadings is intended to refer to the fact that there was no mechanical or operational problem of succession. The terms "replacement" or "substitution", might, indeed, have better conveyed the intended sense, and the Applicants would have preferred to have used them and regret that they did not.

The Applicants, with respect, fully associate themselves with the declaration made by President Winiarski in connection with the 1956 Advisory Opinion. In that declaration, the learned Judge commented, *inter alia*:

> ". . . I think that as the Opinion of 1950 was not based on the idea of the United Nations as a successor in title of the League of Nations, the question of a devolution of the powers of the Council of the League of Nations to the General Assembly does not arise. I am in agreement with the minority opinion in considering that the whole

structure of the Opinion of 1950 was founded on the objective elements of the situation which arose as a result of the disappearance of the League of Nations, and that that Opinion found in the General Assembly the organ qualified to exercise those functions which could not be allowed to go by default." (*I.C.J. Reports 1956*, p. 33.)

The Applicants also submit, with respect, that the last-quoted clause of President Winiarski's opinion—"which could not be allowed to go by default"—is of significance in dispelling any doubt as to the meaning of the Court's finding in the 1950 Advisory Opinion that:

"To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." (*I.C.J. Reports 1950*, p. 133.)

The minority opinion in the 1956 Opinion, to which President Winiarski referred, was that of the learned Judges Badawi, Basdevant, Hsu Mo, Armand-Ugon, and Moreno Quintana. In that opinion, the learned Judges commented as follows, *inter alia*:

"The spirit of the Opinion [i.e., the 1950 Opinion] thus fully confirms what is expressed by its letter: the continuity of the Mandate and of the international obligations of the Union of South Africa which result therefrom." (*I.C.J. Reports 1956*, p. 65.)

"The Opinion does not base itself on the idea of succession, on the idea of the transfer of powers.

The Court, unattracted by the idea of succession, of the transfer of powers, based itself on the objective elements of the situation—the importance of international supervision under the Mandates System as well as the provisions of the Charter of the United Nations." (*Ibid.*, p. 66).

And, as was said by Judge Bustamante, in his separate opinion in 1962:

"Following the scheme of all conventions, in the Mandate agreements provision is made in such a way as to guarantee the functioning of the system *during the whole period of its duration.*" (*I.C.J. Reports 1962*, p. 382.)

Evaluation and appreciation of the events, transactions and undertakings which occurred in 1946, and during this period, accordingly, must proceed from this premise. Seen in the light of this premise of the continuity of the Mandate, and of the international obligations which result therefrom, and the guarantee of the functioning of this system during the whole period of its duration, it becomes obvious, in the Applicants' respectful submission, that all the parties, including the Respondent, the League of Nations, the United Nations, acted in a manner entirely consistently with the "objective elements of the situation which arose as a result of the disappearance of the League of Nations", in the words of the minority opinion, from which I have quoted, and of President Winiarski's opinion, as I understand it.

In Part B of this phase of the Oral Proceedings, immediately following, my colleague, Mr. Moore, will present to the Court the relevant events and undertakings which took place during the period when the United Nations Charter was formulated, the League of Nations was dissolved, and the United Nations commenced operations.

In the light of these events and undertakings, it will be obvious, in our respectful submission, that the League of Nations took all action which was appropriate under the circumstances, to make clear the intention of the Members, including the Parties to these proceedings, that despite its dissolution the obligations under the Mandate would continue—

> ". . . until other arrangements have been agreed between the United Nations and the respective mandatory Powers". (Resolution of the League of Nations of 18 April 1946; quoted in I, pp. 42-43.)

Respondent, which had made statements indicative of its desire to annex the Territory, manifested its intention to seek agreement with the United Nations to such an arrangement. Respondent voted in favour of the 18 April 1946 resolution, thereby acquiescing in what the Court termed a presupposition of the League that the United Nations would take over the supervisory functions of the Mandate, for what was, indeed, hoped would be a short, transitional period, during which arrangements would be completed for trusteeships under the plan of the United Nations Charter.

In the event, the expectation of the trusteeship system becoming operative was fulfilled, with the sole and single exception of the Mandate for South West Africa. All other mandated territories, without exception, either became independent, or were placed under trusteeship, so far as the Applicants are aware.

Pursuant to the 18 April 1946 resolution, to which I have referred, for which Respondent voted, Respondent did, in fact, seek thereafter to make "other arrangements" with the United Nations, thus recognizing the competence of the latter, in the premises. No agreement, however, has been reached. For its part, the United Nations affirmed its competence by resolution 65 (I), of 14 December 1946 (*I.C.J. Reports 1950*, at p. 143). Hence, what was contemplated and hoped for as a brief, transitional period, during which the mandate obligations would continue until replaced by other agreed arrangements, has extended itself into one of long duration, and continues to exist.

The validity of the foregoing propositions, and the legal conclusions which, in our view, are inescapably to be derived therefrom, have been affirmed by this honourable Court. They constitute the reasons for which the Court, in its 1950 Advisory Opinion, concluded, in the words of the Court:

> ". . . that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it". (*I.C.J. Reports 1950*, p. 137.)

Mr. President, in the light of the same events and transactions, including statements made and actions taken by Respondent, this honourable Court concluded, in its 1962 Judgment, that:

> "There could be no clearer recognition on the part of the Government of South Africa of the continuance of its obligations under the Mandate for South West Africa, including Article 7, after the dissolution of the League of Nations." (*I.C.J. Reports 1962*, p. 340.)

Mr. President, and honourable Members of the Court, it seems, with respect, that there is an inescapable implication in the phrase "including Article 7", and the implication must be, it seems to us, that the "normal securities", in the words of the Court, likewise continued.

Now I turn very briefly, Mr. President, with your permission, to the asserted violations of Article 4 and Article 2, paragraph 1, of the Mandate. The Applicants will deal at the later, if I may call it, fact stage of these proceedings, with the issues presented by Respondent's asserted violations of Article 4 of the Mandate, the so-called "military clause", and of Article 2, paragraph 1, of the Mandate, which, together with Article 22 of the Covenant, prohibits Respondent from treating the Territory in a manner inconsistent with its international status, including impediment of opportunities for self-determination by the inhabitants of the Territory. It does appear pertinent, however, at this legal stage of these proceedings to note that the controversy placed before the Court with respect to factual issues involved in the so-called "military clause" of Article 4, are before the Court as a result of the lack, or default, of administrative supervisory authority, which would be in a position to ascertain the true state of affairs. The controversy thus placed before the Court as to the accuracy, or otherwise, of relevant facts would not, and should not, have been necessary if administrative supervisory machinery were operating in accordance with the intentions of the authors of the mandates system and the international rules regulating the Mandate.

The facts asserted by the Applicants with respect to this matter must, under the circumstances, be asserted on what would be called, in jurisdictions with which I am familiar, information and belief. It is submitted, therefore, that the very fact that there is a controversy regarding facts, as to which there should be no controversy necessary, is in itself confirmatory of the essentiality of administrative supervision in the scheme of the Mandate.

Mr. President, and Members of this honourable Court, I have now concluded Part A of this phase of the Oral Proceedings, consisting of a summary presentation of legal issues pertinent to Applicants' several submissions, as set out in the Memorials at I, pages 197-198.

As I have stated earlier, Mr. President, with your permission, this is to be followed by Part B, which will deal with the background and history of relevant events and transactions; Part C, which will deal with legal issues relevant to obligations to submit to international supervision, and Part D, which will deal with legal issues relevant to obligations toward the inhabitants of the Territory, and corresponding to the sacred trust of civilization, as referred to in Article 22 of the Covenant of the League of Nations.

I beg leave, Mr. President, to introduce my colleague, Mr. Edward R. Moore, who will present to the honourable Court, if it please the Court, Part B of this phase of the Oral Proceedings, to wit, the history of events and transactions relevant to a full consideration of the legal issues joined in the cases at bar.

4. ARGUMENT OF MR. MOORE

COUNSEL FOR THE GOVERNMENTS OF ETHIOPIA AND LIBERIA AT THE PUBLIC HEARINGS OF 18 AND 19 MARCH 1965

Mr. President and Members of the honourable Court, please be assured of my appreciation of the great honour of this opportunity to appear before you once again to assist in the presentation of Applicants' arguments in the South West Africa cases.

PART B

Mr. President, since so much of Applicants' dispute with Respondent turns on a proper evaluation and appreciation of the origin and contents of the mandates system, I trust you will deem it appropriate at this point to review the historical background, with particular reference to the basic nature of the mandate agreement for South West Africa and to Article 22 of the Covenant of the League of Nations.

I think it is important to note, Mr. President, that this honourable Court, both in the 1950 Advisory Opinion and in the 1962 Judgment, commenced its analysis with a review of the nature of the mandates system. Applicants also have presented an analysis of the nature of the mandates system prior to setting out an evaluation of Respondent's obligations thereunder.

This is important because, in our submission, it is not possible to reach a proper evaluation and appreciation of Respondent's legal obligations under the mandate agreement without first understanding the essential nature of the mandate system. Any of the several obligations contained in the mandate agreement for South West Africa is best understood in the light of the basic nature of the mandates system as a whole.

However, Respondent's approach appears to be based on an entirely different premise. In an attempt to limit the scope of the several mandate obligations, Respondent has tended to begin with the wording of the particular obligations it assumed with respect to South West Africa, and to induce therefrom its version of the basic nature of the mandates system.

Thus, Mr. President, to provide one illustrative example: Respondent, after citing the provisions of the Covenant and the mandate agreement for South West Africa with regard to the obligations of international accountability, concluded that the "content" of the obligation was not an obligation to submit generally to "international supervision" or to supervision by the "international community", or the like, but was rather an obligation to—

> "report and account to a *specific* organ of a *specific* organization of *certain* of the nations of the world, namely, the Council of the League of Nations". (Counter-Memorial, **II**, p. 119; italics in original text.)

This concentration on the form, rather than the substance and basic nature of the mandates system, has in fact led to the present dispute between the Respondent and the Applicants, and to the Respondent's differences with the United Nations.

In an attempt, then, to clarify still further the basic and essential nature of the mandates system, I should like to turn, Mr. President and Members of the Court, to a review of the essential features of that system.

The authority of Respondent in the Mandated Territory of South West Africa derived from the several international agreements and treaties which became effective immediately after the First World War.

It will be recalled that pursuant to Articles 118 and 119 of the Treaty of Versailles, Germany renounced all of her overseas possessions, including German South West Africa, in favour of the Principal Allied and Associated Powers.

The proper disposition of the former German colonies was a source of much debate among the Principal Allied and Associated Powers, while the solution actually arrived at, and the significance thereof, constitute an important source of the present dispute between the Applicants and the Respondent.

While it was clear at the Paris Peace Conference in 1919 that there was support for territorial annexation, it was equally clear that opposition to such a viewpoint, even with regard to all of the former German colonies, was preponderant.

Of great importance in this connection was the presentation by President Wilson, on 8 January 1918, of his Fourteen Points. Point No. 5 was as follows:

> "A free, open-minded and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined." (Quoted in Miller, D. H., *The Drafting of the Covenant* (1928), Vol. I, p. 101.)

On 29 October 1918, the Cobb-Lippmann Memorandum was published elaborating President Wilson's Fourteen Points, of which the fifth was explained, in part, by C. Seymour in his publication entitled *The Intimate Papers of Colonel House* as follows:

> "It would seem as if the principle involved in this proposition is that a colonial power acts not as owner of its colonies, but as trustee of the natives and for the interests of the society of nations, that the terms on which the colonial administration is conducted are a matter of international concern and may legitimately be the subject of international inquiry and that the peace conference may, therefore, write a code of colonial conduct binding on all colonial powers." (Seymour (ed.), *The Intimate Papers of Colonel House* (1926-1928), Vol. IV, pp. 194-195.)

Mr. President, if this was true of colonies, it applied *a fortiori* to mandated territories.

On 7 May 1919, the Principal Allied and Associated Powers, acting through the instrumentality of the Supreme War Council, formally decided that the territory of German South West Africa should be held under mandate by the Union of South Africa.

On 27 June 1919, draft mandate instruments prepared by Lord Milner were circulated and discussed among the Principal Allied and Associated Powers. It was then agreed that a mandate commission should be established for the purpose of drafting the final mandate agreements.

The commission was to consist of one representative from each of the five Principal Allied and Associated Powers.

Although Article 22 of the Covenant of the League of Nations became effective on 10 January 1920, it was not until the end of the year 1920 that the mandates system became effective. A draft mandate for German South West Africa, prepared by the British Government and conferring the Mandate upon His Britannic Majesty on behalf of the Union Government, was submitted to the Council of the League on 14 December 1920 and was confirmed by the Council on 17 December of the same year.

Mr. President, I will now address myself to the importance of the principle of non-annexation.

[Public hearing of 19 March 1965]

Mr. President, with your permission I will now continue discussion of Part B of this phase of the Oral Proceedings.

Yesterday I began by stressing the necessity to this case of a clear understanding of the basic nature of the mandates system, and I endeavoured to show that the overwhelming viewpoint at the Paris Peace Conference was against annexation of territories. I will now address myself to the importance of the principle of non-annexation.

In the Advisory Opinion of 11 July 1950, this honourable Court stated:

> "When a decision was to be taken with regard to the future of these possessions as well as of other territories which, as a consequence of the war of 1914-1918, had ceased to be under the sovereignty of the States which formerly governed them, and which were inhabited by peoples not yet able to assume a full measure of self-government, two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form 'a sacred trust of civilization'." (*I.C.J. Reports 1950*, p. 131.)

The Court in 1950 went on to say that for purposes of—

> "giving practical effect to these principles, an international régime, the Mandates System, was created by Article 22 of the Covenant of the League of Nations". *(Ibid.)*

It should be noted that the principle of non-annexation had broad support during the period prior to the Paris Peace Conference. Reference has already been made to the fifth of President Wilson's Fourteen Points, and the interpretation thereof by the Cobb-Lippmann Memorandum.

Another important step in the development of Article 22 of the Covenant of the League of Nations was a meeting of the Imperial War Cabinet on 28 November 1918. At this meeting it was generally agreed that as part of the general mandates scheme—

> "there would be a right of appeal from the mandatory power to the League of Nations on the part of anyone who considered himself ill-treated or claimed that the conditions set down by the League of Nations were not being fulfilled. Subject to such an appeal, which might involve the League of Nations withdrawing the mandate in the case of deliberate and consistent violation of its conditions, the mandate would be continuous until such time as the inhabitants of the country themselves were fit for self-government." (Lloyd George, *The Truth About the Peace Treaties* (1938), Vol. I, p. 118.)

It can be truthfully asserted that there was a "compromise" on the issue of annexation, but it is also apparent, even obvious, that the solution finally accepted was a "compromise" only in so far as there was no provision for the "open door" in the "C" Mandate provisions eventually adopted as Article 22, paragraph 6, of the Covenant.

Professor Quincy Wright has summarized the so-called "compromise" reached by the Council of Ten as follows:

> "President Wilson had thus prevented annexation, got the principle of mandates accepted for all the territories, and postponed final allocation of mandates until the League of Nations was in operation, though he had been obliged to recognize the prior claim of the Occupying Powers to receive mandates, the special claim of the Dominion in respect to the open door and of France in respect to recruiting natives." (Wright, *Mandates Under the League of Nations* (1930), p. 41.)

There is no indication by this leading scholar that the basic principle of non-annexation was compromised in any way; and it can only be concluded from his and other publications on this point that Applicants' statement in the Memorials that the mandates system represents "a victory for the opponents of the principle of annexation" is entirely correct.

Mr. President, as stated by Applicants in the Reply, the non-annexation principle underlying the mandates system—

> "is a negative form of expressing the affirmative objective of developing the Mandates, as rapidly as possible, towards sovereignty of their own". (Reply, **IV**, p. 238.)

Respondent argues that is has acknowledged the principle of self-determination, but states that—

> "Even full annexation of a territory, and the exercise of complete sovereignty over it (and *a fortiori* any situation falling short thereof, such as one 'not far removed from annexation') would clearly not be inconsistent with the recognition of a duty, legal or otherwise, to lead its inhabitants towards self-determination, self-government or even independence." (Rejoinder, **V**, pp. 17-18.)

Applicants do not deny that at any given point in time, the exercise of complete sovereignty over a territory may not necessarily be inconsistent with the recognition of a duty to lead the inhabitants of that territory towards self-government and self-determination. The question, however, is not one of theoretical recognition of a duty, but the practical steps to be taken to carry out that duty.

As the record herein makes clear, after the First World War Respondent requested permission to annex South West Africa, but was turned down by the Paris Peace Conference. In 1935 Respondent put before the Permanent Mandates Commission a proposal for the incorporation of South West Africa as a fifth province of the Union, but when met with a critical attitude by most of the members of the Commission, decided not to go ahead with its plan for incorporation.

In 1946 Respondent once more placed a proposed plan of incorporation before the "competent international organ"—the "competent international organ" is a quotation of their very words, and in this case they referred to the General Assembly of the United Nations. Again Respondent's request was turned down. Ever since the refusal of the General

Assembly in 1946 to accede to the request for incorporation, Respondent has carried out a series of steps each designed to bring the Territory of South West Africa, to use Respondent's phrase again, into "closer association" with the Republic of South Africa. Indeed, Respondent has argued that—

> "the interests of the Territory and of the inhabitants may at particular stages be best served—as has in fact been the case regarding South West Africa—by progressive steps of closer association". (Counter-Memorial, **IV**, p. 69.)

Thus, Mr. President, Respondent's position appears to be that so long as it says that it recognizes a duty to prepare the inhabitants of South West Africa for self-government and self-determination, there can be no violation of the mandate obligations even if, after 40 years of mandatory administration, Respondent is still carrying out "progressive steps of closer association".

The historical record demonstrates the importance which the founders of the mandates system attached to the principle of self-determination. Thus, at the 28 November 1918 meeting of the Imperial War Cabinet, it was generally agreed that—

> "the mandate would be continuous [subject to appeal in case of ill treatment] until such time as the inhabitants of the countries themselves were fit for self-government". (Lloyd George, *op. cit.*, Vol. I, p. 118.)

In his pamphlet entitled "The League of Nations—A Practical Suggestion" General Smuts endorsed the principle of "self-determination or the consent of the governed to their form of government" (Miller, D. H., *The Drafting of the Covenant* (1928), Vol. II, p. 27), although he excluded the German colonies in Africa and the Pacific from his plan. General Smuts had conceived of the mandates system as, to use his words, a "temporary expedient" (see Miller, *op. cit.*, p. 36) and he did so with the strong implication that the system was to be a stepping stone towards self-government and self-determination.

President Wilson in his Second Paris Draft of 20 January 1919 added the following provision: in his words—

> "The object of all such tutelary oversight and administration on the part of the League of Nations shall be to build up in as short time as possible out of the people or territory under its guardianship a political unit which can take charge of its own affairs, determine its own connections, and choose its own policies. The League may at any time release such a people or a territory from tutelage and consent to its being set up as an independent unit." (Miller, *op. cit.*, p. 104.)

This statement of President Wilson demonstrates clearly how far removed was his conception of self-determination from the conception now held by Respondent. The phrase "as short time as possible" indicates the view of President Wilson that something more than "progressive steps of closer association" would be required from mandatory powers after decades of mandatory administration. The phrase "a political unit" indicates his view that the concept of self-government and self-determination meant the establishment of a political unit, and not several political units.

The cited paragraph from President Wilson's Second Paris Draft was carried intact into Wilson's Third Paris Draft. He expressed his view in the Council of Ten on 27 January 1919 as follows:

> "Where people and territories were undeveloped [the Mandatory Power should] assume their development so that, when the time came, their own interests, as they saw them, might qualify them to express a wish as to their ultimate relation . . . The fundamental idea would be that the world was acting as trustee through a mandatory, and would be in charge of the whole administration until the day when the true wishes of the inhabitants could be ascertained." ([1919] *Foreign Relations of the United States*, Vol. III (Paris Peace Conference), p. 741.)

The words "as they saw them" in this passage again point to the discrepancy between the concept of self-determination as understood by the founders of the mandates system and as construed by Respondent.

As discussed in the Reply, an indication that the framers of Article 22 of the Covenant viewed self-determination of the inhabitants of mandated territories as important, and eventual self-government as a necessary development, is the presence of the word "yet" in Article 22, paragraph 1.

The paragraph reads: "Territories . . . which are inhabited by peoples *not yet able* to stand by themselves under the strenuous conditions of the modern world . . ."

The importance of the concept of self-determination to the Paris Peace Conference was summarized by Hall, a leading authority on the mandates system, as follows:

> "As conceived by the Paris Peace Conference, the Mandates System was not merely an expedient limited to a particular situation; it was also thought of as something essentially temporary in character. The assumption was that it would come to an end when the various mandated territories were able to 'stand by themselves'." (Hall, H. D., *Mandates, Dependencies and Trusteeship* (1948), p. 31.)

Another development of great significance was the refusal of the Milner Commission to adopt a proposed article for "C" Mandates which provides that:

> "If it should occur that the natives of the mandated territory express the desire to be united to the mandatory power and the Allied and Associated Powers consider that this proposal is made in good faith and with the approval of the majority of the population and so as to favour its best interests, the Allied and Associated Governments may accede to this request. In this case, the mandated territory shall be incorporated into the Mandatory Power to all useful ends, and the administration established by the present act shall cease to exist." (Conférence de la Paix, 1919-1920, *Recueil des Actes de la Conference*, Partie VI, p. 356.)

This proposed amendment was discussed at a meeting of the Milner Commission on 10 July 1919. M. Simon stated during the discussion that he felt this article was dangerous in that, to use his words, "it would be pure mockery to permit natives to express their *desiderata* if they are in conformity with those of the Mandatory Power". (*Ibid.*, p. 354.) Upon his suggestion, the article was dropped. There was no later discussion of re-insertion of this provision, either by the Milner Commission,

or during later discussions among the Principal Allied and Associated Powers and in the Council of the League of Nations. As is obvious from the text, this article would have made another significant distinction between "B" and "C" Mandates, and its rejection may be interpreted as evidence of the true nature of the concept of self-determination as viewed by the founders of the mandates system.

Mr. President, it is clear, in Applicants' submission, that the basic principle of self-determination includes two necessary elements: first, an independent political unit; and second, the free choice of the inhabitants.

With your permission, I should like to turn now to the relevant historical background with specific regard to the basic obligations of international accountability contained in Article 22 of the Covenant of the League of Nations and in the mandate agreement for South West Africa.

As I have already indicated, Mr. President and Members of the Court, the fifth of President Wilson's Fourteen Points of 8 January 1918 provided a form of international control. As elaborated in the Cobb-Lippmann Memorandum of October 1918 this was to mean that "a colonial power acts not as owner of its colony, but as true trustee for the natives and for the interests of the society of nations, that the terms on which the colonial administration is conducted are a matter of international concern and may legitimately be the subject of international inquiry". (Seymour (ed.), *The Intimate Papers of Colonel House* (1926-1928), Vol. IV, p. 195.)

The pre-Conference evaluation of the mandates system shows clearly the interpretation projected by the writers and planners concerned with it. Thus, P. H. Kerr, of the *Round Table*, stated that the Mandatory Power "ought to govern the dependency as trustees for all mankind". (Grant, A. J., *Introduction to the Study of International Relations* (1916), p. 179.)

The *New Statesman* put the "sacred trust" argument as follows:

> "If the Allies determine at the end of the war to retain control of the German colonies they might and ought to give a solemn undertaking to hold those territories in trust for civilization, to treat the interests of the natives therein as paramount . . ." (*New Statesman*, VII, p. 583 (1916).)

Even General Smuts, who felt that the proposed mandates system should not be applicable to the Territory of South West Africa, felt that "the disposal of these colonies should be decided on the principles which President Wilson has laid down in the fifth of his celebrated fourteen points". (Miller, *op. cit.*, Vol. II, p. 28.)

Perhaps the most succinct statement of the nature of the obligation of international accountability was made by President Wilson himself. To use his words, "the administration will be so much in the view of the world that unfair processes could not be successfully attempted". (Written Statement of the United States before the International Court of Justice: *(1950) I.C.J. Pleadings, Oral Arguments, Documents*, p. 107.)

Obligations of international accountability could only be performed through an international body. Thus, it was natural that the discussions concerning the projected League of Nations in turn provided much of the

opportunity for suggestions as to possible means of international supervision by the League of mandated areas.

The result of this was that, although the writers, commentators, and statesmen differed on the *technical form* that international supervision of mandated areas would take, there was unanimous agreement on the desirability and necessity of international supervision of mandated areas, and the corresponding obligation of international accountability.

For example, J. S. Hobson, a member of the group contributing to the *Round Table*, advocated a "Standing International Council" which would select States to receive the right to administer areas liberated from the imperial control of Turkey or Germany, provided that the chosen States did so in a manner not prejudicial to the interests of other nations. (Hobson, J. S., *Towards International Government* (1915), p. 141.) P. H. Kerr soon extended the idea to the protection of the well-being of the inhabitants of the territories, stating that the ruling powers "are to govern the dependency as trustees for all mankind". (Grant, *op. cit.*, p. 179.)

As the Peace Conference drew near, and as proposals for a League of Nations grew more precise and detailed, it was natural that the founders of the League should conceive of international supervision and international accountability as duties to be carried out through the instrumentality of the projected League. Thus, the members of the *Round Table* published in the December 1918 issue an article on the German colonies which proposed that supervision and ultimate control of mandated areas be placed in the hands of the League. (*Round Table*, IX, pp. 1-47, at p. 27.)

Shortly thereafter, General Smuts devoted a major portion of his publication *A Practical Suggestion* to the details of the mandates system which was to be based on the principles of no annexations and of self-determination. His basic thesis was, in his words, that "any authority, control or administration which may be necessary in respect of these territories and peoples, other than their own self-determined autonomy, shall be the exclusive function of and shall be vested in the League of Nations and exercised by or on behalf of it". (Miller, *op. cit.*, Vol. II, p. 30.)

The substance of these provisions was taken by Smuts from the *Round Table* article already cited, where provision for both international accountability and the protection of inhabitants were clearly spelled out, including the ultimate right of retraction and transfer of the mandate by the international organization.

The broad mandates system embodied in Smuts' proposal was taken up almost intact by President Wilson in the first two Draft Covenants he wrote after reaching Paris. Wilson envisaged even stronger international control of the mandates system, and he offered a provision permitting the League "at any time" to "release such a people or territory from tutelage and consent to its being set up as an independent unit". (*Ibid.*, p. 104.)

Hence, Mr. President, I think it clear that throughout the pre-conference evolution of the mandates system, the concept of international supervision of the mandatory's execution of the mandates was dominant. In the actual drafting of Article 22 at the Conference, this concept remained of central importance.

That the founders of the mandates system, and the drafters of Article

22 of the Covenant of the League of Nations were more concerned with the general obligations of international accountability than with the precise organ of the League to which the mandatory powers would report, may be seen from the history surrounding the adoption of Article 22, paragraph 9, of the Covenant of the League. This article, it will be recalled, states that:

> "A permanent Commission shall be constituted to receive and examine the annual report of the Mandatory and to advise the Council on all matters relating to the observance of the Mandates."

The idea of a permanent Commission first emerged in the British "Draft Convention" of 24 January. However, it was dropped from the Hankey-Latham draft of 28 January. (Scott, E., *Official History of Australia in the War of 1914-1918* (1938), Vol. XI, pp. 781-783.)

The Hankey-Latham draft provided simply that "in every case of mandate, the mandatory State shall render to the League of Nations an annual report in reference to the territory committed to its charge". (Miller, *op. cit.*, Vol. I, p. 110.)

This is important, Mr. President and Members of the Court, because the Hankey-Latham draft was adopted almost verbatim as Article 22 of the League Covenant. A statement of the nature and principles of the proposed mandates system, the Hankey-Latham draft was primarily concerned with the general legal obligations of mandatory powers, and not the precise form or technical body through which the obligations of international accountability would be carried out. In short, the draft was more concerned with the *nature* of the international obligations undertaken by mandatory powers, rather than the precise form and details of those obligations.

However, President Wilson, evidently aware of the illogic of having no official body to receive and examine the annual report, stated in the Council of Ten on 30 January, that "there must be a responsible body . . . to hear the self-expression" of the people under tutelage. ([1919] *Foreign Relations of the United States*, Vol. III (Paris Peace Conference), pp. 788-789.)

Thereafter, General Smuts submitted a draft of Article 22, paragraph 9, to the League Commission on 8 February, and the clause was retained without change down to the final adoption of the Covenant on 28 April. (Miller, *op. cit.*, Vol. II, pp. 272, 274-275.)

It seems fair, therefore, to conclude that the Hankey-Latham draft, in so far as it established a mandates system without a specific League organ to oversee the workings of that system, was rejected for its imprecision. However, it is apparent that the primary concern of the founders of the mandates system was the obligation of international accountability, and not the details which would spell out the manner in which the obligations would be carried out.

Mr. President, the provision in Article 22, paragraph 7, for an annual report is, of course, at the very heart of the mandates system. As analysed by one leading authority on the mandates system, "the annual reports of the mandatory powers and their examination by the Commission were the heart of the mandates system". (Hall, *op. cit.*, p. 186.)

The idea of annual reports from colonial areas was a long-established practice on the national level by the middle of the nineteenth century, and the practice was discussed in the international realm at the Congress

of Vienna in 1815, and again at the Brussels African Conference in 1890.

In his *A Practical Suggestion*, General Smuts included a reference to "periodic reports from the Mandatory *(sic)* State", although he did not include such a stipulation in his final recommendation. (Miller, *op. cit.*, Vol. II, p. 32.)

The British "Draft Convention" of 24 January provided for annual reports from mandatories of both "vested" territories and "assisted" States. (Miller, *op. cit.*, Vol. I, p. 107.) The provision in its final form was included in the Hankey-Latham draft of 28 January.

However, no further discussion ensued during the meetings of the Council of Ten, or the League Commission. Thus, the annual report provision, generally recognized as constituting a crucial means of maintaining international control over the exercise of the mandate, was never a source of debate during the drafting of Article 22 of the League Covenant.

Yet it is apparent that the provision for an annual report was considered of the most crucial importance by the founders of the mandates system. The report submitted by the Belgian representative to the League Council, Mr. Hymans, and later unanimously adopted by the Council, rendered clear the broad scope of the annual report requirement:

> "Is the Council to content itself with ascertaining that the mandatory Power has remained within the limits of the powers which were conferred upon it, or is it to ascertain also whether the mandatory Power has made a good use of these powers, and whether this administration has conformed to the interests of the Native population?
>
> It appears to me that the wider interpretation should be adopted. Paragraphs 1 and 2 of Article 22 have indicated the spirit which should inspire those who are entrusted with administering peoples not yet capable of governing themselves, and have determined that this tutelage should be exercised by the State in question as mandatories and in the name of the League. The annual report stipulated for in Article 7 should certainly include a statement as to the whole moral and material situation of the peoples under the Mandate. It is clear, therefore, that the Council also should examine the question of the whole administration." (League of Nations Council, P.V., 20/29/14 (8th Sess.), p. 187.)

The essential nature of the reporting requirement was thus made clear by the League Council. For the Council caused the mandatory powers to submit reports on their administration of the various territories, and examined such reports even prior to final approval of the mandate instrument for the several mandated territories. Administration of the mandated territories was allowed by the Council, prior to the approval of the mandate instruments, only on condition that the reports be submitted to the Council.

The Council thus made clear from the outset the essential and necessary connection between administration of mandated territories, and the corresponding obligation of international accountability. In so doing, the Council made manifest its understanding with regard to the basic nature of the accountability obligation of the mandates system and showed clearly that the *nature* of the obligation was, in its view, the basic and controlling consideration.

The essential nature of the obligation of international accountability also emerges by reference to the history concerning the provisions of the mandate agreements, requiring the consent of the Council for any modification of the terms of the Mandate.

The draft submitted by the Milner Commission to the Principal Allied and Associated Powers was in the following form: "the consent of the Council of the League of Nations is required for any modification of the terms of this Mandate." ([1919] *Foreign Relations of the United States*, Vol. IX (Paris Peace Conference), p. 656.)

The Balfour draft, submitted to the Council of the League of Nations on 14 December 1920, included the following clause:

> ". . . the consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate, provided that in the case of any modification proposed by the Mandatory, such consent may be given by a majority". (Oral proceedings, 22 Oct. 1962, morning.)

The Secretariat of the Council, in its memorandum submitted on 17 December 1920, recommended that the words following "Mandate" be dropped, thus restoring the provision to its original form, as provided in the draft submitted to the Principal Allied and Associated Powers by the Milner Commission.

The significance of the above is readily apparent. By requiring the unanimous consent of the Council for any proposed modification of the terms of the Mandate, even if such modification were proposed by the mandatory power, the founders of the mandates system were stating implicitly that the obligation of international accountability was to be interpreted liberally. Changes in the terms of the mandatory power's administration should be subject to the strictest international supervision.

Professor Quincy Wright has summarized the afore-mentioned consideration as follows:

> "Continuous international supervision is the essence of the mandates system. It focuses attention upon the problem of backward areas as concretely presented by the mandated area from the native and the world points of view. Anyone is a poor judge in his own case, and however it may try, a state has always found it difficult to visualize a subject people except from the standpoint of its own interests." (Wright, *op. cit.*, p. 585.)

Mr. President, it may be pertinent at this point to review the historical background with regard to promotion of the material and moral well-being and the social progress of the inhabitants of the mandated territory.

Concern with the well-being and progress of the inhabitants of the mandated areas was evidenced throughout the discussion of possible types of mandates, prior to the Peace Conference.

The drafts submitted by Lord Milner, as the basis of discussion for the "C" Mandates, at the first meeting of the Milner Commission, contain the following provision:

> "The mandatory Power . . . accepts the Mandates to govern . . . as guarantor of the well-being and development [of the inhabitants of the Mandated Territory]." (*Recueil, op. cit.*, p. 330.)

In the draft of the "B" Mandates, the same provision was inserted

in both the American and French drafts presented to the Milner Commission on 8 July 1919, with the addition in the case of both drafts of the term "social progress". (*Recueil, op. cit.*, p. 340 (Art. 2); p. 343 (Art. 1).) The provision for social progress was inserted in the "C" Mandate draft in the 10 July revised text. For the first time a separate sentence was devoted to this provision for the well-being of the Natives:

> "The Mandatory Power agrees to increase by all means in its power, the material and moral well-being and social progress of the natives of the Mandated Territory." (*Recueil, op. cit.*, p. 330.)

The revised draft of the "B" Mandate agreement, dated 10 July 1919, also contained a provision for the protection of the well-being of the inhabitants, in virtually identical terms to that of the "C" Mandate. (*Ibid.*, p. 361.) Both these provisions were retained unchanged through the further deliberations of the Milner Commission. In the draft submitted by the Commission to the Principal Allied and Associated Powers on 24 December 1919, the wording of the clause was as follows:

> "The Mandatory Power undertakes to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the Mandate." ([1919] *Foreign Relations of the United States*, Vol. IX (Paris Peace Conference), pp. 655-656.)

The final draft of the mandate agreement, as approved by the Council of the League of Nations on 17 December 1920, contains the same clause with two minor amendments. *(Ibid.)* Thus, Mr. President, it is evident that the final text of the "C" Mandate agreements goes considerably beyond the terms proposed in Milner's original draft. The insertion of the phrases "promote to the utmost" and "social progress" involved expansion of the scope of Article 2, paragraph 2.

The essential nature of the obligation found in Article 2, paragraph 2, of the Mandate Agreement for South West Africa was stated by President Wilson in a general discussion of mandates provisions in the Plenary Session of 14 February 1919, in the following words:

> "In all cases of this sort hereafter it shall be the duty of the League to see that the Nations which are assigned as tutors and advisors and directors of these peoples, shall look to their interest and to their development before they look to the interest and material desires of the Mandatory itself." (*Ibid.*, Vol. III, p. 214.)

The basic nature of the obligation was even more succinctly stated by Duncan Hall, a leading authority on the mandates system—"The welfare of native peoples . . . is the real heart of the system". (Hall, *op. cit.*, p. 65.)

Mr. President, I turn now to an analysis of the historical background during the period 1945-1949. This background will render apparent the common intention of the League of Nations, the United Nations, and Respondent, at the respective times.

I shall begin, Mr. President and Members of the Court, with the critical period just prior to the official dissolution of the League of Nations.

The relevant and decisive historical facts during the period of the dissolution of the League of Nations and the establishment of the United Nations and thereafter, demonstrate clearly that it was the general

understanding of the League of Nations, the United Nations Organization, and, indeed, of Respondent, that the mandate obligations for South West Africa survived the dissolution of the League, and that this survival should include the obligations of Article 6 of the mandate agreement.

The League of Nations, in its last session during April 1946, was very much concerned with the interim period prior to the formal establishment of the trusteeship system of the United Nations. Both by resolution and by individual declaration, the members of the League, including those administering territories under mandate, made clear their intention that the obligations of the several mandate agreements would not lapse notwithstanding the dissolution of the League of Nations, and, indeed, would be binding until new arrangements under the United Nations trusteeship system had been concluded.

The declarations made by the mandatory powers, evidencing a clear intention to continue to carry out the obligations of the mandates pending the conclusion of trusteeship agreements, were as follows:

The United Kingdom on 9 April 1946 undertook the following:

> "Until the three African territories have actually been placed under trusteeship and until fresh arrangements have been reached in regard to Palestine—whatever those arrangements may be—it is the intention of His Majesty's Government in the United Kingdom to continue to administer the territories in accordance with the general principles of the existing Mandates." (*L. of N., O.J.*, Spec. Supp. No. 194, p. 28.)

The Union of South Africa on 9 April 1946 undertook (to use their words):

> "It is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South West Africa a status under which it would be internationally recognized as an integral part of the Union. As the Assembly will know, it is already administered under the terms of the mandate as an integral part of the Union. It the meantime the Union will continue to administer the territory scrupulously in accordance with the obligations of the mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.
>
> The disappearance of these organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the mandate. [The Respondent continued:] But the Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory." (*Ibid.*, pp. 32-33.)

France on 10 April 1946 undertook that:

> "The French Government intends to pursue the execution of the mission entrusted to it by the League of Nations. It considers that

it is in accordance with the spirit of the Charter that this mission should henceforth be carried out under the regime of trusteeship and it is ready to examine the terms of an agreement to define this regime in the case of Togoland and the Cameroons." (*Ibid.*, p. 34.)

New Zealand on 11 April 1946 undertook that:

"New Zealand has always strongly supported the establishment of the international trusteeship system, and has already declared its willingness to place the mandated territory of Western Samoa under trusteeship . . . New Zealand does not consider that the dissolution of the League of Nations, and as a consequence, of the Permanent Mandates Commission will have the effect of diminishing her obligations to the inhabitants of Western Samoa, or of increasing her rights in the territory. Until the conclusion of our Trusteeship Agreement for Western Samoa, therefore, the territory will continue to be administered by New Zealand, in accordance with the terms of the mandate, for the promotion of the well-being and advancement of the inhabitants." (*Ibid.*, p. 43.)

Belgium on 11 April 1946 stated:

"We expressed our confidence that the Trusteeship Council would soon come to occupy in the United Nations Organization the important place which it deserves. We can only repeat that hope here and give an assurance that, pending its realization, Belgium will remain fully alive to all the obligations devolving on Members of the United Nations under Article 80 of the Charter." *(Ibid.)*

Australia on 11 April 1946 undertook that:

"After the dissolution of the League of Nations and the consequent liquidation of the Permanent Mandates Commission, it will be impossible to continue the mandates system in its entirety.

Notwithstanding this, the Government of Australia does not regard the dissolution of the League as lessening the obligations imposed upon it for the protection and advancement of the inhabitants of the mandated territories, which it regards as having still full force and effect. Accordingly, until the coming into force of appropriate trusteeship agreements under Chapter XII of the Charter, the Government of Australia will continue to administer the present mandated territories, in accordance with the provisions of the mandates for the protection and advancement of the inhabitants. In making plans for the dissolution of the League, the Assembly will very properly wish to be assured as to the future of the mandated territories, for the welfare of the peoples of which this League has been responsible. So far as the Australian territories are concerned, there is full assurance." (*Ibid.*, p. 47.)

The declarations by each of the mandatory powers make it abundantly clear that the general intention and understanding was that all of the obligations of the mandate agreements remained in force pending the conclusion of trusteeship agreements. This is seen particularly in the declaration made by Respondent's representative.

The statement that the Union Government would regard the dissolution of the League "as in no way diminishing its obligations under the mandate" can mean no less than an undertaking to carry out each and every one of the obligations of the Mandate for South West Africa, including the obligations under Articles 6 and 7 thereof. This conclusion becomes all the more compelling when it is noted that the above-quoted

phrase follows immediately upon a statement by the South African representative citing the disappearance of the League organs concerned with the supervision of the madates.

I turn now, Mr. President, to the League of Nations resolution of 18 April 1946. The resolution, in relevant part, reads as follows:

> "The Assembly,
>
> Recalling that Article 22 of the Covenant applies to certain territories placed under mandate the principle that the well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world for a sacred trust of civilization:
>
> Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;
>
> Takes note of the expressed intentions of the members of the League now administering territories under mandates to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective mandates until other arrangements have been agreed between the United Nations and the respective mandatory powers." (*I.C.J. Reports 1950*, p. 134.)

On 9 April 1946, Dr. Lone Liang, the representative of China, had proposed for general discussion the following draft resolution:

> "The Assembly,
>
> Considering that the Trusteeship Council has not yet been constituted and that all mandated territories under the League have not been transferred into territories under trusteeship;
>
> Considering that the League's function of supervising mandated territories should be transferred to the United Nations, in order to avoid a period of interregnum in the supervision of the mandatory regime in these territories;
>
> Recommends that the mandatory powers, as well as those administering ex-enemy mandated territories shall continue to submit annual reports to the United Nations and to submit to inspection by the same until the Trusteeship Council shall have been constituted."(*L. of N.*, 21st Assembly, 1st Comm., 2nd Mtg., Provisional Record; Counter-Memorial, **II**, p. 49, footnote 2.)

This draft resolution was never considered since the Chairman ruled that it was not properly raised by Dr. Liang at that time. However, on 12 April 1946, Dr. Liang introduced a new draft resolution which was later adopted unanimously and became the final League of Nations resolution on the mandates system. Dr. Liang, in discussing the new draft resolution, stated that he recalled (to use his words)—

> "that he had already drawn the attention of the committee to the complicated problems arising in regard to mandates from the transfer of functions from the League to the United Nations. The United Nations Charter in Chapters XII and XIII established a system of trusteeship based largely upon the principles of the mandates system, but the functions of the League in that respect

were not transferred automatically to the United Nations. The Assembly [he continued] should therefore take steps to secure the continued application of the principles of the mandates system. As Professor Bailey had pointed out to the Assembly [Dr. Liang said] the League would wish to be assured as to the future of mandated territories. It was gratifying to the Chinese delegation, as representing a country which had always stood for the principle of trusteeship, that all the mandatory powers had announced their intention to administer the territories under their control in accordance with their obligations under the mandates system until other arrangements were agreed upon.

The Chinese delegation had pleasure in presenting the draft resolution now before the Committee, so that the question could be discussed by the Assembly in a concrete form and the position of the League clarified." (*L. of N., O.J.*, Spec. Supp. No. 194, pp. 78-79.)

There is no public record indicating why Dr. Liang changed the wording of his original draft resolution. However, it is most likely that the League of Nations, notwithstanding the several undertakings by the mandatory powers to carry out all of the obligations of the mandate agreement pending the establishment of the United Nations trusteeship system, did not wish to appear to encourage delay in the early formation of the trusteeship system. This had already been the concern of the Preparatory Commission delegates with regard to a temporary trusteeship committee, a matter which will be referred to shortly.

Respondent has sought to attach significance to the difference in wording between the original Chinese draft resolution and the draft resolution finally adopted by the League Assembly. However, Dr. Liang, in discussing the second draft, referred to "obligations under the mandate system", not *some* of the obligations. The resolution when passed, as has been noted, made the same reference to "obligations".

Further, after stating that the League functions were not transferred automatically to the United Nations, Dr. Liang continued, "the Assembly should therefore take steps to secure the continued application of the principles of the mandates system". The understanding then was that since the League functions were not transferred "automatically", the League should remedy the situation by taking "steps" to secure the continued application of the principles of the mandates system.

Several words in the quoted phrase are significant. The word "therefore" indicated Dr. Liang's view that the proposed resolution would solve the problem he had posed. The words "continued application" demonstrate the general understanding that the obligations carried out prior to the dissolution of the League would also be carried out subsequent to such dissolution. The word "principles" is not qualified in any way, and must surely include the essential principle of international accountability.

In the event, the draft resolution submitted by Dr. Liang on 12 April 1946 was unanimously adopted, with Egypt abstaining, for reasons which appear in the records of the proceedings, not germane to this particular issue.

Immediately following the presentation of the resolution to the League Assembly, the Egyptian representative stated his Government's reservation concerning Palestine in these words:

"The opinion of my Government is that Palestine has intellectu-

> ally, economically, and politically reached a stage where it should no longer continue under mandate or trusteeship or whatever other arrangements may be considered." (*Ibid.*, pp. 58-59.)

He made "all reservations" to paragraph 4 of the proposed resolution and stated further—"it is the view of my Government that mandates have terminated with the dissolution of the League of Nations . . .". (*Ibid.*, p. 59.)

It is important to note that the Egyptian representative clearly felt that the resolution under consideration was not acceptable because it signified that mandates continued in force and were not terminated by the dissolution of the League of Nations. Since the opinion implicit in his reservations was not controverted by any Member of the League of Nations, it would seem obvious that the general understanding of the League Members in adopting the resolution was that all of the obligations of the various mandates survived the dissolution of the League and were binding upon the Mandatory Powers pending the conclusion of new arrangements under the United Nations trusteeship system.

Mr. President, I should like with your permission to turn now to the proposal for a temporary trusteeship committee, made in the Preparatory Commission in 1945. This proposal, first suggested by the Executive Committee of the Preparatory Commission, was outlined by the Chairman of Committee Four—the Trusteeship Committee—of the Preparatory Commission as follows:

> "The basic task of the Temporary Trusteeship Committee, as it was contemplated, was to assist the General Assembly in expediting the establishment of the trusteeship system and was to remain in existence until a sufficient number of trusteeship agreements had been concluded to promote the establishment of the permanent Trusteeship Council in accordance with Article 86 of the Charter."

This is found in the records of the Preparatory Commission, 4th Plenary Meeting, page 125.

The representative of the Union of South Africa in Committee Four of the Preparatory Commission supported the proposal for a temporary trusteeship committee. The summary record of the second meeting of Committee Four reports Mr. Nicholls of the Union of South Africa as stating that, "it seems reasonable to create an interim body as the Mandates Commission was now in abeyance and the countries holding mandates should have a body to which they could report". (Oral proceedings, 15 Oct. 1962, morning.)

The proposal for a temporary trusteeship committee was not adopted by the Preparatory Commission, primarily on the basis of the objections advanced most forcefully by the Soviet Union, to the effect that such a committee might delay rather than accelerate the establishment of a trusteeship council. *(Ibid.)* It was pointed out that in the event of undue delay in completing trusteeship agreements, it was open to the General Assembly of the United Nations at any time to establish any body which seemed necessary. The Soviet delegate is reported as stating that he was not surprised that the Mandatory Powers were in favour of substitute organs, but if the problem were dealt with along those lines, discussion could continue for months or years without any action being taken. *(Ibid.)*

I emphasize, Mr. President, that no argument was presented by any

delegate to the Preparatory Commission that the proposal for a temporary trusteeship committee was not acceptable on the grounds that the United Nations had no supervisory authority over mandated territories. Rather, it seems to have been assumed by the Preparatory Commission that the United Nations did have such supervisory authority, but that the most expedient method, not the only method, for giving effect to such authority was the rapid conclusion of trusteeship agreements and the formation of the Trusteeship Council.

Mr. President, I turn now to an analysis of the relevant historical occurrences at the United Nations between the years 1946 and 1949.

It is quite clear that events at the United Nations during the autumn of 1946, that is to say, several months after the dissolution of the League of Nations, indicate the general understanding of the United Nations Organization and of the Respondent, that the mandates had not lapsed and were subject to the supervisory authority of the United Nations.

I discuss first a memorandum prepared by the Secretariat of the new United Nations Organization and dated 16 October 1946. The memorandum referred to a letter written by Secretary-General Trygve Lie on 29 June 1946, addressed to the States administering territories now held under mandate, i.e., Australia, Belgium, France, New Zealand, the Union of South Africa and the United Kingdom. (U.N. Doc. A/117, 16 Oct. 1946.)

The letter, which also referred to States "administering trust territories now held under mandate", and to "the mandatory powers", reflected the concern of the Secretary-General that as of the date of the letter no trusteeship agreements had yet been submitted to the United Nations.

According to the memorandum prepared by the Secretariat, the Secretary-General received replies to his letter from each of the States to whom letters had been addressed, including a communication from the Government of the Union of South Africa dated 12 August 1946 concerning the "mandated territory of South West Africa"—these are the words of the Union. (*Ibid.*, p. 3.)

The replies to the letter of the Secretary-General indicated that of the six Mandatory Powers, four understood the mandate to be in existence notwithstanding the dissolution of the League of Nations. New Zealand alone referred to Western Samoa as "the former mandated territory" (*ibid.*, p. 7) and Belgium gave no indication of her view as to whether it considered the Territory of Ruanda-Urundi to be still under mandate.

The reply from Australia, dated 11 September 1946, which was almost five months after the dissolution of the League of Nations, states that "the Australian Government has prepared an agreement in respect of the mandated territory of New Guinea". (*Ibid.*, p. 4.)

The reply from France, dated 20 September 1946, reads in relevant parts as follows:

> "The French Government has decided to place the mandated territories of Togoland and the Cameroons under the trusteeship systems as defined by the provisions of the Charter . . . The terms of the trusteeship have . . . been communicated for information purposes . . . to the Mandatory Powers of territories on the African Continent . . . The British Government, for its own part, has submitted for approval by the French Government terms of trusteeship regarding Togoland and the Cameroons under British Mandate." (*Ibid.*, p. 6.)

The reply of the United Kingdom, dated 5 September 1946, referred to "the territories in Africa under United Kingdom mandate", "the West African mandated territories of Togoland under British mandate and the Cameroons under British mandate", and "the three African territories under United Kingdom mandate". (*Ibid.*, pp. 9-10.)

The initial reply of the Union of South Africa, dated 12 August 1946, indicates Respondent's view at that time that the Mandate for South West Africa was still in effect. The reply, in relevant part, reads as follows:

> "By direction of the Government of the Union of South Africa, I have the honour to request that the question of the desirability of the territorial integration in, and the annexation to, the Union of South Africa of the mandated territory of South West Africa, be included in the agenda for the second part of the first session of the General Assemby to be convened at New York City on 23 September next." (*Ibid.*, pp. 8-9.)

A later request by the Union of South Africa submitted an amended wording of the original proposal. The subsequent request, written on 9 October 1946, provides an indication that almost six months after the dissolution of the League of Nations, the Union of South Africa not only considered the Mandate for South West Africa to be in effect, but considered that the United Nations was the proper authority for the implementation of proposals by the mandatory concerning the Territory. The later request reads as follows, in the relevant part:

> ". . . I have now been instructed by my Government to request that you be so good as to amend the text of the item in relation to South West Africa as follows:
>
> > 'Statement by the Government of the Union of South Africa on the outcome of their consultations with the peoples of South West Africa as to the future status of the mandated territory, and implementation to be given to the wishes thus expressed.'"
> > *(Ibid.)*

The submission of the question of the termination of the Mandate to the General Assembly is of particular significance.

It will be recalled that on 22 January 1946, Respondent's representative to the Fourth Committee of the General Assembly stated that after consultation with the inhabitants of the Territory, his Government's plans for South West Africa "would be submitted to the General Assembly for judgment". (*I.C.J. Reports 1950*, p. 142.)

The meaning of this statement of submission and the words "for judgment" was further elucidated by Respondent's Prime Minister in a statement to the Fourth Committee on 4 November 1946, that South Africa's—

> "international responsibility precluded it from taking advantage of the war situation by effecting a change in the status of South West Africa without proper consultation either of all the peoples of the Territory itself, or with the competent international organs". *(Ibid.)*

The importance of these statements was noted by this Court in its Advisory Opinion of 1950, when it stated:

> "By thus submitting the question of the future international status of the Territory to the 'judgment' of the General Assembly

as the 'competent international organ', the Union Government recognized the competence of the General Assembly in the matter." *(Ibid.)*

Respondent's representative to the Permanent Mandates Commission, in response to a critical reaction from the Commission on the proposed incorporation of South West Africa as a fifth province of the Union, stated that—

> "He could assure the Mandates Commission that the Union Government would never take any action in this respect until it had first communicated its intentions to the Mandates Commission itself." (Counter-Memorial, **IV**, p. 80.)

The near identity of Respondent's actions with regard to proposals for incorporation, taken in 1935 under the League, and in 1946 after the dissolution of the League, reveal clearly that in each instance Respondent was submitting to what it regarded as "the competent international organ".

Since, in the autumn of 1946, Respondent had not yet begun to argue that the Mandate as a whole had lapsed, or that the United Nations had no supervisory authority over its administration of South West Africa, the only reasonable inference to be drawn is that reached by this Court in 1950, which is:

> "By thus submitting the question of the future international status of the Territory to the 'judgment' of the General Assembly as the 'competent international organ', the Union Government recognized the competence of the General Assembly in the matter." (*I.C.J. Reports 1950*, p. 142.)

Mr. President, I had just reached the point of commenting upon certain requests made by Respondent to the United Nations and I said that since in Autumn 1946 Respondent had not yet begun to argue that the Mandate as a whole had lapsed, or that the United Nations had no supervisory authority over its adminstration of South West Africa, the only reasonable inference to be drawn being that reached by the Court in 1950, namely to the effect that by thus submitting the question of the future international status of the territory to the judgment of the General Assembly as the competent international organ, the Union Government recognized the competence of the General Assembly in the matter.

The importance of such submission by Respondent is obvious. As the Court stated in another context:

> "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument." (*Ibid.*, pp. 135-136.)

Mr. President, I now wish to discuss a letter and memorandum submitted to the United Nations by Respondent on 17 October 1946. (U.N. Doc. A/123.) The memorandum demonstrates quite clearly the understanding of the Union Government that not only was the Mandate in existence, but that the United Nations was the proper supervisory authority. The letter, while twice referring to South West Africa as "the mandated territory", requests that the accompanying memorandum be tabled as a United Nations General Assembly document.

It must be noted that the memorandum submitted to the United

Nations, some six months after the dissolution of the League of Nations, is based on the assumption that the Mandate for South West Africa was still in force. Thus paragraph 3 of the memorandum refers to repeated requests by the European section of the population for "the termination of the mandate" and the incorporation of the Territory. After stating that the "Natives" also favoured incorporation, the memorandum continues, in paragraph 4, as follows:

> "Therefore, prior to the opening of the second part of the first session of the General Assembly, the Secretary-General of the United Nations was requested to include on the agenda a statement by the Government of the Union of South Africa on the outcome of their consultations with the peoples of South West Africa as to the future status of the mandated territory, and the implementation to be given to the wishes thus expressed." (*Ibid.*, p. 5.)

Paragraphs 3 and 4 of the memorandum to the effect that the Territory of South West Africa had, in the fall of 1946, a status as a "mandated territory", and that the United Nations General Assembly was the proper authority to give "implementation" to the wishes of the inhabitants of that territory, indicate Respondent's understanding in 1946 concerning the existence of the Mandate, and supervisory authority over its administration.

Another clear indication of Respondent's attitude in the fall of 1946 may be found in paragraphs 150 and 151 of the memorandum, which read as follows:

> "The Union Government, as Mandatory, has governed the Mandated Territory of South West Africa for over a quarter of a century . . . That the Mandatory is satisfied that its duties under the Mandate have been faithfully carried out is justified . . ." (Para. 150.)
>
> "Yet, the Union Government, considering the fruits of its efforts in the Territory and the task which lies ahead, shares with the people of South West Africa the conviction that the mandates system is inapplicable to the Territory. This conviction rests upon three main considerations, namely:
>
> *(a)* The fundamental principle of the mandates system and its successor the trusteeship system is ultimate political self-government and separate statehood. The low economic potential of the Territory and the backwardness of the vast majority of the population render this impossible of achievement.
>
> *(b)* The immediate aim of the Mandate is the development of the Territory and its people. This development can only be satisfactorily carried on at an expense to the Mandatory which, in the nature of things, it cannot undertake.
>
> *(c)* The uncertainty as to the ultimate future of the Territory inevitably militates against racial tranquility and the optimum development of the country." (*Ibid.*, p. 51.)

The significance of these paragraphs is obvious. Six months after the dissolution of the League of Nations, South Africa was arguing that the mandates system was inapplicable to the Territory, but for reasons having nothing whatsoever to do with the dissolution of the League. If in fact it was the understanding of the Union of South Africa that the demise of the League of Nations resulted in the lapse of the Mandate as a whole, then surely an argument presented six months after the disso-

lution of the League would have included such reasons. The only inference to be drawn from the memorandum of 17 October 1946 was that, at that time, the Government of South Africa was of the opinion that the Mandate for South West Africa continued in full force.

Mr. President, the debates in the Fourth Committee of the General Assembly in the autumn of 1946 also indicate clearly that the general understanding of the Members of the United Nations and of the Government of the Union of South Africa was that the Mandate was still in force and that the United Nations had general supervisory authority over Respondent's administration of the Territory. Thus, Field-Marshal Smuts stated to the Fourth Committee on 16 November 1946 that:

> "The people wanted incorporation; the Union Government could not ignore that wish and had no alternative but to bring their wish before the General Assembly." (*G.A., O.R.*, 1st Sess., 2nd Part, 4th Committee, Sub-Committee 2, p. 7.)

Similarly, on 28 November 1946, Mr. John Foster Dulles, late Secretary of State of the United States, told the Fourth Committee of the General Assembly that:

> "The information at the disposal of the General Assembly did not enable it to approve, during the present session, the incorporation of the Mandated Territory of South West Africa. Agreement on the subject might be said to be unanimous. It was not a question of discovering what the verdict of the General Assembly would be, but in what terms it would be expressed." (*Ibid.*, p. 49.)

The next day Mr. Liu Chieh, the representative of China in the Fourth Committee, stated that:

> "If the Sub-Committee accepted the contention of the Government of the Union of South Africa that the future incorporation of South West Africa into the Union was justified, then consultations among the inhabitants should be conducted under the supervision of the Trusteeship Council . . . Far from accepting the statements contained in paragraph 151 of document A/123 [the memorandum of 17 October 1946, referred to previously] he was of the opinion that South West Africa should be placed under the Trusteeship System rather than continued as a Mandate." (*Ibid.*, p. 56.)

Again representatives of member States had recognized the existence of the Mandate, as well as the supervisory authority of the United Nations.

The General Assembly of the United Nations, on 14 December 1946, passed resolution 65 (I) which, by its terms, recognized the existence of the Mandate, as well as the supervisory authority of the United Nations. The resolution reads as follows:

> "The General Assembly,
>
> *Having considered* the statements of the delegation of the Union of South Africa regarding the question of incorporating the mandated territory of South West Africa in the Union;
>
> *Noting with satisfaction* that the Union of South Africa, by presenting this matter to the United Nations, recognizes the interest and concern of the United Nations in the matter of the future status of territories now held under mandate;
>
> *Recalling* that the Charter of the United Nations provided in Articles 77 and 79 that the Trusteeship System shall apply

to territories now under mandate as may be subsequently agreed;

Referring to the resolution of the General Assembly of 9 February 1946, inviting the placing of mandated territories under trusteeship;

Desiring that agreement between the United Nations and the Union of South Africa may hereafter be reached regarding the future status of the mandated territory of South West Africa;

Assured by the delegation of the Union of South Africa that, pending such agreement, the Union Government will continue to administer the territory as heretofore in the spirit of the principles laid down in the mandate;

Considering that the African inhabitants of South West Africa have not yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion which the Assembly could recognize on such an important question as incorporation of their territory:

The General Assembly, therefore

Is unable to accede to the incorporation of the territory of South West Africa in the Union of South Africa; and

Recommends that the mandated territory of South West Africa be placed under the international trusteeship system and invites the Government of the Union of South Africa to propose for the consideration of the General Assembly a trusteeship agreement for the aforesaid territory."

Thus by the end of 1946 Respondent had not, at any time, indicated a view that the Mandate for South West Africa had lapsed, or that the United Nations had no supervisory authority over the Territory.

On the contrary, Respondent had on several occasions indicated its understanding that the Mandate was still in force and effect and that the United Nations had supervisory authority. Respondent submitted its plan for termination of the Mandate "to the General Assembly for judgment . . ." (to use their words again), the procedure to which there was, in Respondent's words ". . . no alternative . . .".

A final observation concerning this point is that the General Assembly, by resolution 65 (I), ". . . affirmed its competence . . ." over the mandated territory of South West Africa.

Although Respondent in September 1947 indicated for the first time a view that the United Nations had no supervisory authority over South West Africa, statements made by Respondent up to that time, during the year 1947, indicated precisely the opposite view.

Respondent's letter of 23 July 1947 to the Secretary-General of the United Nations cites General Assembly resolution 65 (I), in which the Assembly expressed inability to accede to the incorporation of South West Africa in the Union. The letter states:

". . . the Union Government desire to reiterate their view that it is implicit in the mandate system and in the Mandate for South West Africa that due regard shall be had to the wishes of the inhabitants in the administration of the Territory. The wish, clearly expressed by the overwhelming majority of all the native races in South West Africa, and by unanimous vote on the part of the European representatives of the Territory, that South West Africa be incorporated in the Union therefore debars the Union Government from acting in accordance with the resolution of the General Assembly, and thereby

flouting the wishes of those who under the Mandate have been committed to their charge. In the circumstances, the Union Government has no alternative but to maintain the *status quo* and to continue to administer the Territory in the spirit of the existing Mandate." (U.N. Doc. A/334, 1 Aug. 1947, p. 135.)

The next two paragraphs of the letter of 23 July 1947 are equally significant with regard to Respondent's recognition of the supervisory authority of the United Nations. Those paragraphs read in part as follows:

"The Union Government are mindful of the fact that the General Assembly, in passing the recommendation, was mainly concerned about the welfare of the inhabitants of the Territory—especially the non-Europeans. This concern the Union Government naturally share. It will, however, be recalled that the interests of the native inhabitants were fully provided for with specific safeguards under the Mandate and that the administration of South West Africa and the implementation of those safeguards have been uniformly satisfactory ever since the inception of the mandatory system. They feel confident, therefore, that their continued administration of the Territory in the spirit of the Mandate will equally merit the satisfaction of the United Nations.

To that end the Union Government have already undertaken to submit reports on their administration for the information of the United Nations." *(Ibid.)*

Yet another recognition by Respondent of the supervisory authority of the United Nations over the mandated Territory of South West Africa is to be found in a communication from Respondent to the Secretary-General of the United Nations dated 22 September 1947 (see U.N. Document A/334/Add. 1). The communication recites the fact that General Assembly resolution 65 (I) was "fully discussed" at a session of the South West African Legislative Assembly, after which a resolution by the South West African Legislative Assembly was adopted unanimously, according to Respondent, on 7 May 1947, and that it read as follows:

"That this House expresses to the Right Honourable the Prime Minister of the Union its appreciation and thanks for his firm and courageous stand before the United Nations Organization in connexion with the incorporation of this Territory with the Union, and trusts that the United Nations Organization will grant the wishes of the large majority of the inhabitants of this Territory, European as well as non-European." (*Ibid.*, p. 138.)

Mr. President, I turn now to a consideration of the actual exercise of competence by the United Nations of its supervisory authority over South West Africa.

Whereas by resolution 65 (I) of 14 December 1946 the General Assembly "affirmed its competence" (to use the phrase of this Court) over the administration of South West Africa, "this competence was in fact exercised by the General Assembly in resolution 141 (II) of 1 November 1947 . . ." (see *I.C.J. Reports 1950*, p. 137).

The resolution urged the Government of the Union of South Africa to propose a trusteeship agreement for South West Africa, and authorized—

"the Trusteeship Council in the meantime to examine the report on South West Africa recently submitted by the Government of the

Union of South Africa and to submit its observations thereon to the General Assembly".

In accordance with resolution 141 (II) of the General Assembly, the Trusteeship Council did examine the report submitted by the Respondent for the year 1946.

Although the Council, in the exercise of its competence, did not agree upon the extent of supervision, there was no doubt as to the legal authority of the Council to examine the report of the mandatory power and submit observations thereon. Notwithstanding the dissolution of the League, it was agreed that the Mandate continued in full force and effect, and that the United Nations was the proper supervisory authority.

Thus, the Chinese representative made the following uncontroverted argument. He said:

> "I wish briefly to discuss the basis for the examination by this Council of such a report. In the first place, South West Africa is a mandated territory. If the mandate system had not ceased to function, that report would have been examined by the Permanent Mandates Commission of the League of Nations. I think that by design and by general acceptance the functions and responsibilities of the Mandates Commission have fallen upon the shoulders of the Trusteeship Council. The Government of the Union of South Africa has asserted that it will continue to administer that territory in the spirit of the Mandate. Therefore, I believe it must have been in the minds of the members of the General Assembly that the proper organ of the United Nations to examine the report was the Trusteeship Council." (*T.C.O.R.*, 2nd Sess., 1st Part, p. 123.)

Mr. Ryckmans, the delegate of Belgium, followed the Chinese statement with the opinion that, in his words:

> "I agree with the substance of the statement just made by the Chinese representative . . . We shall in fact examine this report as we examine any other, but in principle we should consider it in the same way as it would have been considered by the Permanent Mandates Commission." (*Ibid.*, p. 124.)

Mr. Gerig, the delegate of the Unites States, in assuming the competence of the United Nations, stated that South West Africa "is a mandated territory, recognized as such by everyone, including the Union of South Africa". (*Ibid.*, p. 130.)

The Trusteeship Council requested further information from Respondent, and such information was submitted in May 1948. The Council examined the initial report and the supplementary information submitted by Respondent, and reported its observations to the General Assembly.

The United Nations received no further reports from Respondent subsequent to May 1948. In a letter to the Secretary-General on 11 July 1949, Respondent explained its refusal to submit further reports by referring to "unjustified criticism and censure" of Respondent's administration, and to "misconceptions" concerning the competency of the Trusteeship Council, and "misunderstandings" which gave rise to "repercussions" in the Union and the Territory with "deleterious effects" on the administration of South West Africa. It was also stated that:

> "It will be recalled . . . that the Union Government have at no time recognized any legal obligations on their part to supply information on South West Africa to the United Nations, but in a spirit of goodwill, co-operation and helpfulness offered to provide the United Nations with reports on the administration of South West Africa, with the clear stipulation that this would be done on a voluntary basis, for purposes of information only and on the distinct understanding that the United Nations has no supervisory jurisdiction in South West Africa." (II, pp. 61-62.)

It will be recalled that Respondent's letter of 23 July 1947 explicitly recognized the continuing existence of the Mandate.

Mr. President and Members of the honourable Court, since the General Assembly of the United Nations had "affirmed its competence" over the administration of South West Africa by resolution 65 (I), and since "this competence was in fact exercised by the General Assembly", as was noted in the Opinion of 1950, page 137, regarding resolution 141 (II), it is not surprising that the United Nations likewise exercised its competence over the Mandated Territory of Palestine.

The handling of the Palestine problem by the United Nations shows clearly that the general understanding in 1947 was that not only was the Mandate for Palestine still in effect, but that the United Nations had the authority to supervise the administration and termination of that Mandate. This is seen most clearly in a report of the United Nations Special Committee on Palestine (*G.A., O.R.*, 2nd Sess., Supp. No. 11), and in the subsequent resolution of the General Assembly on the Palestine question.

Thus, for example, in paragraph 112 of the report of the Special Committee, it was noted that on 1 May 1946 the report of the Anglo-American Committee of Inquiry was published. Among the major constitutional proposals of the Committee of Inquiry was the following:

> "That until Arab-Jewish hostility disappears 'the government of Palestine be continued as at present under mandate pending the execution of a Trusteeship Agreement under the United Nations'." (*Ibid.*, p. 27.)

The Special Committee, however, in its first recommendation, stated that "it is recommended that the Mandate for Palestine shall be terminated at the earliest practicable date". (*Ibid.*, p. 42.)

In a comment giving the reasons for the unanimous recommendation of the Special Committee that the Mandate for Palestine be terminated, was the following conclusion:

> "All directly interested parties—the Mandatory Power, Arabs and Jews—are in full accord that there is urgent need for a change in the status of Palestine. The Mandatory Power has officially informed the Committee 'that the Mandate has proved to be unworkable in practice, and that the obligations undertaken to the two communities in Palestine have been shown to be irreconcilable'. Both Arabs and Jews urge termination of the Mandate and the grant of independence to Palestine. . ." (*Ibid.*, pp. 42-43.)

The recommendation and the cited conclusion giving reasons for the recommendation indicate quite clearly the view of the inhabitants of Palestine, as well as the view of the United Nations Special Committee

on Palestine, that, notwithstanding the dissolution of the League of Nations, the Mandate for Palestine was still in effect.

It was further recommended by the Special Committee that during the transitional period prior to the granting of full independence to the territory of Palestine, "the present Mandatory Power" shall "carry on the administration of the territory of Palestine under the auspices of the United Nations . . .". (*Ibid.*, p. 48.)

It is true that the Special Committee, citing the dissolution of the League of Nations and the Permanent Mandates Commission, stated that the mandatory power had no means of discharging fully its international obligations with regard to the mandated territory. The Special Committee also stated that the trusteeship system of the United Nations had not "automatically" taken over the functions of the mandates system. However, the Special Committee also stated that:

> "At the time of the termination of the Permanent Mandates Commission in April 1946, the mandatory power did, in fact, declare its intention to carry on the administration of Palestine, pending a new arrangement, in accordance with the general principles of the Mandate. The mandatory power has itself now referred the matter to the United Nations." (*Ibid.*, p. 43.)

More significantly, it is clear that the United Nations felt itself competent to supervise the administration of Palestine prior to the granting of independence to that territory. Thus, for example, in addition to the recommendation noted above concerning the transitional period, it was also recommended by the Special Committee that "during the transitional period the authority entrusted with the task of administering Palestine and preparing it for independence *shall be responsible to the United Nations*". *(Ibid.)*

In commenting upon the latter recommendation, the Special Committee stated that:

> "Certain obstacles which may well confront the authority entrusted with the administration during the transitional period make it desirable that a close link be established with the United Nations. It will be of the utmost importance to the discharge of its heavy responsibilities that, while being accountable to the United Nations for its actions . . . the authority concerned should be able to count upon the support of the United Nations in carrying out the directives of that body." (*Ibid.*, p. 44.)

In sum, it seems obvious that the view of the United Nations Special Committee on Palestine was:

(1) that the Mandate for Palestine was in effect notwithstanding the dissolution of the League of Nations;

(2) that the United Nations had the authority to terminate the Mandate; and

(3) that the United Nations had the authority to supervise the administration of Palestine prior to the granting of independece to that territory.

It seems equally clear that the views of the Special Committee on Palestine were also the views of the General Assembly of the United Nations. The General Assembly, on 29 November 1947, 19 months after the dissolution of the League of Nations, passed resolution 181 (II) which read, in relevant part, as follows:

"The General Assembly,

. . . . . .

Takes note of the declaration by the mandatory power that it plans to complete its evacuation of Palestine by 1 August 1948;

Recommends to the United Kingdom, as the mandatory power for Palestine, and to all other members of the United Nations the adoption and implementation, with regard to the future government of Palestine, of the Plan of Partition with Economic Union."

The Plan of Partition with Economic Union referred to by the General Assembly, and annexed to resolution 181 (II) of 29 November 1947, indicates even more clearly the general understanding that the Mandate for Palestine was still in existence as of November 1947. Thus, the first recommendation in the final Plan of Partition was that "the Mandate for Palestine shall terminate as soon as possible but in any case not later than 1 August 1948". (P. 132.) It is obvious that this recommendation assumed the existence of the Mandate for Palestine.

An examination of the Plan of Partition also makes clear the understanding of the General Assembly that the United Nations had extensive powers of supervision over the administration of the Mandated Territory of Palestine. For example, on page 133 of the Plan of Partition, the following is noted:

"The mandatory power shall not take any action to prevent, obstruct or delay the implementation by the Commission of the measures recommended by the General Assembly."

Mr. President, notwithstanding the general view of the United Nations and Respondent that the Mandate was still in force, and that the United Nations was properly authorized to exercise supervisory function over the administration of the mandated territory, Respondent *for the first time*, in September of 1947, began to indicate a view that the United Nations had no supervisory jurisdiction over South West Africa, and by 1948 Respondent had extended the argument to the point at which it was then contending that the Mandate as a whole had lapsed. But notwithstanding Respondent's new assertion in 1948 that the Mandate as a whole had lapsed, Respondent indicated several times that it was still possessed of *rights* under the Mandate Agreement for South West Africa.

Thus, for example, Mr. Eric Louw, appearing for the Government of the Union of South Africa before the Fourth Committee of the General Assembly on 18 November 1948, referred to the second operative paragraph of a joint draft resolution submitted by the delegations of Denmark, Norway and Uruguay. The paragraph referred to recommended anew that South West Africa be placed under the trusteeship system. (*G.A., O.R.*, 3rd Sess., 1st Part, 4th Comm., pp. 367-368.)

According to the record of the proceedings before the Fourth Committee:

"Mr. Louw pointed out that the provisions of the second operative paragraph of that draft resolution precluded any possibility of arriving at the agreement contemplated in the League of Nations' last resolution on the question. According to that resolution, the mandatory power was to continue to fulfill its functions until new agreements had been concluded . . . The representatives of the Union of South Africa felt that the paragraph was contrary to the provi-

sions of the Charter inasmuch as it disregarded rights possessed by the Union of South Africa under the Mandate and the Charter." (*Ibid.*, p. 368.)

This statement recalls another made by Respondent's representatives to the General Assembly in 1946. Referring to consultations with the inhabitants of South West Africa on the proposed termination of the Mandate and incorporation, Respondent's representatives stated that:

> "Arrangements are now in train for such consultations to take place and, until they have been concluded, the South African Government must reserve its position concerning the future of the Mandate, together with its right of full liberty of action, as provided for in paragraph 1 of Article 80 of the Charter." (*Journal of the U.N.P.C.*, p. 131.)

The view seems to have been that Article 80 (1) of the Charter provided for rights, but not for obligations.

It would seem that by November of 1948 Respondent's view was that in so far as the Mandate Agreement for South West Africa contained obligations, the Mandate had lapsed; but that in so far as the Mandate Agreement contained rights, the Mandate was still in full force and effect.

In Mr. Louw's statement of 18 November 1948, cited above, it is to be noted that Respondent's representative used the phrase "rights possessed by the Union of South Africa under the Mandate". This was no isolated reference to "rights" under the Mandate. On 9 November 1948 Mr. Louw stated before the Fourth Committee that "the closer union scheme was nothing new or startling. The right to incorporate the territory of South West Africa was inherent in the former Mandate . . ." (*G.A., O.R.*, 3rd Sess., 1st Part, 4th Comm., p. 346.)

Similarly, on 26 November 1948, Mr. Louw, in presenting his Government's case to the General Assembly plenary session, quoted a cable just received from the South African Prime Minister which stated:

> "The South African Government is exercising a right which has never been disputed to administer the territory as an integral part of the Union, pursuant to the power granted in the original Mandate." (*G.A., O.R.*, 3rd Sess., 1st Part, Plenary, p. 587.)

The General Assembly, by resolution 227 (III) of 26 November 1948, once again gave its views on the problem of South West Africa, and in so doing exercised its competence over the mandated territory.

The Assembly resolution refers to "the mandated territory of South West Africa", the "existing mandate", "the administering authority", and finally:

> "*Recommends*, without prejudice to its resolutions of 14 December 1946 and 1 November 1947, that the Union of South Africa, until agreement is reached with the United Nations regarding the future of South West Africa, continue to supply annually information on its administration of the territory;
>
> *Requests* the Trusteeship Council to continue to examine such information and to submit its observation thereon to the General Assembly."

The Court, in its 1950 Opinion, also noted that the General Assembly, in resolution 337 (IV) of 6 December 1949, confirmed the exercise of

its competence over South West Africa. This was done by confirming resolutions 141 (II) and 227 (III). I refer to the Opinion at page 137.

In sum, Mr. President, the view of this Court, explicitly stated in 1950 and in 1962 and assumed in 1955 and 1956, that the Mandate for South West Africa remains in full force and effect and that the United Nations is the legally authorized supervisory authority over the administration of the territory, is one which is fully supported by the historical record.

Respondent, evidently aware of the importance attached by this Court to "recognition by a party of its own obligations under an instrument" (*I.C.J. Reports 1950*, p. 136), has denied Applicants' contention that "in the period of 1946-1949 the Union's policy concerning the Mandate underwent a marked change". (**I**, p. 48.)

The understanding of the United Nations that the Mandate continued in force and that the obligations of international accountability were owed to the United Nations, thus appears clearly from the General Assembly resolutions 65 (I) of 14 December 1946 and 141 (II) of 1 November 1947, as well as 227 (III) of 26 November 1948, and 337 (IV) of 6 December 1949. The last resolution confirmed the first three; the 1946 resolution "affirmed" the competence of the Assembly, and the 1947 and 1948 resolutions "exercised" this competence.

Respondent has insisted, both in the Rejoinder (**V**, p. 66) and in the Counter-Memorial (**II**, p. 140), that between the years 1947 and 1949, 25 Members of the United Nations, in participating in United Nations debates, "maintained quite clearly" that, outside of trusteeship, Mandatory Powers had no obligation to account for their administration of the said territories to the United Nations or any other body.

In its list, Respondent has included six nations, namely Czechoslovakia, Guatemala, Iran, Peru, Sweden, and Yugoslavia, for the sole reason that they were signers of the report of the United Nations Special Committee on Palestine. As I have mentioned, the Palestine report shows that the United Nations not only considered the Mandate for Palestine to be in full force and effect at that time, but also recommended that the United Nations exercise comprehensive supervisory authority over the administration of that mandate prior to its termination. It is difficult to perceive how these six States can be considered as having "maintained quite clearly" that, outside trusteeship, there was no obligation of accountability to an international body.

Furthermore, three of the 25 States (Cuba, India and Uruguay), and the United States in its written statement before this honourable Court in 1950, made clear their viewpoint that international accountability had survived.

Two of the States mentioned in Respondent's list of 25, namely China and the Philippine Republic, made statements reflecting their view that the United Nations had supervisory authority over the mandated territory. (*T.C.O.R.*, 2nd Sess., 1st Part, pp. 123, 475-476.)

The Chinese representative in 1947 stated to the Trusteeship Council that "I think that by design and by general acceptance the functions and responsibilities of the Mandates Commission have fallen upon the shoulders of the Trusteeship Council". (*Ibid.*, p. 123.)

The most decisive fact remains, Mr. President, that while there was disagreement among several Members of the United Nations with regard to the existence of the Mandate and the obligations of international accountability, the view of the United Nations as a whole, expressed

through its resolutions on the subject, demonstrated its understanding that the Mandate remained in full force and effect, and that the United Nations had supervisory authority over the Territory. This is reinforced by the United Nations treatment of the Palestine Mandate.

Respondent, through the several declarations and statements heretofore discussed, also demonstrated its recognition of the continuance of the obligations of the Mandate after the dissolution of the League. It was not until the autumn of 1947 that supervisory authority of the United Nations was questioned, and not until November 1948 was it argued by Respondent that the Mandate had lapsed.

Hence, the actions of the League Assembly, of the United Nations, and relevant statements and actions of the Respondent, combine to support the conclusion that the Mandate and all of the obligations contained therein survived the dissolution of the League, and that the United Nations replaced the League as the supervisory organ over the Mandate.

This concludes Part B of this phase of the Oral Proceedings, and, with your permission Mr. President, the Applicants, at the appropriate time, will place before this honourable Court legal issues connected with the obligations of Respondent to submit to international supervision, which will be Part C of the present phase of these proceedings.

5. ARGUMENT OF MR. GROSS

AGENT FOR THE GOVERNMENTS OF ETHIOPIA AND LIBERIA AT THE PUBLIC HEARINGS OF 19, 22, 23 AND 24 MARCH 1965

Mr. President and Members of this honourable Court, in my opening presentation I had the honour to present to the Court the principal points upon which the Applicants rely in support of their submissions that the Respondent has violated, and is violating, its obligations under the mandate.

PART C

The obligations in question, as I have pointed out, are those comprising the two groups or kinds of obligations described in the Advisory Opinion of this honourable Court of 11 July 1950, as well as in the Judgment of the Court in 1962, namely (if I may quote from the 1962 Judgment) "obligations both towards the inhabitants of the mandated territory and towards the League of Nations and its Members".

As this honourable Court held in the 1962 Judgment, the Applicants "have a legal right or interest in the observance by the mandatory" of both of these groups of obligations. (That is quoted from *I.C.J. Reports 1962*, p. 343.)

My colleague, Mr. Moore, has presented to the Court the historical background concerning the origin, nature and contents of the mandates system, as well as events, transactions, undertakings and instruments made, formed or occurring during the period 1945 to 1949, that is to say, the period which included the formation of the United Nations, the dissolution of the League of Nations, and the commencement of operations of the United Nations. This material, which has now been presented to the Court as Part B of this phase of the Oral Proceedings, is, we respectfully submit, a foundation, as well as a background, upon which rests the contentions of both Parties to the present proceedings, in respect of both groups or kinds of obligations, that is to say, those towards the inhabitants and those towards the international supervisory organ.

A proper evaluation and interpretation of all such events, transactions and undertakings must, we submit, proceed from this point of departure. The aspect of the cases to which I now address myself, if the Court please, concerns that group of Respondent's obligations which, in the words of the Advisory Opinion of 1950, relate to the machinery for implementation. In the words of the Court, in the 1950 Opinion "these include the supervisory functions formerly exercised by the League of Nations" and now, in the Applicants' submission, by the United Nations. They include also, and very importantly, the right of the Applicants, already settled by this honourable Court, to seek recourse to the judicial process for protection "against possible abuse or breaches of the mandate", in the words of the 1962 Judgment, at page 336.

In their written pleadings, the Applicants have dealt first with the obligations of the mandatory towards the inhabitants of the Territory, followed by a discussion of the Respondent's obligations towards the

international supervisory machinery. In view of the fact that this order has been reversed in the Respondent's written pleadings, the Applicants do so likewise with respect to their own presentation, for the Court's convenience and for clarity of presentation.

The Applicants' submissions relevant to contentions which are advanced at this stage are Submissions Nos. 1, 2, 5, 7, 8 and 9, set forth in the Memorials (I) at pages 197 to 198 and incorporated by reference in the Reply (IV), at page 520.

Respondent does not dispute or deny the Applicants showing that Respondent has failed and refused, and continue to fail and refuse (1) to render to the General Assembly of the United Nations annual or other reports containing information with regard to the territory and indicating the measures it has taken to carry out its obligations under the Mandate, and (2) to transmit petitions to the United Nations from the inhabitants of the territory. On the contrary, Respondent contends (and I quote from the Counter-Memorial, II, at p. 164) that its—

> "obligations to report and account to, and submit to the supervision of, the Council of the League of Nations, lapsed upon dissolution of the League and have not been replaced by obligations to submit to the supervision of any organ of the United Nations or any other organization or body".

Mr. President, an issue of law thus is squarely joined which, in the Applicants' respectful submission, is susceptible only of an unqualifiedly affirmative or negative determination and judgment.

If I may pass now to a consideration of the supervision in the plan of the Mandate.

Mr. President, the history of the origin, nature and content of the mandates system, which has been presented to the Court, makes crystal clear that the most basic substantive innovation introduced by the mandates system was that of international accountability. Such accountability, as has been pointed out, forms the very foundation of what the Court has called "the novel international regime", instituted by the Mandate. It is a first principle. Accountability is expressed in the mandates system by the imposition upon the Mandatory of an obligation to submit to continuing international administrative supervision, so long as the Mandate exists, or endures; and to submit to the ultimate recourse of judicial protection when necessary, and when the appropriate conditions of Article 7, paragraph 2, the compromissory clause, have been met.

In 1950 the Court explicitly so held on both counts, both with respect to the submission of administrative supervision, and with respect to submission of unsettled disputes to the Court, in terms of the compromissory clause of Article 7.

In 1962, it is submitted, although the Court explicitly so held with respect to judicial protection, it also, by necessary implication, as I shall endeavour to show, did so with respect to administrative supervision. The innovation of international accountability also is expressed, as I shall elaborate shortly and as I attempted to set forth in my opening summary in Part A of this phase of the Oral Proceedings, by the requirement that the consent of the League Council, now the United Nations, be obtained for any modification of the terms of the Mandate. This is the rule of the Mandate, expressed in the first paragraph of

Article 7, and stated in another way it reflects the basic concept of the Mandatory's accountability.

Such accountability is the major element which distinguishes the mandates system from the previously accepted concept—prior to the mandates system and antecedent to the Covenant of the League of Nations—the previously accepted concept of the moral obligation of colonial regimes in existence prior to that time. It is the embodiment of the principle of no annexations, which is expressed by the mandates system, and which my colleague, Mr. Moore, has adumbrated to this honourable Court in his remarks concerning the origin, nature and background of the mandates system itself.

It has been submitted in our opening comments, Mr. President, that the logical basis of the need for international supervision has nothing to do, and has nothing in common, with the subjective motivations or the intent of an advanced nation administering a non-self-governing territory. Indeed, the requirement of international supervision is not inconsistent with a presumption that an administering power will, and must, endeavour in good faith to promote the welfare of the inhabitants; this would seem to be an axiomatic, primitive and basic requirement, underlying all international agreements, or any other agreements of any character. The submission to international accountability is based upon the premise that decisions affecting the destinies of dependent peoples should not be unilateral and unsupervised, however well-intended, or well-motivated, or ill-intended, or ill-motivated such decisions, with respect to their destiny, progress, and welfare, may be. It is for this reason, among others, that the Applicants reject the contention of the Respondent that the test or measure of the obligations of Article 2, paragraph 2, of the Mandate, lies in the good or bad faith of Respondent in respect of the procedures, methods, or conduct under those obligations.

The innovation imported into the mandates system was that the sacred trust of civilization must be assured by means of an enforceable check or confirmation on the part of the organized international community in respect of the actual performance of the administering power, and the consequences of its conduct and of its performance objectively appraised. And, indeed, without such accountability, as the facts and events of recent years has made only too clear, and continues to make clear, no check or control of an international character would exist over the administration of the territory.

Administration without accountability of an international character, administration only "in the spirit of the old mandate", to borrow a characterization frequently pronounced by Respondent's highest officials, is inherently incompatible with the essential nature and very basis of the madates system. It follows, almost as a *quod erat demonstrandum*, that administration of the territory, in "the spirit of the old mandate", without international supervision, is a contradiction in terms. The "spirit of the old mandate", as has been shown, and as I shall endeavour to elaborate further, contains, as of its essence, the duty to submit to international supervision. Administration without such submission would be incompatible with the Mandate, both in letter and in spirit.

From this conclusion follows yet another, namely that to govern the territory "in the spirit of the mandate", but without international supervision, is, in fact, a mutilation of the Mandate, in the term used

by Judge Bustamante in his separate opinion in 1962, to which I have referred in my opening remarks. Acting "in the sprit of the mandate" without submission to international supervision, or the unsupervised government or regulation of the territory, is, as a matter of mandate law, mandate regulation, *per se* a violation of the Mandate if, as we assume and as the Court has twice held, the Mandate continues in existence.

In short, the authors of the mandates system incorporated in the Covenant the requirement for normal securities to assure performance of the trust, notwithstanding their undoubted assumption that the Mandatory would be motivated, if that term can be used in respect of a collective and shifting group of individuals comprising a government, by the purpose of discharging the trust in good faith. If the powers concerned had entertained doubts upon this score, it must be presumed that they would not have conferred the responsibilities upon the Mandatory in the first place. The measure of the obligations, as I shall endeavour to make clear, must have been broader than that.

The essentiality of supervision consists not in policing the motivation of the Mandatory, but in assuring that the results of its conduct are compatible with the mandate objectives. It was for this reason that in the decisive general considerations, formulated in the 1950 Advisory Opinion, the Court found:

> "The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision." (*I.C.J. Reports 1950*, p. 136.)

The Court went on to say that the rights of the peoples of mandated territories could not be "effectively safeguarded without international supervision and a duty to render reports to a supervisory organ". (*I.C.J. Reports 1950*, p. 137.)

The Court in 1950 distinguished what it called "the two kinds" of international obligations, assumed by Respondent under the Mandate, as I have said; the first group, in the words of the Court, was defined in Article 22 of the Covenant and in Articles 2 to 5 of the Mandate. In the Advisory Opinion of 1950, the Court referred to these substantive obligations and stated:

> "These obligations represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon." (*I.C.J. Reports 1950*, p. 133.)

[Public hearing of 22 March 1965]

Mr. President, if it please the Court to recall, at the conclusion of the Court's session on Friday I was on the point of commencing a discussion of the Applicants' contentions with respect to that phase of international supervision or accountability which relates to the right of recourse

to judicial protection. I had endeavoured, in introducing that subject, to make clear the fact that the authors of the mandates system had incorporated into the Covenant the requirement for normal securities to assure performance of the trust, notwithstanding their assumption that the Mandatory would be motivated by the purposes of discharging the trust in good faith, and that, as a concomitant of the normal security, the authors of the Covenant and the express provisions of the Mandate in Article 7 contemplated that there would be a right of judicial recourse under the circumstances and in the terms foreseen in Article 7, paragraph 2.

With your permission, Mr. President, I should now like to address myself to the right of recourse to judicial protection. Respondent, in its written pleadings, has revived arguments which were fully elaborated before this honourable Court in 1962, with respect to the question of the lapse or otherwise of international supervision over the Mandate, including the right of judicial recourse. In the 1962 Judgment this honourable Court reaffirmed the holding of the Court in 1950 in the Advisory Opinion, in the following terms:

> "The unanimous holding of the Court in 1950 of Article 7 of the Mandate continues to reflect the Court's opinion today. Nothing has since occurred which would warrant the Court reconsidering it. All important facts were stated or referred to in the proceedings before the Court in 1950.
>
> The Court finds that, though the League of Nations and the Permanent Court of International Justice have both ceased to exist, the obligation of the Respondent to submit to the compulsory jurisdiction of that Court was effectively transferred to this Court before the dissolution of the League of Nations. By its own resolution of 18 April 1946 the League ceased to exist from the following day, i.e., 19 April 1946."

And I stop there in my quotation from the 1962 Judgment, at page 334.

The 1962 Judgment thereupon, after referring to the actions taken by the Parties in respect of ratifications of the Charter of the United Nations, and the consequent acceptance of the compulsory jurisdiction of this Court in lieu of that of the Permanent Court, concluded as follows:

> "This transferred obligation was voluntarily assumed by the Respondent when joining the United Nations. There could be no question of lack of consent on the part of the Respondent as regards this transfer to this Court of the Respondent's obligation under Article 7 of the Mandate to submit to the compulsory jurisdiction of the Permanent Court. The validity of Article 7, in the Court's view, was not affected by the dissolution of the League, just as the Mandate as a whole is still in force for the reasons stated above."

I have quoted, Mr. President, from page 335 of the 1962 Judgment.

The phrase in the Judgment, "for the reasons stated above", refers, *inter alia*, to the discussion by this honourable Court in the 1962 Judgment of considerations set forth in the 1950 Advisory Opinion. In that Opinion, as the 1962 Judgment observed, the Court discussed the two kinds of international obligations assumed by the Respondent under the Mandate, to wit, those "directly related to the administration of the Territory", and those "related to the machinery for implementation".

In the context of the Court's references to the 1950 Advisory Opinion, this honourable Court reached the conclusion in the 1962 Judgment that:

> "The findings of the Court on the obligation of the Union Government to submit to international supervision are thus crystal clear. Indeed, to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate. That the League of Nations in ending its own existence did not terminate the Mandates but that it definitely intended to continue them by its resolution of 18 April 1946 will be seen later when the Court states its views as to the true effect of the League's final act of dissolution on the Mandates."

That is from page 334 of the 1962 Judgment.

Notwithstanding the reasons advanced by the Court in the 1950 Advisory Opinion, on the basis of which the Court concluded that the Mandate as a whole is in existence and that its provisions with regard to international supervision remain in full force and effect, and in the *light of the reasoning and conclusions of the Court in its 1962 Judgment*, to which I have just referred, Respondent nonetheless, and in the teeth of such findings and conclusions, not only reasserts and reargues its "new facts" contention—a phrase which I shall explain in a moment—but goes so far as to say that:

> "The Court in 1950 treated the obligation of accountability as being severable from other aspects of the Mandate, and based its judgment regarding survival of accountability on a finding which in effect rested on a tacit agreement considered to have been entered into during 1945-1946 providing for substitution of supervisory organs. And in 1962 the Court left open the question whether the obligation of accountability had lapsed."

This is from the Rejoinder, V, at page 73.

Indeed, Respondent goes even further and makes the somewhat surprising comment that: "Applicants have made no attempt to answer Respondent's analyses in the Counter-Memorial of the 1950 Opinion and 1962 Judgment in these respects."

The relevant sections of the Counter-Memorial are cited in footnotes on page 73 of the Rejoinder (V).

In all deference, Mr. President, the Applicants have considered, and remain of the view, that the Respondent's analyses in the Counter-Memorial in these respects are both self-answering and self-defeating. If an implication is sought to be drawn from Respondent's quoted comment concerning the asserted failure of the Applicants to attempt to answer analyses in the Counter-Memorial of the 1950 and 1962 Judgments of the Court—if an implication is sought to be drawn from Respondent's comment that the Applicants either tacitly agree with such analyses made by Respondent, or that they have omitted comment thereon through inadvertence, the Applicants take the opportunity of assuring this honourable Court that neither of such implications is warranted. On the contrary, the Applicants submit respectfully that the Court's reasons and conclusions in both the 1950 Opinion and the 1962 Judgment speak for themselves, and do not require analysis or exposition by the Applicants in this respect. It is submitted that the Respondent's analyses of both the 1950 Opinion and the 1962 Judgment are irreconcilable with their clear intendment and actual purport.

The meaning, weight and scope of the Judgment of this honourable Court of 21 December 1962 was a subject of consideration and analysis

by the honourable President of the Court in his separate opinion appended to the Judgment of the Court in the case concerning the *Northern Cameroons* (the Judgment of 2 December 1963, at pages 68-70 of the *I.C.J. Reports* of that year). In the light of the cogency and clarity of the treatment of this subject by the honourable President—if I may be permitted the liberty of characterizing the President's comments thereon—it may be of convenience to the Court to set forth as part of the record of these proceedings the following passages from the separate opinion of the honourable President, and with the Court's permission I should like to quote therefrom:

> "In the South West Africa cases the view of the Court that Article 7 of the Mandate Instrument was inherently necessary or essential to the functioning of the Mandates System, giving effect to the concept of what has been termed the 'judicial protection of the sacred trust', was of the very heart of the Court's reasoning. This view found its first expression in the Judgment when the Court was dealing, not with the question of what was a dispute within the meaning of Article 7 of the Mandate, but with the question raised by the Second Objection of the Union of South Africa which centred on the term 'another Member of the League of Nations . . .' in that Article. The Union of South Africa had claimed that Ethiopia and Liberia did not have the status required by the Article to invoke the jurisdiction of the Court since neither was any longer a Member of the League of Nations. The Court, after stating that this contention was claimed to be based upon the natural and ordinary meaning of the words 'another Member of the League of Nations', did not, as I understand the Judgment, deny that the natural and ordinary meaning of the words were as contended for by the Union of South Africa. It stated that the rule of interpretation that recourse should be had, in the first place, at least, to the ordinary and natural meaning of words was not an absolute rule of interpretation and then proceeded to observe that—
>
> > 'Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.' (*I.C.J. Reports 1962*, at p. 336.)
>
> The Court then proceeded to state its reasons why reliance, in the light of this observation, could not be placed upon the natural and ordinary meaning of the words in question. The centre of its reasons was the assertion that 'judicial protection of the sacred trust in each Mandate was an essential feature of the mandates system'; the administrative supervision by the League was 'a normal security' to ensure full performance by the Mandatory of the 'sacred trust' but 'the specially assigned role of the Court was even more essential, since it was to serve as the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate'; for 'without this additional security the supervision by the League and its Members could not be effective in the last resort' since supervision by the League Council was subject to the rule of unanimity of its Members, including the approval of the Mandatory itself. In the event of a conflict between the Mandatory and other Members of the Council, in the last resort, the Court continued, 'the only

course left to defend the interests of the inhabitants in order to protect the sacred trust would be to obtain an adjudication by the Court . . .'. This, it said, could only be achieved by a State a Member of the League invoking the adjudication clause in the Mandate Instrument.

'It was for this all-important purpose that the provision was couched in broad terms embracing "any dispute whatever" . . . It is thus seen what an essential part Article 7 was intended to play as one of the securities in the Mandates System for the observance of the obligations by the Mandatory . . .' (*I.C.J. Reports 1962*, p. 337.)

Moreover [the honourable President continues and concludes in the relevant passage I am taking the liberty of citing from the *Northern Cameroons* separate opinion], this 'essentiality of judicial protection for the sacred trust', the right to implead the Mandatory before the Permanent Court, was 'specially and expressly' conferred upon the Members of the League 'evidently also because it was the most reliable procedure of ensuring protection by the Court, whatever might happen to or arise from the machinery of administrative supervision'."

The honourable President concluded his opinion, so that I may present it to the Court respectfully in context, by stating:

"In the Dissenting Opinion of myself and Judge Sir Gerald Fitzmaurice in those cases there appear the reasons why we were unable to agree with this reasoning of the Court, and there is no need to repeat them here."

The reasons referred to are the following.

"There was, the Court said, an 'important difference' in the structure and working of the system of supervision of mandated territories under the League and that of trust territories under the United Nations, namely that the unanimity rule in the Council of the League had under the Charter been displaced by the rule of a two-thirds majority. This observation of the Court was directed to meet an argument that Article 7 was not an essential provision of the Mandate Instrument for the protection of the sacred trust of civilization, in support of which argument attention had been called to the fact that three of the four 'C' Mandates when brought under the trusteeship provisions of the Charter of the United Nations did not contain, in the respective trusteeship agreements, any adjudication clause. It was in the course of dealing with this argument that a statement of the Court, greatly relied upon by the Respondent in this case [that is, the *Northern Cameroons* case], to distinguish the present case from that of South West Africa was made. The Court's statement [said the honourable President], was as follows:

'Thus legally valid decisions can be taken by the General Assembly of the United Nations and the Trusteeship Council under Chapter XIII of the Charter without the concurrence of the trustee State and the necessity for invoking the Permanent Court for judicial protection which prevailed under the Mandates System is dispensed with under the Charter.' " (*I.C.J. Reports 1963*, pp. 68-70.)

Mr. President, I had begun to read and conclude the honourable President's statement in the separate opinion in the *Northern Cameroons*

case, and I should like to read several sentences more to assure that, to the best of my ability, I state the honourable President's comments in proper context.

As I started to read before:

> "In the Dissenting Opinion of myself and Judge Sir Gerald Fitzmaurice in those cases [the *South West Africa* cases] there appear the reasons why we were unable to agree with this reasoning of the Court, and there is no need to repeat them here. It is sufficient for the moment to note the reasoning of the Court and to observe that it was directed to establishing that in the events which happened there arose out of a debate in the Assembly of the League, on the eve of its dissolution, a unanimous agreement among all Member States that the Mandate should be continued to be exercised after the dissolution of the League of Nations in accordance with the obligations defined in the Mandate Instrument, including that of the Mandatory under the adjudication clause; that this specific obligation survived and necessarily involved reading into the clause the words 'Members of the United Nations' in place of the words 'Members of the League of Nations'." (*Ibid.*, p. 70.)

I thus end my quote from the opinion of the honourable President appended to the Judgment in the *Northern Cameroons* case.

I have, with respect, and with apology, quoted at this length from the honourable President's opinion because it does seem to me, as I stated at the outset of the quotation, that it reflects a clear, cogent, unanswerable analysis of "the very heart" of the Court's Judgment in 1962 and that further elaboration is hardly necessary by way of comment or analysis of that Judgment.

In the light of the analysis which I have just read by the honourable President, I therefore will forbear to comment further in this context on that subject.

It will be recalled, Mr. President, as I pointed out in my summary of legal issues, in Part A of this phase of the Oral Proceedings, that this honourable Court in the 1962 Judgment noted that Respondent, at that time, in the Court's words—

> ". . . argued that the rights and obligations under the Mandate in relation to the administration of the territory of South West Africa being of an objective character still exist . . .". (*I.C.J. Reports 1962*, pp. 332-333.)

It was, of course, clear on the face of Respondent's statement before this honourable Court in 1962, and in its written pleadings on the Preliminary Objections, that Respondent's argument in this respect was an alternative argument. It was directed to the proposition that, in respect of this honourable Court's jurisdiction—which was the central legal issue joined in 1962 on the Preliminary Objections—

> ". . . even in the event of a total lapse of the Mandate as a treaty or convention, it could still have an objective existence independently of a treaty or convention. And I say [this was Mr. de Villiers speaking] that I am perfectly prepared to accept that proposition for purposes of argument, because it does not affect my contention relative to jurisdiction. I need not, at this stage, ask the Court to choose between those two alternatives, because both have the

same result as far as jurisdiction is concerned." (Counsel's statement in Oral proceedings, 19 Oct. 1962, afternoon.)

Respondent's alternative argument, thus submitted *arguendo*, was, however, thought relevant by the Court to its interpretation of the 1950 Advisory Opinion, an interpretation advanced by Respondent in 1962, and now repeated, that:

> "The Court in 1950 treated the obligation of accountability as being severable from other aspects of the Mandate . . ." (**V**, p. 73.)

In the words of Respondent's learned Counsel during the 1962 Oral Proceedings:

> ". . . if the elements contained in Articles 6 and 7 are severable from the rest of the Mandate institution, then acceptance of my propositions concerning Articles 6 and 7 does not result in a conclusion that the whole of the Mandate has lapsed. It means that the rest still survives as a trust without, however, international accountability or international supervision, and without compulsory jurisdiction on the part of the Court." (Oral proceedings 1962, 19 Oct. 1962, afternoon.)

As I have said, Mr. President, Respondent's contention, even though advanced in the alternative and *arguendo*, was based and remains based, as it is renewed in the written pleadings now before the Court, upon the untenable premise that the mandate provisions, as a matter of mandate law, *could* survive as a so-called trust, "without", to use the Respondent's phrase again, "without, however, international accountability or international supervision, and without compulsory jurisdiction on the part of the Court". This, we submit, is a contradiction in terms, whether made as an alternative argument, *arguendo* or otherwise.

It was, no doubt, we submit with respect, for this reason that the Court, in the 1962 Judgment, after noting Respondent's argument, pointed out that:

> "Similar contentions were advanced by the Respondent in 1950, and the Court in its Advisory Opinion ruled:
>
> 'The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified.' (*I.C.J. Reports 1950*, p. 133.)" (*I.C.J. Reports 1962*, p. 333.)

The 1962 Judgment, after quoting the passage which I have just read to the Court, proceeds, in the same context, with a further analysis of the 1950 Advisory Opinion, and concluded:

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

It will thus be seen that the substance of Respondent's present first alternative argument, that the supervisory provisions of the Mandate have lapsed although not carrying to their death the balance of the Mandate, was first advanced to the Court in 1950 and rejected in the

1950 Advisory Opinion. The same argument was advanced in 1962, and again rejected. The same argument is today advanced.

In the light of the foregoing, it seems sufficient to note, without further comment or characterization, that Respondent's argument concerning the severability of Articles 6 and 7 does not gain force or merit upon repetition for the third time.

In distinguishing the two kinds or groups of obligations assumed by Respondent under the Mandate, that is, these relating respectively to the administration of the Territory and to the machinery for implementation, the Court commented:

> "What expression was given to 'the right of the population to have the Territory administered in accordance with these rules' by the framers of the mandates system? It was no more and no less than the obligation of accountability of the mandatory, which took the form of the 'second group of obligations' ",

(This is from the 1950 Opinion and the Court goes on to say—)

> "which in turn related to the machinery for implementation, and was closely linked to the supervision and control of the League."

Hence, the Court concluded, if the first group of obligations still existed (those towards the inhabitants), the right of the population to have the territory administered in accordance therewith also remained.

There is one, and only one, way in which the right to have the Territory administered in accordance with "the very essence of the sacred trust of civilization" (in the language of the 1950 Opinion) can be fulfilled. "No such rights of peoples [said the Court] could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ." This is from the 1950 Opinion.

As a matter of logical deduction, it is manifest that the continued vitality of the rights of the inhabitants with respect to the first group of the substantive obligations requires that such rights be subject to administrative supervision and judicial enforcement. To require that such rights be capable of enforcement is to require that the territory be administered in accordance with such rights—these are complementary and mutually inter-related rights and obligations. To require this is to require that the Mandatory, so long as it retains rights under the Mandate, must be subject to the obligations of accountability, including judicial protection.

Mr. President, in the Judgment of 2 December 1963 in the case concerning the *Northern Cameroons*, the Court made clear the nexus linking the several forms of international supervision and accountability in respect of an international trust cognate to that now before the Court. In that case, as the Court pointed out, the whole system of administrative supervision under the relevant trusteeship agreement had come to an end as a result of a decision of the United Nations General Assembly.

On the basis of the foregoing consideration (that is to say the end of administrative supervision), the Court drew the following conclusion:

> "The Court cannot agree that under these circumstances the judicial protection claimed by the Applicant to have existed under the Trusteeship System, would have alone survived when all of the concomitant elements to which it was related had disappeared." (*I.C.J. Reports 1963*, at p. 36.)

In the cases now before this honourable Court, the Court has held that the judicial protection claimed by the Applicants has continued to exist, notwithstanding the dissolution of the League of Nations, and the disappearance of the old Court. On a parity of reasoning with the finding just cited from the *Northern Cameroons* case, it cannot be assumed that the Court's decision in the 1962 Judgment is to be interpreted as holding that the only form of international supervision which has survived is that of judicial protection, without the concomitant elements implicit in the system of administrative supervision, along with judicial protection. Indeed, in our submission, it would seem to follow as an *a fortiori* proposition, that the Court's holding concerning the survival of judicial protection presupposes the survival of concomitant administrative supervision, which the honourable Court characterized in the *1962 Judgment* as the "normal security".

Mr. President, I have, in presenting to the Court the problems involved in the survival of judicial protection, attempted to show the relationship between administrative supervision and judicial protection as interrelated concomitant elements of one system of international supervision. I shall shortly, with the Court's permission, come to a separate, more detailed analysis of the elements inherent in the system of administrative supervision itself, but I have taken the liberty of referring to both administrative supervision and judicial protection in this phase of my remarks because of their inter-relationship and because of the Applicants' respectful submission that the Court having held that judicial protection has survived, it follows, in our view, as an *a fortiori* proposition that the concomitant element of administrative supervision likewise must be deemed to have survived in accordance with the reasoning of the Court.

The obligations of international supervision, accordingly, are of the following three inter-related kinds. They comprise the obligation to submit to administrative supervision and the obligation to submit to judicial protection. And thirdly, as I shall show later, they include also the duty to seek the consent of the United Nations, the administrative organ in respect of any proposals to modify the terms of the Mandate.

It seems clear that emphasis is properly to be placed upon the use of the phrase by the Court "one of the securities", in the passage from the 1962 Judgment I shall now quote to the Court. The Court referred to the obligation to submit to judicial protection, and I quote—"as one of the securities in the Mandates System for the observance of the obligations by the Mandatory"—"*one* of the securities in the mandates system".

The history of the dispute now before the Court, Mr. President, in which the normal security for the protection of the rights of the inhabitants has been frustrated by virtue of Respondent's failure and refusal to discharge its obligation to submit to international supervision, even while retaining rights under the Mandate, underscores the significance of the Court's description of the right to implead the mandatory before the Court as (what the Court described as) "the most reliable procedure of ensuring protection by the Court, whatever might happen to or arise from the machinery of administrative supervision". (*I.C.J. Reports 1962*, p. 338.)

The Court's concept in respect of the importance of judicial protection, as I have pointed out, was characterized by the honourable President, in his separate opinion in the *Northern Cameroons* case, as "the very heart of the Court's reasoning".

As I have also attempted to point out, Mr. President, Respondent, in terms of Article 6, is under a duty to account administratively to a supervisory organ, as well as to submit to the jurisdiction of this Court.

In terms of Article 7, paragraph 1, of the Mandate, Respondent is also under a duty to account to that same organ (to the United Nations) in respect of modifications of the terms of the Mandate, and to seek consent thereto.

Therefore, in conclusion of this section of my argument, before turning to an analysis of administrative supervision itself, may I be permitted to summarize again, by pointing out the inter-related, concomitant aspects of administrative supervision, the right of judicial recourse, and the duty to obtain the consent of the administrative organ to any proposed modifications of the terms of the Mandate.

Keeping in mind, Sir, the inter-relationship of these three concomitant elements, I turn, with the President's permission, to a discussion of the provisions of the mandate concerned with administrative supervision and Article 22, paragraphs 7-9, of the Covenant of the League of Nations, as well as Article 6 of the Mandate itself.

Mr. President, in Part A of this phase of the Oral Proceedings, as well as in the remarks just concluded, I have referred to the Court's holding in both the 1950 Advisory Opinion and in the 1962 Judgment, that the validity of the compromissory clause of Article 7 "was not affected by the dissolution of the League, just as the Mandate as a whole is still in force". That is from the 1962 Judgment, at page 335.

In its written pleadings, Respondent requests the Court to reconsider and reverse its holding with respect to the validity of the compromissory clause of Article 7, as I have just described. In support of its request, Respondent re-argues the points presented to the Court in 1962, in substantially the same form and terms, and I have not, with respect, regarded it as necessary to do more than refer to the comments by the honourable President summarizing cogently the meaning and purport of the 1962 Judgment of the Court, with respect to the judicial protection phase.

In addition, Respondent has advanced a new form of argument, as a new alternative contention, to the effect that the asserted lapse of Article 6 of the Mandate has brought about collapse of the Mandate as a whole, on the basis of the premise—advanced by Respondent only in the context of its second alternative contention—that the mandate provisions in respect of administrative supervision are essential in the mandates system and an inseverable element of the Mandate. This is the premise of the second alternative contention.

Inasmuch as the Applicants contend that the mandate provisions imposing upon the Respondent the obligation to submit to administrative supervision are, indeed, inseverable and integral to the Mandate, it appears that there is common cause in this proposition, at least in so far as the Respondent's second alternative contention is concerned. Respondent, in the Rejoinder (it is only fair to point out to the Court), expresses some concern lest the Applicants' reference to "common cause" between the Parties in respect of the integral and inseverable nature of international supervision—that reference to "common cause" in that respect might create a misleading impression. In view of Respondent's method of pleading and its highly selective use of the premise of essentiality of administrative supervision (which is limited, as I say, only

to the context of its second alternative argument), there seems little purpose to be served by engaging in debate on the matter of whether there is "common cause" in this respect or not. It seems important to the Applicants to come to grips with the problem itself, which I shall now endeavour to do.

The Applicants, accordingly, will attempt in what follows, to support their submission that the provisions of the Mandate embodying obligations to submit to international administrative supervision are basic obligations essential to the Mandate and inseverable from the balance. As the Applicants have pointed out in Part A of this phase of the Oral Proceedings, acceptance of Respondent's first alternative contention, according to which administrative supervision has lapsed without however collapsing the balance of the Mandate, would leave the Applicants and other States similarly situated with no protection against asserted abuse or breaches of the Mandate other than through recourse to judicial protection which is, in any event, the indispensable final bulwark.

Under the Applicants' first alternative contention, pursuant to which Article 6, the administrative supervision provision, would fall away, leaving the balance of the Mandate intact, Article 7, the compromissory clause, would remain in effect. The Applicants likewise have pointed out, citing the *Northern Cameroons* Judgment as I just have done, that administrative supervision is a concomitant of the right of judicial recourse. We have, moreover, quoted from the Judgment of the Court in 1962 as well as from opinions of learned judges in the 1962 proceedings, which I quoted in the opening phase of our presentation, showing that, in the concise phrase of the honourable President and Judge Sir Gerald Fitzmaurice, in their joint dissenting opinion in 1962, Articles 6 and 7 of the Mandate stand as "designed portions of an inherent and integrated whole" (*I.C.J. Reports 1962*, p. 553).

The arguments advanced by Respondent in the context of its second alternative argument demonstrate persuasively that administrative supervision was regarded by the authors of the mandates system as an integral element of the mandates system, as being of the essence thereof, and as being an inseparable provision of the Mandate. This being so, there might appear to be small justification or warrant for the Applicants to make a demonstration tending toward the same conclusion.

Nevertheless, in the light of Respondent's rather hypothetical and conditional approach with respect to this premise, particularly inasmuch as Respondent proceeds from the premise of essentiality of administrative supervision only in the context of one branch of its case, that is in respect of the second alternative contention, the Applicants respectfully adduce considerations and arguments, demonstrating that the obligation to submit to international administrative supervision is undoubtedly an essential element of the mandates system, that it imported a basic obligation into the Mandate, as a matter of mandate law, and that the events and transactions which took place at the time of the dissolution of the League of Nations leave no room for doubt that the obligations of international administrative supervision survived the dissolution of the League, and that the United Nations replaced the League of Nations as the administrative supervisory organ.

In Part A of our presentation, Mr. President, I summarized the major legal premises of the respective Parties, addressed to the issues posed by Respondent's contention that administrative supervision has lapsed,

and the Applicants' counter-contention that the United Nations has replaced the League as supervisory organ over the Mandate, in terms of Article 22 of the Covenant and of Article 6 and Article 7, paragraph 1, of the Mandate.

I venture to summarize again Respondent's two major contentions in this regard as follows. In assuming the Mandate, the obligation undertaken by Respondent, "was not one to submit to 'international supervision', but, rather, to submit to a specific supervision of particular League organs"—this is quoted from the Counter-Memorial.

When the League dissolved and the United Nations commenced operations—so runs their second major premise—the latter did not decide to assume supervisory authority over the Mandate, nor did Respondent agree to submit to supervision by the United Nations.

The Applicants have sought to point out that appraisal of Respondent's first major contention rests upon analysis and interpretation of events, transactions and undertakings occurring during the period of the formation of the League and of the mandates system. Similarly, proper evaluation of Respondent's second contention, that is that when the League dissolved and the United Nations commenced operations the United Nations did not decide to assume supervisory authority, nor did Respondent agree to submit to supervision by the United Nations, proper evaluation of that contention involves analysis and interpretation of events, transactions and undertakings occurring during the period of the demise of the League and the birth of the United Nations.

The relevant history and background of the League Covenant and of the mandates system has been laid before the Court in Part B of our presentation by my colleague, Mr. Moore.

Upon the basis of the events and transactions thus surveyed, the Applicants respectfully submit that an obligation to submit to international administrative supervision was regarded by the authors of the mandates system as, indeed, basic to the novel international institution then being formed, one regulated by international rules particular to itself. The feature of international supervision, indeed, stamped the mandates system with its novel character; such supervision was the "normal security", embodied in the Covenant of the League itself, and designed to safeguard the sacred trust.

As I ventured to comment during the Oral Proceedings before this honourable Court in 1962:

> "Responsibilities assumed by South Africa in the Mandate were based upon its pledge to discharge a 'sacred trust of civilization' and to give 'securities for the performance of this trust'—these are the words of the Covenant of the League. Phrases of such weight and dignity tend to lose their lustre with the passage of time, but never their significance." (Oral proceedings, 15 Oct. 1962, morning.)

Mr. President, the high and humane purposes of the new institution, based as it was upon the principle of non-annexation on the one hand, and self-determination on the other, call for the application of principles of interpretation in a manner befitting its character.

This honourable Court, in interpreting the Convention of Genocide, an international agreement the objectives of which, broadly speaking, are cognate with those of the sacred trust of the Mandate, stated as follows:

> "The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a Convention that might have this dual character to a greater degree since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interest of their own: they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions." (*I.C.J. Reports 1951*, p. 15.)

This is from the Court's Judgment in the case involving reservations to the Genocide Convention.

Mr. President, it would be difficult indeed to find words more apposite to a determination of the principles of interpretation and application of Article 22 of the Covenant and of the relevant provisions of the Mandate for South West Africa itself.

Respondent, in its written pleadings, summarizes certain principles of treaty interpretation, which are set forth in the Counter-Memorial, **II**, pages 110-114. In respect of the application of such principles Respondent correctly comments:

> "it is, of course, necessary to look at and consider the instrument as a whole before any conclusion is reached about the meaning or effect of any part thereof".

With specific reference to the principle of effectiveness Respondent states:

> "This principle takes account of the objects and purposes of the instrument to be interpreted, and presumes that the parties intended for particular provisions the maximum effectiveness, consistent with the clear text, towards achievement of such objects and purposes."

This also is quoted from the Counter-Memorial, within the series of pages I have already cited.

Although Respondent's comments, just quoted, appear to the Applicants in general to be a correct formulation, note might be taken that the phrase "clear text" in the second quoted passage may involve a latent ambiguity. Whether or not a provision is "clear" may, of course, depend upon the context rather than merely upon the text.

The phrase "clear text" as employed by the Respondent in the quotation I have just cited, probably is intended by Respondent to refer to another canon of interpretation, namely that effect should be given to the natural and ordinary meaning of words employed in a provision. However, as this honourable Court said in the 1962 Judgment, in relation to precisely the same point:

> "But this rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible

with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it." (*I.C.J. Reports 1962*, p. 336.)

Mr. President, applications of canons, or rules, to the interpretation of treaties or institutional arrangements to which there are parties—whether called "treaties" or not—is, of course, based upon the premise of ascertaining the intentions and views of the parties in the light of common sense and experience in the conduct of human affairs.

The principle of maximum effectiveness, *ut res magis valeat quam pereat*, is the very embodiment of that premise.

In a widely quoted comment concerning the rule of effectiveness, Lord McNair remarked, *inter alia*:

"it is the duty of a tribunal to ascertain and give effect to the intention of the parties as expressed in the words used by them in the light of the surrounding circumstances". (*Law of Treaties* 1961, p. 383.)

On the one hand, the tribunal is to avoid revision of the instrument, in the sense of reforming it, rather than ascertaining the true intentions of the parties or, as it is sometimes put, engaging in judicial legislation.

On the other hand, full effect is to be given to the "spirit, purpose and context of the . . . instrument in which the words are contained", in the words of this honourable Court, which I have previously quoted from the 1962 Judgment.

In their written pleadings, the Applicants refer to a long line of cases decided by this honourable Court and its predecessor, in relation to the Applicants' contention that the compromissory clause of Article 7 of the Mandate should be interpreted in a sense which would give effect to the humanitarian objectives of the Mandate and effectuation of the sacred trust of civilization.

I forbear from repetition of quotations from our written observations, respectfully drawing them to the Court's attention—they appear at pages 476-482 (I) of the Applicants' Observations in the preliminary objections phase of these proceedings.

In the same context, the Applicants have quoted an excerpt from *The Development of International Law by the International Court*, by the late Judge Sir Hersch Lauterpacht, in which the learned Judge referred to the fact that:

"in a considerable number of cases the Court, in interpreting international law, has been in fact confronted with a choice between the principle of the minimum restrictions upon the sovereignty of States and the attribution of full effect to what appears to be the purpose of the obligations binding upon or undertaken by them".

The learned late Judge then proceeds, after citing numerous instances and precedents, to say:

"We have seen that the result of that choice has been such that the jurisprudence of the Court in this sphere can to a large extent be conceived in terms of a restrictive interpretation of claims of State sovereignty."

This is cited from the 1958 edition at page 297.

Respondent's contention that the obligation of international supervision, imposed and assumed under the Covenant and Mandate, merely

was intended to refer to a specific supervisory authority, to wit, the League Council, is based upon the argument, *inter alia*, that:

> "Since in fact nobody in 1920 contemplated the possibility of the future dissolution of the League, it would be unrealistic to impute an intention to the authors of the Mandate to guard against the possible consequences of such dissolution."

This is from the Rejoinder, V, at page 34.

This argument, with all respect, seems to the Applicants to involve a *non sequitur* and, moreover, misapplies principles of interpretation. It is, we think, a *non sequitur* because the undenied fact that nobody in 1920 foresaw the dissolution of the League of Nations has nothing to do with what they would have wished to guard against had the possibility been envisaged. Unless the nature and purpose of the mandate institution has been misunderstood and misapplied by this honourable Court, it seems obvious that the authors of the mandate systems would have been, and indeed were, intent upon guarding against any possibility—foreseen or unforeseen, predictable or unpredictable—whereby international supervision would lapse, leaving the sacred trust to the unregulated, unsupervised control of the trustee. In short, the authors of the mandates system could not have intended that any situation could possibly arise in which the trustee would end up with the *corpus* of the trust in his pocket, by default. An intention to the contrary would have been irreconcilable with the essential attribute of the Mandate, as found by this honourable Court, namely that:

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

Respondent's argument to the contrary would impute to the authors of the Covenant and the Mandate an intention to permit the mandatory, under unforeseen and unpredictable circumstances, to employ its rights as a lever for annexation, rather than merely as a tool enabling it to fulfil its international obligations.

For these reasons we find a *non sequitur* in the Respondent's contention.

Moreover, Respondent's argument is not based upon any valid principle of interpretation. Courts frequently determine, in the light of circumstances, the nature and other provisions of an agreement, what the parties would have intended, had they foreseen certain possibilities. This is indeed particularly pertinent to the present cases, in other respects.

As Judge Jessup pointed out in his 1962 separate opinion:

> "It must also be remembered that the mandatory was a 'Mandatory of the League of Nations'. But according to the accepted view, the termination of the League did not terminate the Mandate as an institution which means that the Mandatory also, and specifically the Union of South Africa, *qua* Mandatory, must have survived the dissolution of the League although its mandator was no longer in existence." (*I.C.J. Reports 1962*, p. 414.)

The authors of the mandates system, in other words, did not foresee that Respondent would cease to be a member of the League of Nations, a mandatory on behalf of the League, or for that matter, if it is relevant, would cease to be a member of the juridical system of which His Britan-

nic Majesty was Sovereign. In accordance with the text of the Mandate, the Mandate was—

> "... conferred upon his Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa".

These are words to which literal and normal interpretation could not be applied in the present context.

Application of the principle of interpretation contended for by Respondent would thus make it "unrealistic" to impute an intention to the authors of the Mandate that Respondent should continue to exercise rights over the Territory at a time when it might no longer be a member of the League or of the British Commonwealth of Nations.

In the course of a consideration of principles of construction, in his 1962 dissenting opinion, Judge van Wyk made the following comment, pertinent to the question under discussion:

> "One must also bear in mind that parties frequently deliberately use wide terms so as to provide for all possible situations, foreseen and unforeseen, and it follows that when a situation not foreseen by the parties arises which falls within the meaning of the words employed by them they are deemed to have had a common intention in regard thereto." (*I.C.J. Reports 1962*, p. 580.)

It need not be added that the passage quoted from the dissenting opinion was a statement of a general nature and no contrary inference is to be drawn from the fact that I have quoted it with respect to its application to the pending cases.

Article 22 of the Covenant of the League used very "wide terms" indeed in formulating and innovating the legal principle—

> "... that the well-being and development of such peoples [that is, peoples not yet able to stand by themselves] form a sacred trust of civilization and that securities for the performance of this trust should be embodied in the Covenant".

These are the words of Article 22, paragraph 1, of the Covenant.

Read in the light of this overriding purpose, the conclusion is not merely permissible, but, with respect, it seems to be unavoidable, that the intention of all the parties to the Covenant and to the mandates system must be presumed to have been that, if the League were to dissolve, which was not foreseen and not predicted, some other way would have to be found by which the Mandate would be supervised.

In the words of Judge Bustamante, in his 1962 separate opinion:

> "Following the scheme of all conventions, in the Mandate agreements provision is made in such a way as to guarantee the functioning of the system *during the whole period of its duration.*" (*I.C.J. Reports 1962*, p. 382.)

The *Barcelona Traction* case, the Judgment in which was rendered after the filing of the Applicants' Reply, is instructive by analogy to the point under discussion. Warning against a "confusion of ends with means", the Court spoke in that case of:

> "... the end being obligatory judicial settlement, the means an indicated forum, but not necessarily the only possible one". (*I.C.J. Reports 1964*, p. 38.)

The Court went on to say:

> "An obligation of recourse to judicial settlement will, it is true, normally find its expression in terms of recourse to a particular forum. But it does not follow that this is the essence of the obligation . . . The substantive object was compulsory adjudication, and the Permanent Court was merely a means for achieving that object. It was not the primary purpose to specify one tribunal rather than another, but to create an obligation of compulsory adjudication. Such an obligation naturally entailed that a forum would be indicated; but this was consequential." *(Ibid.)*

Similarly, Mr. President, in the present cases, the end was international supervision, the means was the League and is now the United Nations which, as the Court found in 1950, is—

> ". . . legally qualified to exercise the supervisory functions previously exercised by the League of Nations . . .". (*I.C.J. Reports 1950*, p. 137.)

The "substantive obligation"—to use the phrase of the Court of the *Barcelona Traction* case—the "substantive obligation" under the Mandate, is international supervision: the League was—quoting again—"merely a means for achieving that object".

The *Barcelona Traction* case, it is submitted, demonstrates that the Court will construe the intention of the parties to an agreement in the light of what their common intent would have been, if they had foreseen developments relevant to their common purpose.

The parties to the compromissory clause in *Barcelona Traction* did not foresee the demise of the Permanent Court, yet the Court had no difficulty in reaching the conclusion that, in view of their purpose, the parties would have intended to submit their disputes to the new Court had they anticipated the demise of the old one.

In the present cases, the presumption is strengthened by reason of the applicability of the basic rule of equity and of reason, to wit, that parties will never be deemed to intend that, by virtue of disappearance or demise of other parties, the fiduciary will keep for himself a beneficial interest never intended for him.

It is therefore, Mr. President, not an occasion for surprise that actions of the parties to the events and transactions during the period of 1945-1949, including the Respondent, were wholly compatible with the purpose of the mandates system, and the equitable principle to which I have just referred.

A most compelling form of evidence in respect of the intention of parties to an instrument, no doubt, is the conduct of the parties in relation thereto. With specific reference to the events and transactions which took place during the period commencing in 1945 and which centred upon the future of the Mandates, including the Mandate for South West Africa, this honourable Court cited and applied the principle that, and I quote from the 1950 Opinion:

> "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its obligations under an instrument." (*I.C.J. Reports 1950*, pp. 135-136.)

Application to the undisputed facts of the principle thus formulated

by the Court was one consideration, *inter alia,* which underlay the Court's conclusion that Respondent's declarations during the relevant period, and I quote again from the 1950 Opinion:

> "... constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government". (*I.C.J. Reports 1950,* p. 135.)

The indispensability of administrative supervision in the scheme of the Mandate, and its complementarity with judicial protection, of which it is a concomitant element, in the words of this honourable Court in the *Northern Cameroons* Judgment, is conceded by Respondent in a rather explicit manner in its Counter-Memorial, from which I quote the following passage:

> "... it is therefore clear that the possibility of proceedings under the compromissory clause, even on the widest suggested interpretation of the Court's powers thereunder, could not have provided a substitute for reporting and accountability and administrative supervision, as contemplated by the authors of the Mandate System in providing that the tutelage should be exercised by the advanced nations 'as Mandatories on behalf of the League' ". (II, p. 173.)

It is, needless to say, quoted in quite a different context, but nevertheless the words do mean what they say.

Respondent's concession which I have just quoted is but another way of saying that administrative review is essential, but must be supplemented by judicial protection, just as judicial protection is essential, but cannot fill the role of administrative supervision. It is submitted, with respect, that this is precisely the meaning of the Court's finding in the 1962 Judgment, that:

> "The administrative supervision by the League constituted a normal security to ensure full performance by the Mandatory of the 'sacred trust' ... but the specially assigned role of the Court was even more essential, since it was to serve as the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate." (*I.C.J. Reports 1962,* p. 336.)

In the 1962 Judgment, the Court decided explicitly the legal issue as to survival of the compromissory clause of Article 7 of the Mandate. As an essential element of its consideration of the questions underlying that issue, the Court treated of the inseparably related and concomitant question of administrative supervision in the plan of the Mandate.

In the 1962 Judgment, the Court quoted from the 1950 Advisory Opinion the conclusion that:

> "It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist ..." (*I.C.J. Reports 1950,* p. 136.)

It is quoted by this honourable Court in its 1962 Judgment at pages 333 to 334.

The quoted passage, Mr. President, both in letter and spirit, is as applicable to organs for administrative supervision as it is to the tribunal endowed with the function of judicial protection of the Mandate for South West Africa.

The role of judicial protection is indispensable, as I have said, but it cannot serve as a first, or exclusive recourse, without the imposition of an inappropriate burden upon this high tribunal. Respondent recognizes the truth of this fact, but distorts its application by suggesting that the issues in the cases at bar are too complex, detailed and cumbersome for judicial attention. We shall come to a consideration of these arguments in Part D of our presentation.

The reason—and the sole reason—that these issues are before this honourable Court is precisely because of Respondent's rejection of administrative supervision; that rejection has made impossible the workings of the normal security contemplated in Article 22 of the Covenant of the League and in the Mandate itself.

The inter-dependence of Article 6 and of Article 7 I have attempted to describe, and will avoid further elaboration. The compromissory clause in the second paragraph of Article 7 of the Mandate is, in the words of the 1962 Judgment, which I have just quoted, "even more essential" in a functional sense than the administrative supervision provisions. These provisions, however, as I have said, are designed to accomplish related ends; both are vital to the functioning and purpose of the Mandate; they are interlocking and mutually reinforcing.

Mr. President, I had reached the point of stating that in their Reply the Applicants have demonstrated that the basic principles of the mandate structure, being a combination of the concept of trust or *tutelle* and of *mandatum*, require that the Mandatory, the trustee, or the *tuteur*, be subject to accountability. This is discussed in our Reply **(IV)** at pages 525-540.

The Applicants contend that from the "... basic division between control and benefit flow two consequences: there must be an accounting concerning the exercise of the control; there must be supervision by a public authority". This is from the Reply, at **(IV)** page 530.

Applicants refer in this connection, *inter alia*, to the normal rule of accountability enforced upon a guardian in the United States, to guardianships or *tutelles* under the French Civil Code, to the laws of Quebec in Canada, and to the civil codes of Argentina, Chile, Mexico, Panama and Peru.

Respondent's rebuttal thereto consists of mere assertion, coupled with doubtfully relevant propositions concerning principals and agents, master and servants, and certain types of brokers, and with the contention that "... in England, the home of the trust, there does not appear to be any provision at all for regular accounting to, or supervision by, a public organ". That is from the Rejoinder, **V**, page 43.

In the Applicants' view, Respondent does not emphasize or indeed, appears largely to ignore, that in every legal system of which the Applicants have been made aware, whenever control is split from benefit the beneficiary has the right of recourse to supervision or protection by a public authority as a protection against abuse or breach of the trust.

Respondent contends that an "... obligation with respect to accountability which is normally regarded as incidental in principle to a fiduciary relationship, is the duty to render account *to the beneficiaries*". This is at page 43 of the Rejoinder **(V)**. Respondent does indeed refer to the right of recourse to supervision either by the beneficiary or on his behalf, but the stress, if we understand correctly, is placed upon the duty to render account to the beneficiaries as, for example, in the quotation to which I have just referred the Court.

Respondent's contention, thus stated, has two defects:

1. The right of a beneficiary, either on his own motion or through that of another, to enforce a duty to account, may be a wholly inadequate protection against abuse or breach of the trust. Without recourse to a public authority established to supervise the proper performance of the trust, the more incapable a beneficiary is of conducting his own affairs, the less meaningful would be an accounting to him alone. That, of course, is a self-evident proposition.

As will be demonstrated more fully in considering the substantive obligations of the Respondent under the Mandate, Respondent places heavy though, in the Applicants' view, hollow, reliance upon the asserted incapacity of the inhabitants of the territory to manage their own affairs. Respondent's contention that its sole fiduciary duty is that of reporting to the inhabitants—and there is no regular international or other supervisory authority to which Respondent reports or concedes the duty to report—the contention that its sole fiduciary duty is to report to the inhabitants, is incompatible with its insistence upon their very need for tutelage, as is asserted by the Respondent. I leave aside for the time being the question, which touches on the merits, how one could, in any event, "account" to the inhabitants of the Territory, who are presently denied possibilities of an effective, common voice.

2. Respondent's contention also ignores the fact that the trust at issue here was undertaken "on behalf of the League of Nations", language quoted from the Mandate itself.

The international organization, hence, is to be regarded as a surrogate, whose continuing existence was held essential by the Court both in 1950 explicitly and in 1962 at least by necessary implication. In the Advisory Opinion of 1950, the Court held, as I have already mentioned, that for Respondent to retain rights under the Mandate, while denying obligations, "could not be justified". In the 1962 Judgment, similarly, the Court held that Respondent's rights over the Territory were, in the Court's words, "mere tools" to enable it to discharge its obligations.

In other words, in the absence of a surrogate to whom Respondent regularly reports and accounts, its rights under the Mandate cannot be retained, and must lapse. Any other result would be irreconcilable with the Court's holdings in 1950 and in 1962.

Notwithstanding Respondent's formal objection to the doctrine of *cy-près*, and recognizing that the beneficiaries have remained the same, nonetheless the beneficiaries themselves have no right under the Mandate to seek judicial or administrative recourse. The concept underlying the *cy-près* doctrine, accordingly, may be thought to be analogous to the situation here, that is, a new surrogate, or representative of the beneficiary, is essential, inasmuch as without such representative the beneficiary, which has no "existence" in law, has no right to seek protection, as inhabitants.

As Judge Bustamante commented in his separate opinion appended to the 1962 Judgment:

> "The tutelary organization's right of supervision over the exercise of the Mandate is an institutional rule in the Mandates System, expressly provided for by Article 22 of the Covenant (paragraphs 7, 8 and 9). This right is not just an adjectival or procedural formality, but an essential element on which adherence to the purposes of the

system and the efficiency of its application depend. It should not be forgotten that in the Mandate agreements one of the parties, the beneficiary under tutelage, has no possibility of entering into discussion with the other party, the Mandatory, on an equal footing, having regard to its lack of legal capacity. Thus, the only way of safeguarding the rights of the people under Mandate is to entrust the supervision of the Mandatory's acts to the Mandator or tutelary organization which, on the one hand, represents the ward and, on the other, personifies the interest of the States of the world assembled in an association." (*I.C.J. Reports 1962*, p. 358.)

This honourable Court has had occasion to consider in some detail the nature of the requirements essential to "the maintenance of effective international supervision of the administration of the Mandated Territory".

The matter arose for discussion in connection with the request of the General Assembly to this honourable Court to give an advisory opinion on the question whether it was consistent with the Advisory opinion of 1950 for the Committee on South West Africa to grant oral hearings to petitioners on matters relating to the Territory of South West Africa. As the Court noted, in its opinion in 1956, oral hearings had not been granted to petitioners by the Permanent Mandates Commission at any time during the regime of the League of Nations. The right of petition was introduced to the mandates system by the Council of the League of Nations on 31 January 1923, and certain rules relating thereto were prescribed. This was, as the Court commented in the 1956 Advisory Opinion, "an innovation designed to render the supervisory function of the Council more effective".

In response to a suggestion that the grant of oral hearings by the Committee on South West Africa to petitioners would involve an excess in the degree of supervision to be exercised by the General Assembly, and that the General Assembly should be restricted to measures which had actually been applied by the League of Nations, the honourable Court found as follows, in its 1956 Advisory Opinion:

"The Court will deal first with the suggestion that the grant of oral hearings to petitioners would, in fact, add to the obligations of the Mandatory and thus lay upon it a heavier burden than that it was subject to under the Mandate Systems. The Court is unable to accept this suggestion. The Committee on South West Africa at present receives petitions from the inhabitants of the Mandated Territory and proceeds to examine them without the benefit of the comments of the Mandatory or of the assistance of its accredited representative during the course of the examination. In many cases, the material available to the Committee from the petitions or from other sources may be sufficient to enable the Committee to form an opinion on the merits of the petitions. In other cases the Committee may not be able to come to a decision on the material available to it. If the Committee cannot have recourse to any further information for the purpose of testing whether a petition is or is not well founded, it may lead in certain cases to acceptance of statements in the petitions without further test. Oral hearings in such cases might enable the Committee to submit its advice to the General Assembly with greater confidence. If, as the result of the

grant of oral hearings to petitioners in certain cases, the Committee is put in a better position to judge the merits of petitions, this cannot be presumed to add to the burden of the Mandatory. It is in the interest of the Mandatory, as well as of the proper working of the Mandates System, that the exercise of supervision by the General Assembly should be based upon material which has been tested as far as possible, rather than upon material which has not been subjected to proper scrutiny either by or on behalf of the Mandatory, or by the Committee itself." (*I.C.J. Reports 1956*, p. 30.)

I would remark, Mr. President, with your permission, and parenthetically, that when in a later phase of these proceedings we come to a discussion of the matter of evidence which has been brought into the record by the Applicants, based upon petitioners appearing before the United Nations, such evidence is sought to be impeached or discredited by the Respondent on the ground that it is erroneous, malicious, ill-informed, unverified, and on other similar bases of criticism. This is a parenthetical remark, because it is relevant here in respect of the fact which I believe the context now justifies—and that is, the nature of the supervisory system and which is brought forth clearly in the 1956 Opinion, specifically in reference to the matter of hearing petitioners. It has, of course, much broader implications, as well, with respect to the nature, function, and role of administrative supervision as a whole.

In the 1956 Opinion, the honourable Court proceeded to interpret the statement in the 1950 Advisory Opinion, in which the Court had held in 1950 that "the degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System". That is from the 1950 Opinion. In its interpretative analysis of the passage just quoted from the 1950 Opinion, this honourable Court rejected the suggestion that the 1950 Opinion passage should be interpreted in a manner to restrict the activity of the General Assembly to measures which had actually been applied by the League of Nations.

The Court concluded that such a suggestion did not accurately reflect the intention of the Court in 1950, and that such a restriction was not justified on a basis of any provision in the Covenant of the League, nor the Mandate for South West Africa, nor the Charter of the United Nations. The Court is respectfully referred to the 1956 Opinion, at page 31.

Among the considerations adduced by this honourable Court in support of its conclusion, which I have just described, the following passage from the 1956 Opinion is relevant:

"The Court notes that, under the compulsion of practical considerations arising out of the lack of co-operation by the Mandatory, the Committee on South West Africa provided by Rule XXVI of its Rules of Procedure an alternative procedure for the receipt and treatment of petitions. This Rule became necessary because the Mandatory had refused to transmit to the General Assembly petitions by the inhabitants of the Territory, thus rendering inoperative provisions in the Rules concerning petitions and directly affecting the ability of the General Assembly to exercise an effective supervision. This Rule enabled the Committee on South West Africa to receive and deal with petitions notwithstanding that they had not been transmitted by the Mandatory and involved a departure in

this respect from the procedure prescribed by the Council of the League.

The particular question which has been submitted to the Court arose out of a situation in which the Mandatory has maintained its refusal to assist in giving effect to the Opinion of 11 July 1950 and to co-operate with the United Nations by the submission of reports, and by the transmission of petitions in conformity with the procedure of the Mandates System. This sort of situation was provided for by the statement in the Court's Opinion of 1950 that the degree of supervision to be exercised by the General Assembly 'should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations'." (*I.C.J. Reports 1956*, pp. 31-32.)

Mr. President, I have cited these passages from the 1956 Advisory Opinion because, in the Applicants' respectful submission, they make clear the specific nature and import of the obligation to submit to international administrative supervision, as well as the practical and legal consequences which have flowed and continue to flow from Respondent's failure and refusal to comply with its obligations in this respect. It also illuminates and confirms the ambit of authority vested in the General Assembly to take measures and to adopt procedures relevant to and essential to the proper discharge of its supervisory power and duty. It therefore clarifies the meaning and nature, as well as the scope, of the administrative supervisory authority which is a concomitant of the final bulwark, which is judicial protection in the event that administrative authority does not do its job. Respondent's contention that there is no body or organ capable of exercising administrative supervision accordingly would deprive the inhabitants of the Territory of one of the prime "securities for the performance of this Trust", in the words of the Covenant, and would leave the Mandatory with asserted rights but without international obligation of administrative accountability, and would deny to the United Nations information necessary to the discharge of its obligations which, in the words of the Court in 1962, were "laid upon the United Nations as an organized international community" to assure the performance by the Respondent of its sacred trust. It is such a result which, in the words of this honourable Court, "could not be justified".

Mr. President, the essential value and integral quality of international administrative supervision in the plan of the Mandates has been regarded by this honourable Court as so self-evident as to require little elaboration of reasons to support it. Such essentiality of administrative supervision, indeed, has never been questioned by this Court, or, so far as Applicants are aware, by any learned member of the Court. Such differences of opinion as have arisen in the Court in respect of the essential requirement of supervision have related to only one aspect of it, to wit, the role of judicial protection in the scheme of the Mandate. This aspect was, of course, settled by the Judgment of this honourable Court in 1962.

The axiomatic validity of the proposition that international administrative supervision is of the essence of the Mandate, and must survive so long as the Mandate itself endures, has been expressed by this honourable Court in divers ways. Irrespective of the form of expression, however, the essence of the Court's rationale may be found in that passage of the 1962 Judgment in which the Court found as follows:

"The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations. The fact is [said the Court] that each Mandate under the Mandates System constitutes a new international institution, the primary, overriding purpose of which is to promote 'the well-being and development' of the people of the territory under Mandate." (*I.C.J. Reports 1962*, p. 329).

The Court's reference to the Mandate as a "new international institution" in turn harks back to the 1950 Advisory Opinion. In that Opinion, as has been noted, the Court employed the same phrase, and referred to "the international rules regulating the Mandate" which, the Court said, "constituted an international status for the Territory". That is quoted from page 132 of the 1950 Advisory Opinion.

Indeed, Mr. President, it was in this very context, on the basis of its analysis of the nature and purposes of the mandates system, that the Court characterized Respondent's contention that the Mandate has lapsed, including provisions for administrative supervision, because the League has ceased to exist—and I quote from the 1950 Opinion—as "based on a misconception of the legal situation created by Article 22 of the Covenant and by the Mandate itself": at page 132.

Respondent, notwithstanding the Court's Opinion and rationale, nonetheless now again repeats the same contention. It is to be noted that Respondent's "new facts" contention, which relates solely to events occurring at the period of the League's dissolution, is wholly irrelevant to the Court's holding with respect to the legal situation created by the Covenant and by the Mandate itself.

The Court in 1950, moreover, found additional confirmation of "the essentially international character of the functions which had been entrusted" to Respondent from the very fact—

". . . that by Article 22 of the Covenant and Article 6 of the Mandate the exercise of these functions was subjected to the supervision of the Council of the League of Nations . . .". (*I.C.J. Reports 1950*, p. 133.)

There could scarcely be clearer evidence than this that international supervision was indeed of the essence of the Mandate, and that the nature and purpose of the mandates system make incredible Respondent's contention that when it assumed the Mandate it was not consenting to supervision as such, but merely to supervision by a specific organ, to wit, the Council of the League of Nations.

So limited or circumscribed an undertaking would have been irreconcilable with the very nature of the institution; it would have treated the rights as ends in themselves rather than as "mere tools given to enable Respondent to fulfil its obligations", in the words of the 1962 Judgment.

It was, moreover, in the context of the Court's reference to the "essentially international character" of Respondent's functions with regard to the Mandate that the Court found: "To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified."

Mr. President, the Applicants submit that stress clearly and properly

belongs on the word "justified", inasmuch as the retention of rights while denying obligations cannot be "justified", either as a contention or as a consequence. Respondent attributes a limited significance to the quoted excerpt, insisting that the Court must have meant no more, and I quote from the Rejoinder—

> "than that if the Mandate has lapsed, Respondent cannot rely *on the Mandate* for authority to administer the Territory while denying the Mandate obligations". (V, p. 83.)

So strained a construction of the Court's language is untenable and, indeed, is the exact reverse of the obvious intent of the language used by the Court. The Court was not referring to the basis on which Respondent *claimed* rights over the Territory; the Court was speaking of the *source* of Respondent's authority over the Territory, and found that "the authority which the Union Government exercises over the Territory is based on the Mandate"—this is at page 133 of the *1950 Advisory Opinion*.

Furthermore, the Court did not speak of Respondent's *claim* to rights under the Mandate, but of its *retention* of rights thereunder. The Court must have assumed, as it was right to assume, that Respondent does not claim and, so far as the Applicants are advised, never has claimed—at least, so far as we are aware, since 1920 in any event, that Respondent has any rights over the Territory except on the basis of the Mandate. Respondent's purported interpretation of the Court's finding appears to be based upon an insinuation to the contrary, although phrased in contingent terms.

In its written pleadings Respondent contends that questions such as whether, if the Mandate has lapsed, Respondent would have to rely upon some basis other than the Mandate as such for rights over the Territory and, if so, what that basis would be, are questions which, in Respondent's words, "do not . . . fall to be considered for the purposes of the present case"—this is from the Counter-Memorial, **II**, p. 173.

In view of the fact that this honourable Court has twice held that the Mandate as a whole is still in force, the questions referred to by Respondent are indeed redundant to the purposes of the present case, and they are not raised as an issue in these proceedings. It is, however, difficult to perceive by what measure of logic such questions would at the same time "fall to be considered" for the purpose of interpreting the Court's finding—a finding which is, on its face, significant to the Court's evaluation of the "legal situation created by Article 22 of the Covenant and by the Mandate itself".

Any lingering doubt concerning the true meaning of the Court's statement that retaining rights under the Mandate while denying obligations could not be justified, must be set to rest, in our respectful submission, by this honourable Court's treatment of the same subject in 1962.

The Court in 1962 quoted from the 1950 Opinion the passage under discussion, and did so in a context in which the Court was considering contentions similar to those which Respondent had advanced in 1950. The contentions in question related to the asserted extinction of "obligations relating to administrative supervision by the League and submission to the Permanent Court of International Justice", in the Court's words—this is from the 1962 Judgment, at page 333. The Court in this

context referred also to Respondent's further argument, and I quote again from the Court's Judgment, the argument that—

> "the casualties arising from the demise of the League of Nations are not therefore confined to the provisions relating to supervision by the League over the Mandate but include Article 7 . . .".

It is precisely in this context that the Court quoted the 1950 passage which ends with the words "could not be justified".

Immediately following its quotation from the 1950 Advisory Opinion, the honourable Court went on to refer to the analysis in the 1950 Opinion of the two kinds of international obligations assumed by Respondent under the Mandate, and then the 1962 Judgment quoted from the 1950 Opinion a key passage which defined the nature and purpose of the mandates system in the following words:

> "The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision . . ."

This is quoted by the honourable Court from the 1950 Opinion, and is quoted in the 1962 Judgment at page 333.

And finally, Mr. President, this Court stated its own conclusions immediately following the passage just quoted from the 1950 Opinion in the following words:

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

In short, Mr. President and honourable Members of the Court, to accept Respondent's contention, of the lapse of its obligation to submit to international supervision would be to exclude the very essence of the Mandate.

The Court's reasoning is unassailed and, indeed, unassailable that international administrative supervision is essential to the mandates system because it is part of the international function of administration which Respondent assumed with the Mandate. In the absence of such accountability, Respondent's function of administration would cease to be international. For Respondent to exercise the powers and prerogatives of the Mandatory's position, and to deny the obligations which are concomitant with, and inseparably related to, such powers, is to take advantage of an international function of administration for the purpose of occupying the Territory, while denying the very international nature of the position on which its occupation of the Territory is based.

Mr. President, with your permission, I take the liberty of repeating an excerpt from my statement, made before this honourable Court during the Oral Proceedings in 1962. Referring to the 1950 Advisory Opinion, I ventured the following comment:

> "With respect both to the machinery for implementation and substantive rights and obligations, the Court (at pages 132-133 of

the 1950 Advisory Opinion) referred to the 'international rules regulating the Mandate' which 'constituted an international status for the Territory'. The functions entrusted to the Mandatory possessed an 'essentially international character', said the Court, as appears particularly from the fact that by Article 22 of the Covenant, and Article 6 of the Mandate, the exercise of these functions was subjected to the supervision of the Council of the League of Nations. This fact of subjection is what the Court in 1950 took as showing the essentially international character of the Mandate institution. Respondent, as we shall see, I believe distorts the meaning of this by assuming or contending that this sentence in the Court's opinion in effect means that it was only the Council of the League that was entitled to supervision.

It is to be noted that the Court, by this language (at page 133), made clear that the functions, as they are called, comprise both the international machinery for implementation and the substantive rights and unilateral obligations of the Mandatory. If this were not so, the Court's reference to Article 22 would be meaningless, since it contains both sides of the equation." (Oral proceedings, 16 Oct. 1962, morning.)

In our respectful submission, it was on major premises involving this type of consideration that the Court in 1950 based its findings that "to retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified" (*I.C.J. Reports 1950*, p. 133) and that:

> "It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions." (*Ibid.*, p. 136.)

Similarly, it seems clear that the same premise might well have underlain this honourable Court's Judgment in 1962, at page 338 of the 1962 Judgment, that the right of Members of the League to invoke judicial protection, described at page 344 of the Judgment as "an essential part of the Mandate itself and inseparable from its exercise", that such right to invoke judicial protection continues to exist for so long as the Respondent holds on to the right to administer the Territory under the Mandate.

The results contended for by Respondent cannot be admitted or justified, so long as it is exercising "an international function of administration" under "an international institution", with "international rules regulating the Mandate, constituting an international status for the Territory . . ." (*I.C.J. Reports 1950*, p. 132). All these passages are quoted from judgments of this honourable Court; so long as Respondent is exercising such rights, under such an institution, the results for which it contends cannot be admitted or justified.

"The essentially international character of the functions which had been entrusted to the Union of South Africa", as stated in the Advisory Opinion of 1950, flowed from this Mandate, which "is an international instrument of an institutional character", "a special type of instrument composite in nature and instituting a novel international régime", as described at pages 331 and 332 of the Judgment of 21 December 1962.

Such international character of the Territory Respondent cannot be

heard to deny, so long as it exercises and retains rights over the Territory. Such an international character is independent of its consent. The only right, title, and interest conveyed to Respondent in 1920 were the administrative powers essential to proper exercise of a tutelage of an international character. Occupation of an international territory, while professing to be exercising an international right of administration, and yet denying the international obligations necessary to keep the territory status international, "cannot be justified".

Respondent indeed concedes the validity of this proposition in its written pleadings:

> "As regards history, it seems clear that the various proposals which preceded the Mandate System as actually agreed upon, all proceeded from the basic principle of '*no annexations*', to which effect was to be given by some form or another of *internationalization* of the government or administration of the colonies and territories in question. When proposals came to be made for the establishment of a League of Nations, the League was seen as the medium through which such internationalization could be carried into effect, the various proposers differing, however, as to the exact nature and degree of the authority to be accorded to the League in this respect." (**II**, p. 169.)

The foregoing passage occurs immediately following a paragraph on the same page of the Counter-Memorial, which reads as follows:

> "Analysis of the history and wording of Article 22 of the Covenant fully bears out, in Respondent's submission, that the feature of report and accountability to the League was intended to be an integral portion of the Mandate System, as will appear from the succeeding paragraphs." *(Ibid.)*

Respondent's concession that "the League was seen as the medium through which such internationalization could be carried into effect", confirms that the principle of "no annexations" and internationalization were the objective and that the League was the then-existing means "through which such internationalization could be carried into effect".

Mr. President, this is but another way of saying that the design of international supervision embodied in the Covenant and in the Mandate, and assumed by Respondent thereunder, was a basic obligation of general and objective character, rather than a mere undertaking to submit to the supervision of a specific supervisory organ, which Respondent asserted in 1950, asserted in 1962, asserts again today.

Such consideration, in turn, underlies the statement in the 1962 Judgment that the sacred trust was, in the Court's words ". . . laid upon the League as an organized international community . . .".

The significance of the phrase "organized international community" eludes, or seems to elude, Respondent, which confines itself largely, in our view, to a dissection and a shredding of the concept, in its written pleadings. Indeed, Respondent goes so far as to attribute to the Court's language, in the context, an intention merely, and I quote from the Rejoinder, "to describe the feature distinguishing the League from its Members", and, consequently, as meaning nothing more than if the Court had used the phrase, "laid upon the League as an international organization", rather than "as an organized international community". (This may be found in **V**, p. 38.)

In this connection, it is relevant to note that, in a quite different context, but relevant to this point, President Winiarski has referred to:

> "... the fundamental interests of the organized international community in the realization of international peace and security".

I have taken the liberty of quoting from the learned President's dissenting opinion, appended to the 1962 Judgment (*I.C.J. Reports 1962*, p. 456).

Moreover, Judge Bustamante, in his separate opinion appended to the 1962 Judgment, in one context described the League of Nations as "personifying the international community", and, in another context, stated that the League "represents the international community". (*I.C.J. Reports 1962*, pp. 335 and 356, respectively.)

And in yet another phase of his discussion of the matter, the learned Judge referred to the "tutelary organization which ... personifies the interest of the States of the world assembled in an association". (*Ibid.*, p. 358.)

To like effect, Mr. President, is the analysis of the French authority, Fauchille:

> "... le mandataire s'impose des obligations, pour une mission de civilisation vis-à-vis de la communauté internationale ...". (*Traité de Droit International Public, 1925*, cited in **IV**, p. 536.)

There seems little room for doubt, Mr. President, that the Court's reference to the fact that the sacred trust was "laid upon the League as an organized international community" signified that the League was acting not by virtue of procedures or a structure peculiar to itself, but as a surrogate carrying out an essential function under a trust, and that the performance of such an obligation was recognized to be essential so long as the trust survived.

Respondent, in its written pleadings, questions the relevance of the concept of the organized international community to the legal issue posed by retention by Respondent of rights under the Mandate, while denying international obligations of supervision thereunder.

Respondent queries whether this proposition is advanced independently of the Applicants' "'organized international community' theory", as it describes the concept, "or whether it merely states a result arrived at *via* the application of that theory"—I quote from the Respondent's queries in the Rejoinder, **V**, at page 72.

Mr. President, in our respectful view, the distinction thus sought to be drawn by Respondent involves a false dichotomy. The character of the United Nations as an organized international community is relevant to its role as a tutelary. The Organization serves in that capacity, as did the League of Nations before it, not as a mere aggregation of States which happen to be parties to a treaty, then called the Covenant of the League, now the Charter of the United Nations. The tutelary role of the Organization is institutional, not merely contractual; it embodies obligations as well as powers and functions. As this honourable Court said in the 1950 Advisory Opinion—

> "The League was not ... a 'mandator' in the sense in which this term is used in the national law of certain States." (*I.C.J. Reports 1950*, p. 132.)

Of course not, Mr. President. The organized international community exists as a fact; it is embodied in, and personified by, the United Nations, precisely in the same way as was true of the League of Nations. It is not a mere "theory", to use Respondent's phrase, concocted by the Applicants for the purpose of making a debater's point in this litigation, as Respondent's queries may be taken to imply.

The character and function of the United Nations relevant to the mandates system, and in particular to the Mandate now before this honourable Court, thus was recognized by the Court in its 1962 Judgment, when it said that one of the essential principles of the mandates system consisted in—

> "the recognition of 'a sacred trust of civilization' laid upon the League as an organized international community and upon its Member States". (*I.C.J. Reports 1962*, p. 329.)

The conferment of such a trust upon the League was the normal security designed to ensure, on behalf of the civilized community of nations—"civilization" is the single word used in the Covenant—that the Mandatories, including the Respondent, would exercise their rights in relation to the mandated territories and the inhabitants in the manner and for the only purpose for which such rights were entrusted to Respondent, which was that they were to be used as "mere tools" to enable Respondent to fulfil its obligations, as this Court said in 1962.

Mr. President, but for the existence of an "organized international community", there would not have been, nor would there now exist, a Mandate for South West Africa. Respondent's occupation and administration of the Territory is attributable solely to the fact that the civilized nations of the world, or most of them, formed an association following the First World War to serve the purposes of the organized international community and that Respondent was a Member thereof. Had it not been such a Member, the Mandate would not have been conferred upon it, and could not have been conferred upon it, on behalf of that community as then embodied in the League.

Similarly, if neither the United Nations had existed at the time of the League's dissolution, nor any other international organ with capacity to supervise the Mandate, either a new supervisory organ would have had to be created for this purpose, or Respondent's retention of rights under the Mandate would have terminated. Such a problem, however, did not and does not arise, by virtue of the fact that in the United Nations, as an organized international community, there exists an agency endowed with the capacity to perform "similar, though not identical, supervisory functions" to those performed by the Council of the League, in the words of the 1950 Opinion, at page 136.

In the 1962 Judgment this honourable Court gave weight to the fact, and made clear, that there was no break in the continuity between the League and the United Nations. The Court found in the 1962 Judgment as follows:

> "It is clear from the foregoing account that there was a unanimous agreement among all the Member States present at the Assembly meeting [this refers to the meeting of 18 April 1946] that the Mandates should be continued to be exercised in accordance with the obligations therein defined although the dissolution of the League, in the words of the representative of South Africa at the

> meeting, 'will necessarily preclude complete compliance with the letter of the Mandate', i.e. notwithstanding the fact that some organs of the League like the Council and the Permanent Mandates Commission would be missing. In other words the common understanding of the Member States in the Assembly—including the Mandatory Powers—in passing the said resolution, was to continue the Mandates, however imperfect the whole system would be after the League's dissolution, and as much as it would be operable, until other arrangements were agreed upon by the Mandatory Powers with the United Nations concerning their respective Mandates. Manifestly, this continuance of obligations under the Mandate could not begin to operate until the day after the dissolution of the League of Nations and hence the literal objections derived from the words 'another Member of the League of Nations' are not meaningful, since the resolution of 18 April 1946 was adopted precisely with a view to averting them and continuing the Mandate as a treaty between the Mandatory and the Members of the League of Nations." (*I.C.J. Reports 1962*, p. 341.)

It is to be noted that the quoted passage from the 1962 Judgment follows consideration by the Court of the events and transactions which took place during the period of the dissolution of the League and the commencement of operations of the United Nations. In that context the Court's consideration of such events and transactions included references to acts and statements of the Mandatory Powers at that time, including that of Belgium, which expressed its intention to "remain fully alive to all the obligations devolving on members of the United Nations under Article 80 of the Charter". Moreover, the Court reached the conclusions embodied in the quoted passage—that is, the passage I have just quoted from the Court's Judgment—in the light of full discussion by the Parties during the 1962 proceedings of Respondent's "new facts" contentions.

Respondent re-formulates the Applicants' contention that obligations of international accountability must survive, so long as Respondent retains rights under the Mandate, and does so in a manner which enables it to say that the Applicants' contentions as so formulated are guilty of two "fatal defects", in the Respondent's words. Respondent describes these "fatal defects" in the re-formulated contention of the Applicants as follows. The Applicants' proposition, says Respondent, could only be valid on introduction of an "additional premise, viz., that the Mandate is still in existence"; and they say secondly:

> "no solution is offered to the problem of the supervisory body to which the obligation of accountability would relate after disappearance of the only supervisory bodies mentioned in the formulation of the obligation in the mandate documents". (V, p. 73.)

With respect to the first asserted fatal defect, that an additional premise is necessary that the Mandate is still in existence, the Applicants accept, as the law of the case, that the Mandate is still in existence. If the Court did not decide that, it decided nothing. This Court has found and reaffirmed this proposition in one Advisory Opinion, confirmed it in two Opinions interpretative of the first, and held in the 1962 Judgment, that the Mandate as a whole is still in effect.

The Applicants accordingly do not fully appreciate the significance

of Respondent's criticism or comment that "Applicants never advance any argument in support of the proposition that the Mandate still exists: they merely rest on the Court's decision in that regard". I quote from the Rejoinder, **V**, page 74, footnote 3. Apart from the fact that the Applicants would be quite content to rest upon such authority, the burden of the Applicants' argument on this phase of the cases at bar is directed at establishing the proposition that the Mandate's existence is confirmed by the very fact of Respondent's continued retention of its rights in the Territory, rights granted to it as mere tools given to enable it to fulfil its obligations. Some significance may be attributable to the fact that Respondent appears not to recognize this as an argument.

Respondent's asserted second fatal defect in the Applicants' contention that obligations of international accountability must survive so long as Respondent retains rights under the Mandate, is that "no solution is offered" by the Applicants, or so it is said, "to the problem of the supervisory body to which the obligation of accountability would relate after disappearance of the only supervisory bodies mentioned in the formulation of the obligations in the Mandate documents".

Respondent's asserted second fatal defect which I have just quoted rests on Respondent's argument that the problem of the supervisory body has never been worked out by this honourable Court. The so-called problem was indeed worked out and solved in the Advisory Opinions of 1950, 1955 and 1956. Further comment appears unnecessary, Mr. President, except to note that Respondent's very formulation of the problem in these terms reflects its own erroneous major premise of a limited original specific supervisory body obligation which of course it advances at some length in its written pleadings.

Respondent's premise that international supervision under the Mandate was lashed irretrievably "to a *specific* organ of a *specific* organization of *certain* of the nations of the world"—I have quoted from the Counter-Memorial, **II**, at page 119—such a premise does not stand analysis, in the Applicants' respectful submission. Respondent argues that:

> "The 'supervisory functions of the League' spoken of by commentators was a concept in essence derived from the *obligation*, imposed upon the Mandatories by the above provisions, *to report* with reference to the respective territories and to the measures taken to carry out the substantive obligations." (**II**, p. 118.)

Respondent's argument is fallacious. Supervision is not derived from an obligation to report, as this statement I have just quoted seems to say (perhaps I misread it). An obligation to report is the means by which supervision is given effect. The obligation to report derives from the principle of accountability, not the other way round.

Moreover, "accountability" includes, but it is not limited to, mere reporting to an administrative organ. It includes the submission of disputes to judicial process, as this Court has held, and it includes the obligation to obtain consent of the supervisory organ to modifications of the terms of the Mandate.

Without such accountability, as I have said, the Territory would not be an international institution, or, indeed, it would not be an institution at all. It would not be an international mandate nor would it be a mandate, in any sense, since its "essence would have been excluded", in the

words of this Court in 1962. A mandate which is a cover for annexation is a fraud. It has nothing in common with the purposes of the authors of the mandates system.

Respondent's erroneous formulation of the Applicants' contention regarding survival of the obligations under the Mandate so long as the Mandate survives, leads Repondent into the fallacy of the *petitio principii*.

Thus, Respondent argues, in italics, that—

> "The only basis upon which it can possibly be said that the existence of the Mandate is not open to question is that of accepting that its sacred trust provisions can stand by themselves, without accountability." (V, p. 74.)

Respondent's argument, just quoted, rests upon three premises, namely (1) that the Mandate has lapsed; (2) that the provisions of the Mandate are divisible and must be separately justified; and (3) that the provisions of accountability are, in fact, no longer operative, in fact or in law.

Each of these propositions is untenable, and is irreconcilable with the decisions of this honourable Court, which I venture to describe as the law of the case.

The reasoning of the Advisory Opinion of 1950 is clear. The Court proceeds from the premise that the Mandate is in existence, inasmuch as no other premise would accord with the facts and with the elementary requirements of justice. The sacred trust provisions conferred rights upon the inhabitants of the Territory. Such rights require supervision for their protection. Therefore supervision is essential. The Court's chain of reasoning results in a *quod erat demonstrandum*.

Neither the Court, nor the Applicants—as Respondent's re-formulation implies—proceeds from the premise that because the sacred trust provisions survived, the Mandate must survive, and accountability, which is of the essence, must also be deemed to have survived.

This is not the meaning or intent of the formulation of the Applicants nor, it is respectfully submitted, the logic of the Court. Respondent erects and destroys a straw man by its argument, which I quote from the Rejoinder:

> "It is quite obvious that one cannot say that *administration* of a certain *Territory* must be subject to *accountability* merely because accountability is an essential element of a *Mandate*. The statement would only make sense upon adding or presupposing that the Mandate which requires the accountability, *applies* to the Territory and its administration."

I have quoted from V, at page 74. In Applicants' respectful submission, Mr. President, there is no clearer demonstration, anywhere in these written pleadings, of the chasm between the arguments of the Parties to these proceedings. The Applicants, of course, presuppose that the Mandate "*applies to the Territory*"; that is their major premise.

On the basis thereof, the Applicants conclude, just as this honourable Court has held, with respect, that, so long as Respondent asserts rights under the Mandate, it cannot be heard to deny its obligations thereunder.

Respondent, to the contrary, contends that:

> "The administration and possession of a territory are by them-

> selves essentially neutral facts with reference to the question whether 'international accountability' in respect thereof is undertaken, acknowledged or represented . . . Administration and possession of a territory [says the Respondent] are by themselves even more patently and obviously unrelated to any specific supervisory authority than to a vague idea of 'international accountability'." (V, p. 78.)

In fact, Mr. President, the Applicants perceive no meaningful distinction between administration and possession without international accountability, on the one hand, and annexation, on the other. The fact that the administrator consults his conscience in preference to a supervisory organ, does not alter the practical, common-sense, realities of the situation.

In its written pleadings, the Respondent makes clear, by its own admission, we believe, the hollowness of its contention that (I have just quoted, and repeat):

> "Administration and possession of a territory are by themselves even more patently and obviously unrelated to any specific supervisory authority than to a vague idea of 'international accountability'."

No comment appears necessary concerning Respondent's characterization of international accountability as a "vague idea", in the light of all this honourable Court has had to say with regard to the nature and essentiality of this obligation, in the plan of the mandates system.

Beyond this, however, the organic relationship between administration of the Territory of South West Africa and the function of international supervision is shown, *inter alia*, by Respondent's own avowal, in which it says:

> "In pursuance of the policy of administering the Territory 'in the spirit of the Mandate', Respondent has *de facto* been acting as if all obligations relevant for present purposes were still in force, including [voluntary] abstention from unilateral incorporation."

This is quoted from the Rejoinder, **VI**, pages 447-448—"voluntary abstention from unilateral incorporation" which, with respect, the Applicants read as a synonym for "annexation".

The Applicants will have more to say about this in the context of their consideration of Respondent's misconceived formulation of the nature of the Applicants' submissions with respect to the legal consequences of their actions, "coupled with their intent", in the words of the ninth submission of the Applicants, to modify the terms of the Mandate without the consent of the United Nations.

Throughout the written pleadings, Mr. President, there is a recurrent theme, regarded by Respondent as relevant to numerous contexts, of the measure, the asserted measure, of its obligations under Article 2, paragraph 2, of the Mandate, the sacred trust obligation, as measured by subjective motivation, good or bad faith, purpose of action taken, and like subjective concepts of motivation, intent, and *mens rea*.

In their written pleadings, the Applicants have sought to make clear that the Applicants, in no sense, rest upon, or request this honourable Court to apply, subjective concepts of motivation or intent. The Applicants use, and we submit, appropriately use, the concept of "intent" in a legal sense but not as a subjective motivation, not as *mens rea*, not

to determine whether Respondent has a proper or lofty or illicit purpose in its actions, but in the lawyer's sense of the use of the word, which applies the test of an objective determination, judicial or administrative, in respect of the conduct of groups, individuals, or governments, and which rests upon the universally accepted principle that an individual, or an entity, is presumed to intend the foreseeable and necessary consequences of his, or its, actions. And when the Applicants refer to the "intent" of Respondent, the word is used, and intended to be used, only in that sense. We will have more to say about this later but it is mentioned here, with respect, Mr. President, because it does appear that the application of the subjective test of motivation appears to be relevant to the quotation from the Rejoinder, to which I have referred.

In pursuance of the policy of administering the Territory in the spirit of the Mandate, Respondent has *de facto* been acting as if all obligations relevant for present purposes were still in force, including "voluntary abstention from unilateral incorporation". The inference appears to be that because Respondent is well motivated, and because its purpose is honest or of good faith, that all requirements of the mandate principle are satisfied.

[Public hearing of 23 March 1965]

Mr. President and Members of the honourable Court, at the close of the previous session I had quoted from the Respondent's Rejoinder, a quotation to the effect that—

> ". . . in pursuance of the policy of administering the Territory 'in the spirit of the Mandate', Respondent has *de facto* been acting as if all obligations relevant for present purposes were still in force, including [voluntary] abstention from unilateral incorporation". (Rejoinder, **VI**, p. 397.)

The Applicants will, as I have said, have more to say about this in the context of their consideration of Respondent's misconceived formulation of the nature of the Applicants' submission with regard to the legal consequences of Respondent's actions, coupled with intent, in the words of our submission, to modify the terms of the Mandate without the consent of the United Nations. This is Submission 9 in which we use the phrase "coupled with intent".

As has been stated, and as will be further demonstrated, references by the Applicants to Respondent's "intent" or purpose do not refer to a subjective motivation of good or bad faith, but to an objectively determinable inference, which may be drawn from conduct, on the basis of the universally applicable principle that a person or an entity is presumed to intend the foreseeable and necessary consequences of his or its actions.

The point relevant to the present context, however, is the significance properly to be attributed to Respondent's avowal that its so-called "abstention from unilateral incorporation" is a consequence, not of its international obligations, but of a self-imposed restraint which, by the same reasoning, could be lifted by its own will.

Accordingly, Respondent's argument is irreconcilable with the holding of this honourable Court in the 1950 Advisory Opinion, that:

> "The terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that

> the creation of this new international institution did not involve any cession of territory or transfer of sovereignty to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League . . ." (*I.C.J. Reports 1950*, p. 132.)

Mr. President, it is merely to put the same point in consensual terms to say that so long as Respondent continues to administer the Territory on the basis of rights conferred by the Mandate, Respondent, by that very fact, is manifesting a continuing consent to international supervision. And, inasmuch as there is in existence an international organ, to wit, the United Nations, which is qualified to exercise supervision over the Mandate, it must be presumed that Respondent's retention of rights over the Territory is consistent with no conclusion other than that it is manifesting a continuing consent to submit to the supervisory authority of the United Nations.

Respondent's disclaimer of any such intention imports into the proceedings a legally irrelevant consideration and one which, in any event, is incapable of factual demonstration one way or another, to wit, demonstration of the subjective attitudes of persons who, from time to time, may constitute Respondent's Government. At the most, Respondent's denial of a subjective intention to submit to international supervision proves merely that any such officials, if any there be, would prefer to have it both ways, that is, to treat the Territory as if it were annexed, while claiming to act "in the spirit" of a mutilated Mandate.

It is manifest here again that the Parties proceed from contrasting points of departure.

Respondent's starting point, namely that its original undertaking was limited to an obligation "to report and account to a *specific* organ of a *specific* organization of *certain* of the nations of the world" (**II**, p. 119), leads it to demonstrably false conclusions

Mr. President, neither the composition of the League of Nations, nor the Council of the League, was fixed or static. Respondent, nonetheless, never asserted during the life-time of the League that when the League's original membership was altered by the addition of new members, or the departure of original members, that Respondent's obligations lapsed by virtue of such changes in membership.

Respondent's contention that it contracted for a supervisory organ composed of only "certain nations of the world" hence is a *reductio ad absurdum* of its emphasis on the contractual nature of the Mandate, to the exclusion of its essence as an international institution regulated by international rules.

The recitation by my colleague, Mr. Moore, in Part B of Applicants' presentation, of the events and transactions occurring during the period of the dissolution of the League, has demonstrated that, in fact, no parties to the Mandate, the League, the United Nations, or the Members of either, including Respondent itself, took action on the basis of any such absurd premise.

As has been pointed out, Mr. President, the general expectation was that the trusteeship system would supersede the mandates system. Such an expectation, or hope, as it might be called, was entertained despite Respondent's repeated assertions of its desire to annex the Territory, although always explicitly positing the necessity for consent thereto on the part of the United Nations.

As the Court found in the 1950 Advisory Opinion,

> "By thus submitting the question of the future international status of the Territory to the 'judgment' of the General Assembly as the 'competent international organ', the Union Government recognized the competence of the General Assembly in the matter.
>
> The General Assembly, on the other hand, affirmed its competence by Resolution 65 (1) of December 14th, 1946." (*I.C.J. Reports 1950*, pp. 142-143.)

Respondent's premise of an original undertaking limited to a "specific organization", composed of "certain nations", leads to the equally untenable conclusion that at the moment of the dissolution of that Organization, Respondent's right of annexation would have been perfected, in the absence of a new undertaking, *in expressis verbis*, to an amendment of the language of Article 22 of the Covenant, and of Article 6, and paragraph 1 of Article 7, of the Mandate.

Such a conclusion, as has been demonstrated, is irreconcilable with this honourable Court's repeated holdings in respect of the legal nature and requirements of the mandates system itself.

The Members of the League, who adhered to the United Nations Charter, made clear their understanding that its provisions were not inconsistent with those of the League Covenant which, indeed, was at that moment still in force. The basic aims and purposes, the nature and the functions of both bodies, were entirely congruent.

The only differences between the two Organizations, and these are irrelevant to issues in the cases at bar, lay in internal structure, and involved discarding of the old framework, or parts thereof, which had been found wanting. But such functional differences did not entail any difference in the general scope, in the basic purposes or aims, in the functional field, of the two organized bodies. Their areas of operation and purpose were, in fact, one and the same. They were both, in short, the embodiment and personification of the organized international community.

This conclusion is fortified by the fact that, at the time of the League's dissolution and the commencement of operations of the United Nations the preponderant majority of both Organizations, although, of course, not the entirety, were Members of both. The United Nations was thus a realignment and reformulation. Legal obligations which continued to exist at its inception, by virtue of any reasoning of which the Applicants are aware, cannot be said to have lapsed as a result of the accession of new Members to the United Nations.

The fact that the two Organizations, the League and the United Nations, for a time existed side by side, representing largely the same member States, poses no legal or logical difficulties. The League remained in formal existence solely for the purpose of orderly liquidation, which would assure the continuance of rights and obligations, the survival of which was regarded as necessary and appropriate. The rights of the inhabitants of the Territory under the "sacred trust" obviously were among these rights, in the Applicants' respectful submission, as the Court has held and as Respondent conceded, at least alternatively and *arguendo*, in the 1962 proceedings.

This honourable Court in the 1950 Opinion defined and described the

legal and organic relationship between the League and the United Nations in respect of the law of the mandates system.

First, within the ambit of its general purposes and functions, the United Nations, in fact, was the only organized body capable of performing an essential function under the Mandate. It was the only body in which the international accountability of the Mandatory could be satisfied. Hence, the power and capacity to perform the function of international administrative supervision was reposed in the United Nations, as a matter of the international law, created by Article 22 of the Covenant, and the rules regulating the Mandate itself. This legal consequence was recognized in the finding of the 1950 Opinion, that:

> "It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions." (*I.C.J. Reports 1950*, p. 136.)

Secondly, Mr. President, within the range of duties and powers explicitly conferred upon the United Nations by Chapter XII of the Charter, consent of the United Nations is essential in respect of trusteeship agreements. Under the express holding of this Court in 1950, not only by principles of objective mandate law, but also by express recognition of competence by Respondent, the consent of the United Nations likewise is required to any modification of the terms of the Mandate.

Respondent, in its written pleadings, has undertaken for the second time a dissection, by way of commentary, of the 1950 Advisory Opinion, particularly centring upon the four "decisive reasons", as the Court termed them, underlying the Court's holding that Respondent is under an obligation to report to the United Nations, which is to exercise the supervisory functions over the Mandate.

The extent to which Respondent goes in its renewed effort to render nugatory the 1950 Opinion appears, *inter alia*, from what the Applicants conceive to be its forced construction of the Court's conclusion in the 1950 Opinion that:

> "It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist." (*Ibid.*, p. 136.)

Respondent interprets the quoted conclusion of the Court to mean, and I quote Respondent's comment:

> "The suggestion seems to be that, in the light of the consideration of effectiveness already stated, the interested parties might well (or would probably) have intended that supervision of Mandates should be continued by this new organ. Again [says Respondent] this is reasoning by inference relative to tacit intent." (**II**, p. 143.)

On the contrary, Mr. President, in the Applicants' respectful view, the Court's conclusion patently is based upon a series of inter-related reasons, all of which reflect objective principles of law arising from, and inherent in, the mandates system itself, as well as consent manifested appropriately by Respondent and others during the relevant period.

Thus, in the 1950 Advisory Opinion, the Court's conclusion rested on both the objective situation created by the law of the Mandate in the

light of the League's dissolution, and Respondent's consent made manifest in that situation.

The Court explicitly found, in 1950, that:

> "In declarations made to the League of Nations, as well as to the United Nations, the Union Government has acknowledged that its obligations under the Mandate continued after the disappearance of the League." (*I.C.J. Reports 1950*, pp. 134-135.)

Respondent's renewed effort, to render nugatory the Court's 1950 Opinion, by virtue of the "new facts" contention, has been analysed by my colleague, Mr. Moore, in Part B of the Applicants' presentation. The facts need not be repeated here at any length. The asserted "new facts", again put forward to invalidate or call for reversal of the 1950 Opinion, are as follows: (1) the Chinese draft resolution, mentioned by Mr. Moore; (2) the proposal for a Temporary Trusteeship Committee, likewise mentioned by him; and (3) the attitudes of States during the period prior to the request for the 1950 Advisory Opinion. All of these facts were before the Court in 1962; their immateriality was noted in the words previously quoted from the 1962 Judgment: "All important facts were stated or referred to in the proceedings before the Court in 1950." (*I.C.J. Reports 1962*, p. 334.)

The third so-called "new fact", that relating to views of member States during the period preceding the 1950 Advisory Opinion, nevertheless has implications of which special note may now be taken, with your permission, Sir.

That there were differences of viewpoint expressed by member States during this period is obvious. The true significance of such differences, however, is not the same as that sought to be inferred by Respondent.

This matter also was discussed at length during the 1962 Oral Proceedings. On behalf of the Applicants at that time, I had the honour to address to the Court the following comments, which I take the liberty of repeating, with your permission, Mr. President:

> "The fact is [I said] that in the period 1947 to 1949 strenuous efforts were being made by United Nations Members to induce the Respondent to follow what this Court, in the Advisory Opinion, called—and I quote—the 'normal course indicated by the Charter'.
>
> During this period vague, inconsistent and contradictory views were expressed on the subject of United Nations supervision over the unconverted Mandates . . .
>
> Of course, it was precisely because of the confused, vague and contradictory, and often shifting, statements by Members of the United Nations, that the Members, through the General Assembly, requested this Court for its Advisory Opinion. And now [I said in 1962] Respondent relies upon that very confusion and vagueness to induce the Court to reverse its Opinion." (Oral proceedings, 16 Oct. 1962, morning.)

Mr. President, the Respondent again adverts to the same point as one element of its re-asserted "new facts" contention.

It seems fair to say, Sir, that the confusion manifested during the United Nations debates on this subject was, and indeed still is, reflected by Respondent's own contentions with regard to the subject. Thus, the Respondent again (as in 1962) refers to the asserted position of 25 States

which, according to the Respondent, expressed the understanding, and I quote:

> "that there was outside of a Trusteeship Agreement, no obligation to submit to supervision . . . and no power of supervision on the part of the United Nations in that respect".

Thus spoke Respondent's learned Counsel in the Oral Proceedings of 1962 (5 Oct., afternoon).

The United States, as this honourable Court will be aware, submitted a written statement to the Court in connection with the 1950 advisory proceedings.

The statement of the United States contains the following comments, *inter alia*, on this subject:

> "The general tenor of discussion in the General Assembly from 1946 to 1948 was that the Mandate for South West Africa continued in existence." (P. 103 of the United States statement in 1950.)

The United States statement then went on to cite the views of 11 Members, including two separate statements by United States representatives to like effect during these years.

This United States statement proceeded, and I quote:

> "A minority of the Assembly took the position that the Mandate had already expired; most of these premised their conclusion by contending that the Trusteeship System had already in fact replaced the Mandates System since the placing of Mandates under trusteeship was compulsory." (P. 103 of the United States written statement.)

It may be parenthetically asserted, Mr. President, that the latter view, that is that the placing of mandates under trusteeship was compulsory, was, of course, expressed by the United States prior to the decision by this honourable Court in the 1950 Advisory Opinion to the contrary. However, the fact remains that although the Members of the United Nations expected that all mandates, not otherwise disposed of would be placed under trusteeship, there was no legal compulsion envisaged in Article XII of the Charter that such territories be placed under trusteeship, and in that respect of course the comments expressed to the contrary by the member States during this period were legally untenable.

Back, however, to the main trend of the argument—the United States written statement in 1950 goes on to say:

> "South Africa at the sessions of the General Assembly in 1946-1947 by no means embraced the minority view but firmly supported the view of the majority . . . Recent developments (that is, developments prior to 1950) with respect to the Union of South Africa's administration of South West Africa and the expressions of Union representatives indicating partial or total termination of the Mandate, although perhaps foreshadowed in 1947, first clearly appear in 1948. [The United States written statement goes on] . . . Read beside the record of contemporary events and statements, such belated comments are not persuasive as to the intentions and understandings of the Union and other States when the League was dissolved and the United Nations established." (P. 104 of the United States written statement.)

Mr. President, it may be a reflection of the confusion then existing, and which is still indeed harboured by the Respondent, that of the list

of States cited in the United States statement as holding the view that the Mandate responsibilities continued in existence, six of the same States are listed by Respondent as holding the view that the Respondent had not remained under a duty to submit to international supervision. The Respondent, indeed, goes so far as to call into question the views of the United States itself on this matter, notwithstanding clear expression of views on the part of the United States representatives to the United Nations, including Mr. Benjamin Gerig, the representative of the United States on the Trusteeship Council in 1947, and himself a recognized authority on mandate and trusteeship affairs.

One example, also cited in the 1962 Oral Proceedings (22 Oct., morning), at page 347, is a quotation from a statement made by Mr. Gerig on behalf of the United States at the Fifteenth Meeting of the Trusteeship Council in 1947 at page 505, stating as follows:

> "I am among those who always have believed that the Mandate does continue in force, but there are others who do not take that view."

Mr. President, it must be unique in the annals of judicial proceedings that the very confusion, uncertainty and differences of opinion leading to recourse to judicial process for resolution thereof, should be cited as evidence in support of the proposition that the Court could not have resolved the matter in the way it did had it known of the confusion and disagreement which occasioned judicial recourse. Moreover, the Respondent refuses even now to accept the validity of the 1950 Advisory Opinion, even though this honourable Court in 1962, as I have said, held that the Mandate as a whole is still in force and that (to quote again) "all important facts were stated or referred to in the proceedings before the Court in 1950". (*I.C.J. Reports 1962*, p. 334.)

In fact, Mr. President, as the actual history of the period makes clear, the issue as to which Members of the United Nations were confused and at odds was not as between international supervision over the mandated territory and no supervision. The issue drawn, rather, was that between supervision under the Mandate or supervision under the trusteeship system. It was hesitancy and confusion, reflected in numerous statements made and often shifting within the same delegation—it was hesitancy and confusion as between these two alternatives (supervision under the mandates system or supervision under the trusteeship system) which left matters vague for a period, and which led to the request for the 1950 Advisory Opinion. It is, accordingly, a distortion of the history of that period, and the significance of the debates which took place at the United Nations, to portray the admitted and obvious confusion and disagreements as a difference between those who supported retention by the Respondent of rights over the Territory without supervision, as distinguished from those who held to the view that such a situation could not be justified, in the words of this honourable Court.

If any one fact emerges clearly from those debates, Mr. President, it is that no Member of the United Nations would have or could have supported a legal theory having the former consequence, that is to say, retention of rights over the Territory while denying obligations under the Mandate. Indeed, as will shortly be shown, any such view would have been irreconcilable with the intention of the Members of the United Nations as confirmed, although not established, by Article 80, paragraph

1, of the Charter, stating that until trusteeship agreements were concluded nothing in Chapter XII would be construed to alter in any manner the rights of States or peoples or the terms of existing international instruments, which include the Mandate in question, to which Members of the United Nations were parties.

I shall deal with the question of Article 80, paragraph 1, shortly, with the permission of the President.

Mr. President, I have referred earlier to the fact that Respondent's contention concerning the limited and specific nature of the obligation to report only to a specific body, named in the Covenant and in the Mandate, reflects its contractual or consensual analysis of the mandates system.

Respondent argues, indeed with some vehemence, that the Applicants are in error in suggesting that Respondent's contention is based upon the theory of contract. The Applicants are aware that the present formulation of Respondent's argument is cast in a mould different from that of the 1962 model. Disregarding the form and looking at the substance, however, the conclusion remains inescapable that the theory of the "specific supervisory body", if I may refer to it in that way, rests essentially on the proposition that Respondent did not agree, and would not have agreed, to any supervisory body other than the Council of the League of Nations.

The contention that Respondent agreed to only one body, and not to another, is contractual in essence if not in formulation, even though it may be formally garbed in the robe of principle. As the Court has held, such an interpretation of the obligation is irreconcilable with the characteristics of the Mandate as an international institution with an international status. On the other hand, if the obligation of international supervision is to be regarded, as it properly must be, as a general and basic legal duty, laid upon the League as an organized international community, it follows that the duty of international accountability subsists so long as Respondent retains rights under the Mandate. If the Respondent does not wish to conform to the law of the Mandate, Respondent must relinquish its rights. In the words of Judge Bustamante, previously quoted:

> "The function of the Mandatory is a *responsibility* rather than a right (Article 22, paragraph 2, of the Covenant) . . . it is for the Mandatory to refuse the trust if it cannot bear the burden." (*I.C.J. Reports 1962*, p. 357.)

With the foregoing in mind, it seems to be pertinent again to note the precise terms of the League resolution of 18 April 1946, and to consider the legal significance of Respondent's actions with regard to that resolution.

The contents of certain antecedent declarations made by Respondent have been quoted, in relevant part, in my colleague Mr. Moore's presentation of Part B of the present phase of the Oral Proceedings. I refer to pages 148, 155-157 and 158-159, *supra*.

These were the declarations which were found in the 1950 Advisory Opinion to "constitute recognition by the Union Government of the continuance of its obligations under the Mandate". This is from *I.C.J. Reports 1950*, page 135.

Respondent's declarations corresponded to those made by other

Mandatories as well: the United Kingdom, France, Australia, New Zealand and Belgium. These likewise have been referred to in Part B of the Applicants' presentation, at pages 148-149, *supra*.

The point to which the attention of the honourable Court is now respectfully drawn is the legal significance of Respondent's action in accepting and voting for the resolution of 18 April 1946. It will be recalled, Mr. President, that the fourth paragraph of that resolution was adopted in the following terms:

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

Acceptance by Respondent of this resolution clearly involved an explicit undertaking of some sort, unless it be deemed a mere statement of Respondent's present intention as of that moment. In that case, however, the phrase "until other arrangements have been agreed between the United Nations and the respective Mandatory Powers" would have been meaningless, if not, indeed, misleading. The legal scope and nature of the undertaking, moreover, would be determined by the legal significance attributable to the phrase, in the paragraph I have just quoted, which reads "in accordance with the obligations contained in the respective Mandates".

If the word "obligations" in paragraph 4 of the 18 April resolution means, as the Applicants respectfully submit, a basic and essential obligation of international supervision, then Respondent's undertaking must and can only be read as a clear commitment to submit to supervision by the United Nations, whose agreement must in any event be sought in terms of the same article to any other arrangement. Whether such an undertaking on the part of Respondent is described as implicit, inferred, or tacit has no relevance whatever.

A phrase sometimes used by Respondent in its written pleadings is "an implication of tacit agreement" (for example, **II**, p. 143). Passing notice may be taken of the tautology inherent in the quoted phrase, inasmuch as an agreement which is tacit can only be implied. But the grammar does not matter; the point is that no matter how consent may be manifested or characterized, the legal consequences are identical. The only relevant consideration, which is at the heart of the matter, is that Respondent—in company with other Mandatories—agreed to, or acquiesced in, an undertaking to carry on an obligation which this honourable Court has defined as the very essence of the Mandate.

The Applicants submit, with respect, that the foregoing interpretation of both the event and the intent is a very reasonable one. The Mandatories, including Respondent, accepted the continuance of the existing regimes, including the substitution of the United Nations for the League as the supervisory organ, for what everyone concerned hoped would be a short, transitional period. All Mandatories, other than Respondent, anticipated replacement of the mandates system by the trusteeship

system, and in the event acted in accordance with the spirit of the Charter in the accomplishment of that end.

The United Nations membership resisted and avoided explicit measures or steps, such as the establishment of a temporary trusteeship committee, for fear that any such measures or steps might encourage delay in the completion of trusteeship agreements. The United Nations did, however, manifest its understanding and intention to exercise supervisory authority over the Mandate. Resolutions of the United Nations General Assembly, as the Court said in 1950, affirmed its competence in the premises. This was in the response to question *(c)* in the 1950 Opinion, at page 143. Respondent had manifested the clear intention to seek an agreed arrangement with the United Nations, whereby the Mandate would be terminated as the result of the Territory's incorporation into the Republic of South Africa. Respondent's intention in this respect was followed up by its submission of such a proposal "to the General Assembly for judgment". This is quoted in the *I.C.J. Reports 1950*, at page 142.

On the other hand, Mr. President, acceptance of Respondent's interpretation of the event and the intent would mean that international supervision had lapsed, that all Respondent did by accepting the 18 April 1946 resolution was to void that obligation, or record its nullity, and that such obligation could be restored only, if at all, by a new arrangement which might or might not be agreed with the United Nations. Acceptance of such an interpretation would not merely posit a mutilated Mandate, it would make irrelevant most of what this honourable Court has had to say about Article 22 of the Covenant and about the nature and purpose of the Mandate itself.

Finally, brief comment may be in order concerning the legal significance of the adoption of the 18 April 1946 resolution from the perspective of the United Nations side of the event.

In the 1950 Advisory Opinion, this honourable Court found that the aforesaid resolution "presupposes that the supervisory functions exercised by the League would be taken over by the United Nations". This is from *I.C.J. Reports 1950*, page 137.

It is submitted, with respect, that the word "presupposes" bears precisely the correct connotation. On the one hand, the term reflects the common understanding of the League Members. On the other hand, the term recognizes that the League could not appropriately have taken express action or implied action which purported to assign or transfer functions to the United Nations, or in any other way to bind the latter Organization. Hence, the League resolution went as far, in terms, as was legally or practicably feasible and appropriate under the circumstances.

The resolution of the League made clear the intention of the League Members, most of whom, including Respondent, were also Members of the co-existent United Nations, that the Mandate regime would continue *until*—I stress the word "until"—other arrangements superseding that regime might be agreed upon between the Mandatory Powers and the United Nations.

The 1962 Judgment likewise interpreted the 18 April 1946 resolution in a sense wholly consistent with the 1950 Advisory Opinion.

The honourable Court in the 1962 Judgment said:

"... obviously an agreement was reached among all the Members

> of the League at the Assembly session in April 1946 to continue the different Mandates as far as it was practically feasible or operable with reference to the obligations of the Mandatory Powers and therefore to maintain the rights of the Members of the League, notwithstanding the dissolution of the League itself. The agreement is evidenced not only by the contents of the dissolution resolution of 18 April 1946 but also by the discussions relating to the question of Mandates in the First Committee of the Assembly and the whole set of surrounding circumstances which preceded, and prevailed at, the session." (*I.C.J. Reports 1962*, p. 338.)

The Court's references to feasibility or operability corresponded to the objective realities of the situation caused by the demise of the League, to wit, the necessity to substitute the existing supervisory organs with others, and specifically, the substitution of the United Nations for the League. That such substitution was both practically feasible and operable is beyond dispute, inasmuch as the United Nations, then in existence, had:

> "another international organ performing similar, though not identical, supervisory functions,
>
> .....
>
> [and was] legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory . . ." (*I.C.J. Reports 1950*, pp. 136, 137.)

Accordingly, the United Nations was in a condition and in a position to replace the League of Nations both from a feasible and operable standpoint.

In the 1962 Judgment this honourable Court likewise passed upon the significance properly to be attributed to the declarations made by the mandatory powers prior to adoption of the resolution; the Court concluded that—

> ". . . the common understanding of the Member States in the Assembly—including the Mandatory Powers—in passing the said Resolution, was to continue the Mandates, however imperfect the whole system would be after the League's dissolution, and as much as it would be operable, until other arrangements were agreed upon by the Mandatory Powers . . ." (*I.C.J. Reports 1962*, p. 341.)

The Court's qualifications, such as the phrase "however imperfect the whole system would be", or "as much as it would be operable", referred, in the Applicants' respectful submission, to the obvious fact—which the Court noted in the sentence preceding the quoted language—that ". . . some organs of the League like the Council and the Permanent Mandates Commission would be missing". As the Court also noted, this fact necessarily precluded "complete compliance with the letter of the Mandate". That is also from *I.C.J. Reports 1962*, page 341.

The Court's discussion, of course, was in the context of Respondent's second preliminary objection, which was premised on a literal construction of the term "another member of the League of Nations" in the compromissory clause of Article 7 of the Mandate. The Court's reasoning, based upon its interpretation of the transactions in April 1946, together

with the terms of the resolution itself, led the Court to the conclusion that the resolution "was adopted precisely with a view to averting" literal objections derived from the quoted term in question, "another member of the League of Nations". It is submitted that the same considerations, and full parity of reasoning, apply to interpretation of Article 6 and Article 7, paragraph 1, in respect of the matter under discussion.

The 1946 League agreement was to maintain the "*status quo* as far as possible"—in the words of the *I.C.J. Reports 1962*, at page 342. The maintenance of the *status quo* as far as possible must have included the substitution of the United Nations for the League, unless the very essence of the Mandate was to be excluded, and this must be so for "decisive reasons"—in the words of the Court in 1950 which are set out in the *I.C.J. Reports 1950*, at page 136. Acceptance of Respondent's contention would, on the contrary, have produced a mutilated Mandate which, far from preserving the *status quo* as far as possible, would have destroyed the *status quo* almost as far as possible, by excluding the very essence of the Mandate.

Mr. President and Members of the honourable Court, I should now like to turn to discussion of the significance of Article 7, paragraph 1, of the Mandate.

The Applicants' Submission 9 is as follows:

> ". . . the Union, by virtue of the acts described in Chapters V, VI, VII and VIII of this Memorial coupled with its intent as recounted herein, has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of the Union directly or indirectly to modify the terms of the Mandate." (**I**, p. 198.)

The judgment of this honourable Court, accordingly, is sought in these proceedings, not only in respect of the Mandatory's procedural obligations under Article 6 of the Mandate, but also with respect to the restriction upon the right of modification embodied in Article 7, paragraph 1, of the Mandate and to the interpretation of such paragraph.

This is, as I have said, the stipulation that "the consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate".

The obligation embodied in Article 7, paragraph 1, which is of decisive consequence, precludes the mandatory from unilaterally modifying its obligations, including those of submission to administrative supervision and judicial protection.

The prohibition against unilateral modification is, on the one hand, of the very essence of accountability inasmuch as it assumes the continuance of the securities to assure proper exercise of Respondent's rights in the Territory; such rights, it will be recalled, have been described by this honourable Court as "mere tools given to the Mandatory to enable it to fulfil its obligations". On the one hand, therefore, Article 7, paragraph 1, safeguards the principle of "no annexations"; on the other, it precludes direct, or indirect, modifications which might, *inter alia*, impede the self-determination of the inhabitants of the Territory.

Judge Sir Louis Mbanefo, in his separate opinion appended to the Judgment of 21 December 1962, said with respect to Article 7:

> "Article 7, read in the light of paragraph 8 of Article 22 of the Covenant, is a limitation on the power of administration which had been conferred on the Mandatory. The first paragraph of the Article says the Mandatory cannot modify the terms of the Mandate without the consent of the Council, and the second paragraph imposes on the Mandatory the obligation to accept the compulsory jurisdiction of the Court in the event of any dispute with another Member of the League regarding the interpretation and application of the Mandate."(*I.C.J. Reports 1962*, p. 442.)

At **IV**, p. 135 (which is reiterated by Respondent in **VI**) Respondent refers to the Advisory Opinion of 1950 in this regard, stating that—

> ". . . an essential link in the Court's reasoning [with respect to this Article] was its previous finding that 'powers of supervision in respect of the administration of the Mandates' were vested in the General Assembly of the United Nations".

Respondent then proceeds to argue that if its submission concerning lapse of Article 6 is sound, Article 7, paragraph 1, likewise must have lapsed, and that the reasoning of the Advisory Opinion of 1950, accordingly, is unsound.

In the summary of legal issues in Part A of the Applicants' presentation, the phase with which the Applicants commenced the presentation of this phase of their case to the honourable Court, reference was made to the inescapable consequences which would flow from the lapse or inoperability of Article 7, paragraph 1, so long as Respondent retained and exercised rights based on the Mandate, upon which its administration of the Territory is founded. Either of two intolerable results would ensue: either the Mandate would be frozen in its present form in perpetuity for lack of a supervisory organ competent to give its consent to any modification of its terms; or Respondent would be free unilaterally to modify the terms of the provisions of the Mandate without the consent of a supervisory organ, which modification could include destruction of its international status, thereby annexing the Territory in law as well as in fact. Either one of these two intolerable consequences would flow from lapse of Article 7, paragraph 1, so long as Respondent retained rights over the Territory, while denying obligations under this Article.

Inasmuch as Respondent, for the purpose of refuting the Applicants' Ninth Submission, to which I have alluded, relies upon all its arguments relating to the lapse of administrative supervision, it is necessary to elaborate further, at this stage, considerations underlying Article 7, paragraph 1, and its relationship to Article 6 of the Mandate.

In the Advisory Opinion of 1950, the Court in response to question *(c)* dealt with the issue whether Respondent has the competence to modify the international status of the Territory of South West Africa or, in the event of a negative reply, where competence rests to determine and modify the international status of the Territory.

With respect to the first part of the question, the Court held as follows:

> "The international status of the Territory results from the international rules regulating the rights, powers and obligations relating to the administration of the Territory and the supervision of that

administration, as embodied in Article 22 of the Covenant and in the Mandate. It is clear that the Union has no competence to modify unilaterally the international status of the Territory or any of these international rules. This is shown by Article 7 of the Mandate, which expressly provides that the consent of the Council of the League of Nations is required for any modification of the terms of the Mandate." (*I.C.J. Reports 1950*, p. 141.)

With respect to the second part of question *(c)*, the Court took occasion to point out that "the normal way of modifying the international status of the Territory would be to place it under the Trusteeship System". Failing agreement upon such "normal way", the Court held that:

"The competence to modify in other ways the international status of the Territory depended upon the rules governing the amendment of Article 22 of the Covenant and the modification of the terms of the Mandate." *(Ibid.)*

The Court went on to say, in the 1950 Opinion:

"Article 7 of the Mandate, in requiring the consent of the Council of the League of Nations for any modification of its terms, brought into operation for this purpose the same organ which was invested with powers of supervision in respect of the administration of the Mandates. In accordance with the reply given above to Question *(a)*, those powers of supervision now belong to the General Assembly of the United Nations." *(Ibid.)*

The Court referred to the analogy of the procedures required in Articles 79 and 85 of the United Nations Charter, which gave to the General Assembly authority to approve alterations or amendments of Trusteeship Agreements. By application of this analogy the Court said that it could be inferred ". . . that the same procedure is applicable to any modification of the international status of a territory under Mandate which would not have for its purpose the placing of the territory under the Trusteeship System". That is from page 142 of the Court's Opinion in 1950.

The Advisory Opinion then proceeds to cite declarations made by the Respondent, as well as action taken by the General Assembly, as confirmatory of the Court's conclusion.

One such statement, that of 22 January 1946, before the Fourth Committee of the General Assembly, has been referred to in Mr. Moore's discussion, in Part B of this phase of the Oral Proceedings. Mr. Moore, in that phase, the Court will recall, recounted the history of events taking place during the period 1945 and following.

Respondent's declaration, to which the Court referred, was that in which Respondent explained the special relationship between itself and the Territory under its Mandate. In the course of this declaration, Respondent's representative to the Fourth Committee assured the Committee that there would be no attempt to draw up an agreement until the freely expressed will of the inhabitants of the Territory had been ascertained. Respondent's representative continued: "When that had been done, the decision of the Union would be submitted to the General Assembly for judgment." This is quoted in the 1950 Opinion at page 142.

Similarly, on 9 April 1946, before the General Assembly of the League of Nations itself, Respondent's representative declared that "it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case

for according South West Africa a status under which it would be internationally recognized as an integral part of the Union". That is from page 142 of the 1950 Opinion.

After referring to actions taken by Respondent in accordance with these declarations, the honourable Court concluded: "By thus submitting the question of the future international status of the Territory to the 'judgment' of the General Assembly as the 'competent international organ', the Union Government recognized the competence of the General Assembly in the matter." That is from the 1950 Opinion at page 142.

Finally, the Court noted that the General Assembly, for its part, had "affirmed its competence by Resolution 65 (I) of December 14th, 1946", in which the Assembly expressed the desire that agreement between the United Nations and Respondent "may hereafter be reached regarding the future status of the Mandated Territory of South-West Africa". The resolution concluded: "The General Assembly, therefore, is unable to accede to the incorporation of the Territory of South-West Africa in the Union of South Africa." Cited at page 143 of the Advisory Opinion of 1950.

The attention of the honourable Court is respectfully called to the use of the words "accede to" in the resolution of the General Assembly of 14 December 1946.

On the basis of the foregoing considerations, the Court unanimously reached the conclusion that ". . . competence to determine and modify the international status of South West Africa rests with the Union of South Africa acting with the consent of the United Nations".

The Applicants, with respect, call to the attention of this honourable Court the comment in the 1950 Advisory Opinion which I have already quoted, that "Article 7 of the Mandate, in requiring the consent of the Council of the League of Nations for any modification of its terms, brought into operation for this purpose the same organ which was invested with powers of supervision in respect of the administration of the Mandates". That is from page 141 of the Opinion.

Mr. President, it is crystal clear, in our submission, why this must be so: why the same organ, responsible for modification of the terms of the Mandate, should be the organ which is in charge and has powers of supervision in respect of the administration of the Territory. The organ, the consent of which is required for any modification of the terms of the Mandate, must be in a position to render an *informed* judgment concerning the question whether any particular modification would be in the interests of the inhabitants of the Territory, would be consistent with the spirit and objects of the Mandate, and would, indeed, correspond to the general interest of the international community.

By virtue of paragraphs 7 and 9 of Article 22 of the Covenant, and of Article 6 of the Mandate, the supervisory organ is to receive an annual report, to its satisfaction, "containing full information with regard to the Territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5".

In order to consider intelligently, or to give an informed consent to, any proposed modification of the terms of the Mandate, it is obvious that the consenting organ must have access to the "full information with regard to the Territory" in general, as well as to specific indications of the measures taken to carry out the Respondent's obligations toward the inhabitants. Hence, consent to modification of terms embodying obligations of this type must depend, *inter alia*, upon information read

in the light of specific indications of the practical consequences of measures taken by Respondent to carry out its obligations.

The Council of the League was authorized to define in each case the "degree of authority, control, or administration to be exercised by the Mandatory" under paragraph 8 of Article 22 of the Covenant. The Council of the League likewise confirmed the Mandate and defined its terms. It was therefore appropriate and necessary that the Council of the League be the organ whose consent was a precondition of any modification of the terms of the Mandate.

The Council itself obviously could not accord the necessary attention to the detailed and day-to-day requirements of administrative supervision of the Mandatory's conduct with respect to the Territory. Accordingly, Article 22, paragraph 9, of the Covenant of the League of Nations *required*—not merely *permitted*—that "a permanent Commission be constituted" for the purpose of assisting and advising the Council "on all matters relating to the observance of the mandates". Such advice, it is submitted, would necessarily have included opinion as to whether the Council should give consent to any proposed modification of the terms of the Mandate.

There is thus a direct interrelationship between the provisions for administrative supervision in Article 6 and reporting contained in the Mandate and in the Covenant, and the first paragraph of Article 7 relating to consent to modification of the terms of the Mandate. The two Articles, it is respectfully submitted, are interrelated and must be read in each other's light.

If Article 6 of the Mandate has lapsed, as Respondent contends, the first paragraph of Article 7 would be thereby rendered ineffectual. There would be no supervisory organ to give or withhold consent to modification of the terms of the Mandate.

Precisely the same result would follow from Respondent's second alternative contention, namely that the Mandate as a whole has lapsed, including Article 7, paragraph 1.

The result is one which has long been contended for by Respondent and repeatedly rejected by this honourable Court. In its written statement, submitted to the Court in 1950, Respondent's then Counsel contended:

> "It is the considered view of the Government of the Union of South Africa that there is no international legal limitation upon their competence in respect of the territory and that their international obligations, arising from the status of the territory, are to be determined accordingly."

This is from the 1950 Pleadings, pages 83-84, which we quoted in the Oral Proceedings of 1962 at page 305 (17 Oct., morning).

Respondent's considered view in 1950 is presented to the Court again in 1965, despite the intervening opinion and judgment of this honourable Court.

The absence of such "international legal limitation" is still being pressed. Article 7, paragraph 1, Mr. President, is the major impediment from a legal point of view to Respondent's exercise of a unilateral right to annex the Territory. For, inasmuch as there is a functional relationship between Article 6 and Article 7, paragraphs 1 and 2, of the Mandate, there is likewise a substantive relationship between Article 7, paragraph

1, and Article 2, paragraph 1. The latter—Article 2, paragraph 1—provides as follows:

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

Those are the broadly formulated terms of Article 2, paragraph 1, upon which Respondent very heavily relies.

This was one of the "international rules regulating the Mandate [which] constituted an international status for the Territory", in the words of the 1950 Advisory Opinion, at page 132. Although Article 2, paragraph 1, vests in the Respondent "full power of administration and legislation" over South West Africa "as an integral portion" of South Africa, such grant of powers is of course limited by the international status of the Territory and is, of course, subject to the provisions of Article 22 of the Covenant and of the remainder of the mandate instrument itself, notably Article 2 (2), Article 6 (1) and Article 7, paragraphs (1) and (2).

An attempt, and this is relevant particularly in this context of the discussion of Article 7, paragraph 1, an attempt, direct or indirect unilaterally to incorporate or annex the Territory would constitute a modification of the terms of the Mandate without the consent of the supervisory organ, to wit, the United Nations.

The correlation of Article 2, paragraph 1, with Article 7, paragraph 1, underlies the Applicants' Submissions Nos. 5 and 9 respectively.

As formulated in the Memorials **(I)**, at pages 184-195, and reaffirmed in the Reply **(IV)**, at pages 572-586, Respondent has taken action reflecting a purpose, objectively determined, to incorporate and annex the Territory into the Republic of South Africa. Respondent has pursued this objective by means of policies and acts which impair, and are incompatible with, the separate international status of the Territory.

Such policies and acts are as set forth in the written pleadings of the Applicants: (1) compulsory conferment of South African citizenship on the inhabitants by a process having general application; (2) inclusion of South West African Representatives in the South African Parliament, where they are entitled to vote on South African legislation applicable to South Africa itself; (3) the transfer of the administration of part of the Territory to the South African Government; (4) the vesting of the title to "Native" Reserve Land in the South Africa "Native" Trust; and (5) the transfer of "Native" administration from the Territorial Administrator to a South African Minister of "Bantu" Administration and Development.

The Applicants, relying upon undisputed facts, request this honourable Court in their Submission No. 5 to adjudge and declare, *inter alia*, that Respondent, by virtue of conduct described in Chapter VIII of the Memorials, has treated the Territory in a manner inconsistent with its international status. In Submission No. 9, the Applicants request the Court to adjudge and declare, *inter alia*, that, by virtue of acts described in Chapters V, VI, VII and VIII of the Memorials, "coupled with its intent as recounted" therein, Respondent has attempted to modify the terms of the Mandate, without the consent of the United Nations.

The "intent" referred to in Submission No. 9, as I have said, is the objectively determinable intent, legally to be inferred from Respondent's conduct by virtue of the universally accepted principle that a person or entity is presumed to "intend" the necessary and reasonably foreseeable consequences of his, or its, actions. Submission No. 9 is the only one of the Applicants' Submissions, Mr. President, in which explicit reference to "intent" is made. Such reference is regarded by the Applicants as relevant because of the fact that Article 7, paragraph 1, is the only provision in the Mandate which contemplates a consensual arrangement between the Mandatory and the supervisory organ, a subsequent agreement to accomplish a certain result.

Accordingly, conduct from which may be objectively inferred an *intent to evade the requirements of Article 7, paragraph 1, by means of* unilateral action, takes on significance in the absence of a showing by Respondent of any plan or purpose to seek consent of the supervisory organ.

Respondent's conduct, as set forth in the chapters of the Memorials referred to in Submissions Nos. 5 and 9, is relevant to a consideration of the consequences which would flow from lapse of Article 7, paragraph 1.

Mr. President, I said at the conclusion of this morning's session before the recess, that Respondent's conduct, as set forth in the chapters of the Memorial, referred to in Submissions numbers 5 and 9, is relevant to a consideration of the consequences which would flow from lapse of Article 7, paragraph 1. If the honourable Court were to accept Respondent's contention concerning lapse of provisions for international supervision, including Article 7, paragraph 1, the Applicants' Submissions numbers 5 and 9 would, thereby, and for that reason alone, become unavailing. In some, Respondent's conduct, upon which the said Submissions numbers 5 and 9 are based, demonstrates that Article 7, paragraph 1, is not of merely hypothetical or theoretical consequence and importance, but is of direct immediate practical significance in the light of the actions and policies complained of in the Memorials. Hence, Article 7, paragraph 1, is in a practical as well as a theoretical sense, both constitutionally and organically of the essence. It is analogous to the amendment provisions of constitutions, charters, ordinances or *statutes*, provisions which embrace structural and legal qualities unique to themselves. The Court's reasoning in the 1962 Judgment in respect of the essentiality of judicial protection, applies with at least equal weight to procedures governing and limiting the Mandatory's powers of modification of the terms of the organic instrument itself.

The Court in the 1962 Judgment took special note of this point in the context of the essentiality of judicial protection in the mandate plan. The Court, referring to the unanimity rule of the Council, pointed out that judicial protection was essential because of the possibility, *inter alia*, that a conflict between Respondent and the Council could occur if the former should persist in adopting some measure in its administration of the Mandate notwithstanding the objection of the Council that it was a violation of the Mandate.

The honourable Court went on to say:

> "This possibility is not a mere conjecture or hypothesis. As a matter of fact, the Respondent had more than once intimated its desire to incorporate South West Africa into the Union and the Permanent Mandates Commission of the League each time objected

> to it as being contrary to the Mandate; and the same idea of the Mandatory Power was also conveyed to the United Nations in 1946. If it should have attempted in the days of the League to carry out the idea contrary to paragraph 1 of Article 7, an important dispute would arise between it and the Council of the League." (*I.C.J. Reports 1962*, p. 337.)

The inter-relationship between Article 7, paragraph 1, the inhibition against unilateral modification of the terms of the Mandate, and the essentiality of judicial protection of the Mandate is thus explicitly made clear in the 1962 Judgment itself.

In short, Mr. President, the provisions of the first two paragraphs of Article 7 are inter-related and mutually reinforcing. As I have demonstrated, the provisions of Article 6 and the first paragraph of Article 7 are likewise inter-locking and mutually supporting, just as the provisions of Article 6 and the second paragraph of Article 7, the compromissory clause, are inter-related and mutually supporting, in the decisive aspects I have mentioned earlier in these proceedings.

It follows from the inter-locking and inter-dependent nature of these three aspects of international supervision, administrative accountability in a reporting sense, judicial protection and consent required for modification of the terms of the Mandate, no one can be considered to have lapsed without either jeopardising or, indeed, eliminating the other two.

It follows, Mr. President, that the principle of interpretation relating to the natural and normal meaning of the words "Council of the League of Nations" employed in Article 7, paragraph 1, cannot be applied without doing lethal violence to the 1962 Judgment and the Court's unanimous opinion in 1950.

Respondent's reply to the Applicants' ninth submission is limited to the contention that, inasmuch as the 1950 Advisory Opinion assertedly was wrong in respect of the right of the United Nations to exercise administrative supervision over the performance of the mandate obligations, it must follow that the Court's response to question *(c)* in that Opinion also was wrong since, as Respondent said, "an essential link in the Court's reasoning was its previous finding that 'powers of supervision in respect of administration of the Mandates' were vested in the General Assembly of the United Nations". It was on that basis, which I have just quoted from the Counter-Memorial, **IV**, page 135, that Respondent based its inference with respect to the allegedly erroneous, though unanimous, Opinion of the Court with respect to question *(c)*, relating to the right to modify the terms of the Mandate with the consent of the United Nations.

Respondent's request for reconsideration and revision of the unanimous holding of this honourable Court in the 1950 Advisory Opinion, as well as of the reversal of the 1962 Judgment in this context, leads to a ***reductio ad absurdum***, that is to say, a conclusion that if the alleged "new facts" had been known to the Court in 1950, the Court would have held that Respondent does, after all, have competence to modify, and thereby destroy, the international status of the Territory. No other logical inference can be drawn from Respondent's contention.

Respondent's contention in response to the Applicants' ninth submission accordingly collapses of its own weight.

Apart from the logical imperative which supports the Applicants' reading of the true grounds of the 1950 Advisory Opinion, note also

may be taken of the fact that, as the Court pointed out in 1950, Respondent itself took actions in 1946 which made clear its understanding that Respondent did not have competence unilaterally to modify the Territory's international status.

Reference already has been made to Respondent's declarations and actions in 1946, as well as to pertinent resolutions of the United Nations General Assembly, adopted in the same year, which are cited in the 1950 Advisory Opinion and on the basis of which the Court concluded that Respondent has "recognized the competence of the General Assembly in the matter" and that, as the Court said, the General Assembly has "affirmed its competence" therein.

For all these reasons, Mr. President and Members of the honourable Court, the Applicants respectfully submit that this honourable Court should reaffirm and hold that Article 7, paragraph 1, of the Mandate remains in full force and effect, and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of Respondent, directly or indirectly, to modify any of the terms of the Mandate for South West Africa.

Mr. President, with your permission, I turn now to a consideration of the confirmatory effect and significance perceived by the Applicants to reside in Article 80, paragraph 1, of the Charter of the United Nations.

By way of preface may I, Sir, proffer my regret to the honourable President and Members of the Court for the incompleteness of presentation of this question during the preliminary objections phase of these cases. The incomplete nature of the argument of the issue then before this honourable Court is, indeed, manifest from the degree of misapprehension apparent from opinions on the part of learned judges concerning the intended purport of the Applicants' submission on this matter.

In the joint dissenting opinion of the honourable President and Judge Sir Gerald Fitzmaurice appended to the Judgment of 21 December 1962, the learned Judges, and, in our respectful submission, quite appropriately, commented that:

> "The sole purpose of the Article [that is to say, Article 80, paragraph 1, of the United Nations Charter] was to prevent any provision of Chapter XII of the Charter being construed so as to alter existing rights prior to a certain event." (*I.C.J. Reports 1962*, p. 516.)

The Applicants, with respect, did not intend to intimate a view inconsistent with that expressed in the passage just quoted, and any uncertainty engendered by the Applicants' argument in the premises merely serves to confirm the inadequacy of their Counsel's presentation, for which I have tendered an expression of regret.

The Applicants have, indeed, conceived the sense and intention of the so-called "conservatory clause" (as it was described by its proponents in the San Francisco Charter Conference) to be just as described in the passage which I have quoted from the learned judges in the joint dissenting opinion.

Without venturing to interpret the meaning intended to be attributed to the Article in the Advisory Opinion of 1950, the Applicants respectfully submit that the inclusion of Article 80, paragraph 1, in the Charter serves to confirm the understanding of the authors of the Charter that certain rights, including those under mandates, did continue to exist, notwithstanding the dissolution of the League. The Article, in the

Applicants' view, did not establish, constitute, or maintain these or any other rights. It is, as the President and the learned Judge cogently pointed out, an interpretative or saving clause of a type frequently to be found in legislative or treaty instruments.

The significance of the Article in these proceedings, as conceived by the Applicants, is that the Article serves to confirm, or to make clear by way of confirmation, that the authors of the Charter did consider that certain rights were in existence, by force of other legal instruments or arrangements, which were not to be altered in any manner as a result of any construction, or misconstruction, of Article XII of the Charter.

If such rights were not thought to be in existence, Mr. President, there would seem to have been little reason to insulate or shelter them from the possibly destructive consequences of a misconstruction of Article XII of the Charter.

There is no room for doubt that the "international instruments", referred to in the saving clause, were intended to include the mandates. Such a construction of the first paragraph of Article 80 never has been disputed, so far as the Applicants are aware. Indeed, such a construction is confirmed by the explicit reference to mandated territories in the second paragraph of the same Article which relates to the first paragraph thereof.

The Applicants' understanding of the assumption reflected in, and confirmed by, the saving clause, to wit, that rights embodied in mandate regimes continued in existence until superseded by other agreed arrangements, and I stress the word "until", is likewise confirmed by statements made by Members of the United Nations, including Respondent, during the relevant period.

Thus, Respondent's delegate to the United Nations General Assembly in 1946, announced that—

> "arrangements are now in train for . . . consultations to take place and, until they have been concluded, the South African Government must reserve its position concerning the future of the mandate, together with its right of full liberty of action, as provided for in paragraph 1 of Article 80 of the Charter". (**II**, pp. 41-42.)

This, indeed, if I may interject, gives to Article 80, paragraph 1, an implication of affirmative or positive content not contended for by the Applicants.

Several days later, Respondent's Representative in the Fourth Committee of the General Assembly amplified the foregoing statement as follows, according to the Summary Record of the Fourth Committee. Referring to the text of Article 77 of the Charter, the Delegate of the Respondent to the Fourth Committee said:

> ". . . under the Charter the transfer of the mandates régime to the trusteeship system was not obligatory. According to paragraph 1 of Article 80, no rights would be altered until individual trusteeship agreements were concluded. It was wrong to assume that paragraph 2 of this Article invalidated paragraph 1. The position of the Union of South Africa was in conformity with this legal interpretation." (**II**, p. 42.)

Mr. President, the Applicants do not cite these passages in any respect to comment upon the validity, or otherwise, of their content or implications; they are cited simply to show that the Respondent, along with

other Members of the Organization, attributed some content of a positive nature to paragraph 1 of Article 80, and it does not matter for the present purpose what that content was, in the view of the Respondent, or whether such content was right or wrong.

Rights were assumed to exist at that time, which rights were, by the terms of Article 80, paragraph 1, insulated and sheltered from the corrosive or destructive effects of a misconstruction, or possible misconstruction, of Chapter XII of the Charter of the United Nations.

Respondent was not alone in giving to Article 80, paragraph 1, some sort of positive connotation, exceeding that contended for by the Applicants, as I have said. The Applicants have conceived the Article in question to be a saving clause which indicates the assumption of the United Nations Members that certain rights were in existence which justified safeguarding by such a clause against a misconstruction of another portion of the Charter.

On 11 April 1946, for example, the Belgian representative stated in the United Nations General Assembly that:

> "We expressed our confidence that the Trusteeship Council would soon come to occupy in the United Nations Organization the important place which it deserves. We can only repeat that hope here and give an assurance that, pending its realization, Belgium will remain fully alive to all the obligations devolving on Members of the United Nations under Article 80 of the Charter."

Again here is a positive content, or implication, exceeding that which the Applicants respectfully attribute to the paragraph in question.

And more than two years later, during the period that Members of the United Nations were hopefully prodding Respondent to conform to the spirit of Chapter XII of the Charter and to relent in its refusal to submit a trusteeship agreement for South West Africa, the Belgian representative, Mr. Ryckmans, made a statement in the Fourth Committee of the United Nations General Assembly, admonishing Respondent in the following terms:

> "On the other hand, [he, that is in the summary record to which I refer—he, Mr. Ryckmans] felt bound to draw the attention of the South African representative and the Committee to the terms of Article 80, which provided that nothing in Chapter XII of the Charter should be 'construed in or of itself to alter in any manner the rights whatsoever of any States or peoples' [etc.]. That included [said the Belgian representative] the people of South West Africa, who, having had the benefit of international supervision under the Mandate System, could not be deprived of that right."

This is from the *General Assembly Official Records*, Third Session, Part I, Fourth Committee, 79th Meeting.

Mr. Ryckmans' concluding comment, to the effect that the rights of peoples, *inter alia*, referred to in Article 80, paragraph 1, "included the people of South West Africa who, having had the benefit of international supervision under the Mandate System, could not be deprived of that right", clearly confirms, it seems to the Applicants, that the authors of the Charter assumed that mandate rights, both of States and of peoples, continued, notwithstanding the dissolution of the League, and that the authors of the Charter, in Article 80, paragraph 1, sought to make clear that Chapter XII was not to be construed in a manner which would

alter, in any way whatsoever, such rights which continue to exist by force of other instruments or undertakings.

To like effect, Mr. President, the 1956 Advisory Opinion commented as follows concerning the Court's view of Article 80, paragraph 1, as set forth in the 1950 Opinion:

> "In discussing the effect of Article 80 (1) of the Charter, preserving the rights of States and peoples under existing international agreements, the Court observed: 'The purpose must have been to provide a real protection for those rights; but no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ.' " (*I.C.J. Reports 1956*, pp. 27-28.)

The phrase from the 1950 Opinion in relation to Article 80 (1) may, with your permission, Sir, be read again. "The purpose must have been to provide a real protection for those rights."

It may be repeated, Mr. President, with respect, that the Applicants do not contend that any positive legal consequence was brought about by Article 80, paragraph 1. The language of the Court just quoted from the 1950 Opinion might, with respect, imply a different view. In the Applicants' view, the Article simply confirmed the understanding of the authors of the Charter that there were rights, including those under mandate, that those rights continued despite the dissolution of the League until other arrangements would be agreed with the United Nations, and that, as a saving clause, it made clear that none of those rights could be amended, superseded, or erased by a possible misconstruction of Chapter XII of the Charter. Moreover, as I have said, the common assumption among United Nations Members, that rights under the Mandate did survive and would survive the dissolution of the League, is to be found also in the actions and declarations of the Respondent itself (including the declarations and statements I have just quoted), its acceptance of the League resolution of 18 April 1946, and other relevant transactions and events in which the Respondent participated in the period in question.

In this context, Mr. President, it seems appropriate to note what may be a significant similarity of language employed in three related instruments, as an aid to interpretation of the events and transactions in question.

Article 80, paragraph 1, itself, Respondent's declaration of 9 April 1946, and the League resolution of 18 April 1946. Taking them in reverse order:

First: The League of Nations resolution of 18 April 1946 provides, in its fourth paragraph, as I have read, that mandatories (including Respondent) would continue to administer territories under mandate "in accordance with the obligations contained in the respective mandates, ***until*** other arrangements have been agreed between the United Nations and the respective Mandatory Powers".

Secondly: Respondent's 9 April 1946 declaration likewise, in substantially the same language, undertook to carry on its obligations under the Mandate "***until*** such time as other arrangements are agreed upon".

Thirdly: Article 80, paragraph 1, of the Charter provides that nothing in Chapter XII shall be construed to alter in any manner the rights whatsoever of any States or peoples, or the terms of certain existing inter-

national instruments (including mandates) "*until* [trusteeship] agreements have been concluded".

These three instruments—Article 80, paragraph 1, Respondent's declaration of 9 April 1946 and the League resolution of 18 April 1946, all share at least one decisively relevant common feature: each affirmed the proposition that the mandate regime would continue, with all the rights and obligations, *until* superseded by agreed arrangements.

In like terms, for example, New Zealand agreed to maintain its Mandate "*until* the conclusion of our Trusteeship Agreement for Western Samoa". This is from the League of Nations *Official Journal*, Special Supplement No. 194, at page 43.

It seems clear to the Applicants, with respect, Mr. President, that the uniform use of the word "until" reflected, or tends to confirm, the common understanding that a legal situation then existed, in which mandate rights and obligations were in effect, and would remain so, *until* the United Nations otherwise agreed.

Any other construction, furthermore, would render meaningless the admonition in paragraph 2 of Article 80, that paragraph 1 "shall not be interpreted as giving grounds for delay or postponement" of conclusion of agreements for placing "mandated or other territories" under the trusteeship system.

For the foregoing reasons, the Applicants respectfully submit that Article 80, paragraph 1, is reasonably to be construed as confirming the assumption of the authors of the Charter that mandate rights did continue, and would continue in effect, until superseded by other agreed arrangements, even though the saving clause (Article 80, paragraph 1) did not, in any manner, in and of itself create, maintain, or otherwise ensure the continuance of such rights, except against possible ravages which might result by reason of misconstruction of Chapter XII of the Charter.

Mr. President, the foregoing considerations relating to interpretation of Article 80, paragraph 1, make pertinent a related question which the Parties to these proceedings did not discuss before this honourable Court in the phase dealing with the Preliminary Objections. I refer, Sir, to the question of the role of Article 73 of the United Nations Charter.

As has been said, Article 80, paragraph 1, the "saving" clause, refers only to Chapter XII, and provides that nothing in that chapter—

> "shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties".

And paragraph 2 of Article 80 provides, as I have read:

> "Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77."

It is to be noted, Mr. President, that the second paragraph of Article 80, just quoted, does not refer to former mandated territories, but that it speaks in the present tense, "for placing mandated and other territories under the trusteeship system as provided for in Article 77".

No issue as to the relevance, or otherwise, of Article 73 was raised by the Parties in the 1962 proceedings, nor does Respondent contend, in

its written pleadings (so far as the Applicants have noted) that Article 73 has any application to the Territory for South West Africa.

An important question of United Nations Charter interpretation, however, is raised in the joint dissenting opinion appended to the 1962 Judgment by the honourable President of the Court and Judge Sir Gerald Fitzmaurice. It is, accordingly, with profound respect and as a perceived duty that I submit to this honourable Court observations concerning certain characteristics of Article 73 of the Charter which, in the Applicants' respectful view, show that, despite certain affinities between that Article and Article 22 of the Covenant of the League of Nations, the undertakings embodied in Article 73 differ so markedly from the obligations under both the mandates and the trusteeship systems, that Article 73 is neither capable of serving, nor, in the Applicants' respectful view, was it designed to serve, as a substitute for, or replacement of, either the mandates system or the trusteeship system. Obviously it need not be said that the joint dissenting opinion does not imply to the contrary, with respect, to the trusteeship system.

The caption of Chapter XI of the Charter, of which Article 73 is the principal of two provisions, is styled "Declaration Regarding Non-Self-Governing Territories".

Unlike Chapter XII, Article 73 embodies no reference to "territories now held under mandate", which phrase appears in Article 77 of Chapter XII of the Charter.

As a mere "declaration", rather than an "agreement", Article 73 has no relevance to, or correspondence with, so far as the Applicants can see, the formulations in the 18 April 1946 resolution of the League, Respondent's declaration of 9 April 1946, or Article 80, paragraph 1, of the Charter itself, all of which contemplated continuance of rights and obligations under the mandate regimes, until other *agreements* had been concluded. And here I stress the word "agreements".

The information which United Nations Members responsible for the administration of non-self-governing territories undertake to transmit to the Secretary-General, pursuant to Article 73, paragraph *(e)*, of the Charter, is limited—and I quote from the Article—"to statistical and other information of a technical nature", and even this, Mr. President, is subject to undefined "security and constitutional considerations".

The sacred trust of the Mandate, pursuant to which the material and moral well-being and social progress of the inhabitants of the Territory is required to be promoted to the utmost, would be accounted for, if at all, pursuant to Article 73 of the Charter, merely by transmittal of statistical and other information of a technical nature, subject to unilaterally determined constitutional considerations.

Even more, Article 73 does not in terms preclude, directly or indirectly, unilateral modification by the administering power of the constitutional or political status of a non-self-governing territory. Accordingly, if Respondent were subject only to the requirements of Article 73 of the Charter (the "Declaration", as it is called), there would be no legal inhibition against unilateral action on its part, including incorporation or annexation of the Territory.

It follows that the Respondent, uninhibited by international legal obligations, could alter the character of the Territory so as to remove it from the scope of Article 73 by the device of granting independence to it, annexing it, or in any other manner depriving it of its character as a

non-self-governing territory. It could do so, as I say, by unilateral action.

It would follow then, in the Applicants' respectful submission, that Article 73, in the light of Respondent's express desire to annex the Territory proclaimed by it in 1945 and thereafter, could not, under the circumstances, have reasonably been intended by the founders of the United Nations to supersede the mandates system, since it would have given to Respondent a unilateral right to accomplish what it was openly expressing its desire to see accomplished, that is to say, the incorporation of the Territory into the Union itself. And therefore, in conclusion on the point of Article 73, Mr. President, in the Applicants' respectful submission, the founding Members of the United Nations, the preponderant majority of whom also were Members of the League of Nations, would not have substituted for the regime of the Mandate a declaration pursuant to which Respondent would be free to carry out its openly proclaimed and avowed intention and desire unilaterally to alter the constitutional status of the Territory, without international supervision, accountability or consent.

It is for these reasons and on the basis of these considerations, which were not presented to this honourable Court in the 1962 proceedings, that the Applicants have ventured to present, most respectfully, to the Court these views which we feel may have a bearing upon the construction of an important provision of the United Nations Charter.

By way of conclusion of this Part C of the Applicants' presentation, I should like with your permission, Mr. President, and for convenience of the honourable judges, to offer a concise summation of the legal conclusions which appear to the Applicants to follow from the considerations adduced with respect to the survival of judicial and administrative supervision over the Mandate, as well as the survival of Article 7, paragraph 1, giving to the United Nations the right and duty to pass upon requests for alteration or modification of the terms of the mandate instrument itself:

1. The nature and purposes of the mandates system, together with the history thereof, make it clear that the obligation of international administrative supervision, the normal security of the sacred trust, was of the essence of the Mandate and that such supervision accordingly must survive so long as the Mandate itself endures.

2. No Mandatory, including Respondent, could justify retaining rights derived from the Mandate and denying obligations thereunder. As this honourable Court held in 1950, in a proposition from which there was no dissent, "The authority which the Union Government exercises over the Territory is based on the Mandate". That is from the 1950 Opinion, at page 133.

3. So long as Respondent retains rights over the Territory it is, by that very fact, manifesting consent to international supervision. Disclaimers of any such consent are irreconcilable with the fact of its retention of rights. Such disclaimers would vainly attempt to exclude the very essence of the Mandate, as this honourable Court has said in its 1962 Judgment.

4. Lapse of supervision would freeze the Mandate in perpetuity in its present form or else, equally intolerably, would give to Respondent the right to annex the Territory, inasmuch as there would be no super-

visory organ in existence with capacity or authority to consent to or inhibit modification of the terms of the Mandate, in accordance with Article 7, paragraph 1, thereof.

5. This honourable Court has upheld the continuing right of recourse for judicial protection against asserted abuses or breaches of the Mandate. Respondent's contention concerning lapse of administrative supervision would leave, to the Applicant States and to other States similarly situated, as the sole and only recourse for relief for asserted breaches or abuse of the Mandate, recourse to this honourable Court without possibility of recourse to the normal security through administrative supervision. Such a state of affairs would leave the Applicants and other States similarly situated in the position of presenting to the Court, as regrettably is the case here, masses of detail and information which should have been the subject of enquiry and scrutiny and action on the part of an administrative tribunal, as the mandates scheme contemplated. It is not; in the Applicants' respectful view, pertinent or appropriate that this honourable Court should or need be converted into the first recourse rather than "the final bulwark of protection", in the solemn language of the Court's Judgment in 1962 (*I.C.J. Reports 1962*, p. 336).

6. The events, transactions and undertakings during the period of the dissolution of the League of Nations and the commencement of the United Nations were consistent with the objective elements of the situation arising from the demise of the League. The Mandate regimes were maintained and stabilized until superseded by agreed arrangements of another sort. It was hoped and expected that trusteeship agreements would be the rule, and that the interim period or transitional period would be a short one.

Respondent manifested its understanding and undertaking consistently with the basic nature of the obligation of international supervision and its essentiality in the mandates system.

Respondent reaffirms its understanding and acceptance of such essentiality, but only in the context of its second alternative contention, where it is adduced for the purpose of supporting an untenable conclusion that the Mandate as a whole has lapsed and that the 1962 Judgment should in effect be reversed.

7. The United Nations replaced the League as the organization embodying the organized international community. The obligation of the sacred trust was, in the words of this honourable Court, "laid upon the League as an organized international community", rather than merely as a specific supervisory organ with a fixed membership.

8. The United Nations is legally and practically qualified to exercise supervisory functions over the Mandate. Its consent is necessary to modification of the terms of the Mandate.

9. By exercising its right to refuse to submit a trusteeship agreement for South West Africa, Respondent has converted what was expected and intended to be a transitional period into one of long duration. Respondent has sought, and continues to seek, to avoid the consequences of the fact that no agreement has been reached between Respondent and the United Nations upon other arrangements. And Respondent persists in its contention, made before this honourable Court in 1950, that the Mandate has lapsed because the League has ceased to exist.

Respondent thereby maintains and renews a position which the Court, without dissent, characterized in the 1950 Advisory Opinion as one "based on a misconception of the legal situation created by Article 22 of the Covenant and by the Mandate itself". I quote from the 1950 Opinion at page 132.

For all the foregoing reasons the Applicants respectfully submit that the Mandate as a whole is still in force, that the obligation of international supervision survived the dissolution of the League, that the United Nations General Assembly has replaced the League as the supervisory organ, that Respondent is under a duty to submit to the supervision of the General Assembly, in terms of Article 6 and of Article 7, paragraph 1, of the Mandate, and Article 22 of the Covenant of the League of Nations, and that Respondent remains under a duty to submit to judicial protection of the Mandate by the Court in terms of the second paragraph of Article 7 of the Mandate.

Accordingly, Mr. President, and Members of the honourable Court, the Applicants respectfully request this honourable Court to adjudge and declare on the basis and in favour of the Applicants' Submissions Nos. 1, 2, 5, 7, 8 and 9, all of which are set out in the Memorials at **I**, pages 197-198.

Mr. President, this concludes our presentation of Part C, of this phase of the Oral Proceedings dealing essentially with legal issues, and with the President's permission, I turn now to Part D, the concluding portion of our presentation at this phase. Part D deals with the legal basis and the legal nature of Respondent's obligations toward the inhabitants of the Territory.

PART D

Mr. President, in the 1962 Judgment this honourable Court affirmed its competence to adjudicate the matter of the dispute between the Applicants and Respondent regarding the interpretation and application of the provisions of the Mandate, and the Court, moreover, in the 1962 Judgment, held that the Applicants—

> ". . . have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members". (*I.C.J. Reports 1962*, p. 343.)

The Applicants' right and interest in the observance by Respondent of its obligations under the Mandate thus being of a legal character, it follows that such legal right and interest is judicially determinable. The issues remaining for adjudication of the merits of the dispute accordingly involve juridical interpretation of the terms and nature of Respondent's obligations under an international instrument to which it is a party.

The elements of a legal dispute, which the 1962 Judgment of this honourable Court held did exist between the Applicants and Respondent, were cogently summarized by Judge Sir Gerald Fitzmaurice in his separate opinion appended to the Judgment of the Court in the *Northern Cameroons* case. The learned Judge set the matter forth as follows—

> ". . . there exists, properly speaking, a legal dispute (such as a court of law can take account of, and which will engage its judicial function), only if its outcome or *result, in the form of a decision of the*

Court, is capable of affecting the *legal* interests or relations of the parties, in the sense of conferring or imposing upon (or confirming for) one or other of them, a legal right or obligation, or of operating as an injunction or a prohibition for the future, or as a ruling material to a still subsisting legal situation".

That is from the learned Judge's opinion in the *I.C.J. Reports 1963*, at page 110.

Mr. President, it is submitted respectfully that the dispute in the cases at bar meets the criteria set forth in the passage I have just quoted from Judge Sir Gerald Fitzmaurice's opinion.

Notwithstanding the holding of this honourable Court in the 1962 Judgment which I have quoted at the opening of this section, Respondent contends that its obligations under Article 2, paragraph 2, of the Mandate are not justiciable or, alternatively, that if they are justiciable, the scope and measure of such obligations is limited to a test of Respondent's good or bad faith in the premises.

As originally set forth in the Counter-Memorial, **II**, pages 384 to 398, and as more fully developed in the Rejoinder, **V**, pages 142 to 174, Respondent's alternative major contention in this regard may fairly, we think, be summarized as follows.

The first alternative contention, set out at pages 159 and following, of the Rejoinder **(V)**, is that, in the light of the asserted nature of the obligations of Article 2, paragraph 2, of the Mandate—

> "... although the obligations under the article were of a legal nature, the Court was not intended to possess jurisdiction in regard to alleged breaches thereof". (**V**, p. 146.)

Respondent's second alternative contention, which falls for consideration only if the first is rejected, is that unreviewable discretionary powers over the Territory are invested in Respondent by Article 2, paragraph 2, of the Mandate, subject only to the question whether such powers are exercised by Respondent in good or bad faith. I summarize, without quoting, from the Rejoinder, **V**, page 157 and following.

Respondent's second alternative contention, to which I have just referred, is formulated in what Respondent describes as several "simple propositions", which are summarized in the Rejoinder under five headings at **V**, pages 157 to 158.

These propositions may be concisely re-formulated and slightly amended, as follows:

(a) The grant to Respondent of "full power of legislation and administration" in Article 2, paragraph 1, of the Mandate, necessarily entails, in Respondent's submission, that Respondent is "required and entitled to use its discretion as to the need for and the manner of the exercise of its powers".

(b) It is of the essence of a discretionary power that an act purported to be an exercise thereof, is not illegal unless it is contrary to some legal provision regulating such exercise, or exceeds the limits expressly or by implication placed upon the power. No regulatory provisions having been imposed, in Respondent's submission, the only remaining question is the nature of the limitation imposed by Article 2, paragraph 2.

(c) The only limitation placed by the Article in question on Respondent's discretionary power is asserted to be that such power should

be exercised for the purpose of promoting the well-being and progress of the inhabitants.

(d) Consequently, Respondent asserts, the Court can determine whether an act or policy violates the Article in question only by examination of the question whether the exercise of discretion was directed at the purpose of promoting the well-being and progress of the inhabitants. Such an examination, Respondent contends, would be limited to "enquiry as to the good or bad faith of the Mandatory".

(e) The foregoing conclusion is confirmed, in Respondent's submission, by the consideration that, "whenever there is scope for honest difference of opinion" as to the effect of Respondent's policy and practices, "there are no legal norms—as distinct from political or social views or theories—which a Court can apply for giving preference to any of the conflicting opinions to the exclusion of the others".

These five "simple propositions" are summarized and set forth in the Rejoinder (V) from pages 157 to 158. I believe they have been fairly stated in context but, in any event, they will speak for themselves.

On the basis of the premise that there are no such legal norms applicable by the Court, Respondent finds confirmation of its view that asserted breach of the Article in question can be determined only on the basis of a determination that such policy or practices were not intended to promote the well-being and progress of the inhabitants. This is the second alternative contention.

It will be apparent that a common denominator underlying both so-called alternative contentions is the asserted absence of legal norms or standards, according to which the Court could adjudicate upon the legal interest of the Applicants which underlie their dispute with Respondent, which dispute this honourable Court has expressly held in the 1962 Judgment to be a dispute of a legal nature cognizable by the Court.

Mr. President, before proceeding to a detailed analysis of Respondent's two so-called alternative contentions, two points properly may be noted, concerning which the Applicants and Respondent appear to be in agreement.

First. It appears to be undisputed that all mandates, including that one now before the Court, were conceived and executed as legally binding instruments, as a whole and in each of their parts. I derive this from the Rejoinder, V, page 144. Accordingly it appears to be common cause that Respondent's obligations in terms of Article 2, paragraph 2, are of a legal character.

Secondly. It appears to be undisputed that it does not exceed the power or proper function of a judicial tribunal to consider relevant economic, political, ethnological, social or other factors, however complex—

> ". . . whenever the judicial duty is engaged to adjudicate upon legal rights and interests of litigants with standing to invoke the competence of the Court".

In respect of this second apparently undisputed proposition, it should be noted, however, that Respondent has not made crystal clear—to the Applicants at any rate—the exact nature of its position in this regard.

Thus, on the basis of what Respondent describes as "certain apparent misapprehensions or misrepresentations on Applicants' part", Respon-

dent takes occasion to emphasize what it describes as "the true nature of its contention in this regard". The Applicants do not think it necessary to comment upon the characterization of the Applicants' endeavour to summarize their understanding of Respondent's argument. It suffices to note that by way of emphasizing the "true nature of its contention"—as it says—Respondent quotes several passages from the Counter-Memorial which were responsible in the first place for the Applicants' confusion, if, indeed, it was confusion.

The relevant passages, quoted from the Counter-Memorial in the Rejoinder, **V**, at page 143, contain the following proposition, which I shall take the liberty of reading to the Court—

> "... attention has been drawn [says Respondent] to the wide and general provisions of Article 2. In this respect it has been submitted that it is foreign to the essential nature and purpose of a court of law to entertain matters of a purely political or technical nature, such as might well arise if the Court were required to adjudicate on disputes arising from an alleged breach of the obligation to '... promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory ...' "

This is quoted in their Rejoinder, from the Counter-Memorial, **II**, page 384.

In another passage cited at **V**, pages 143 to 144 of the Rejoinder as showing the allegedly true nature of its contention, the same proposition is restated in the following form. This time Respondent was quoting Book II of the Counter-Memorial, at **II**, page 184.

> "Respondent is mindful of the fact that legal questions are often encompassed or intertwined with political issues, and that the jurisdiction of the Court, if otherwise established, would not for that reason be ousted. It is, however, foreign to the essential nature and purpose of the Court to entertain matters of a purely political character ..."

Mr. President, careful reappraisal by the Applicants of the foregoing quoted passages does not, it must be confessed regretfully, yet bring home to the Applicants the "true nature" of Respondent's contention.

What gave the Applicants pause still remains a source of doubt, to wit, the significance properly attributable to Respondent's use of the word "purely" in both of the passages quoted from the Counter-Memorial, which were designed to make its position crystal clear. Respondent's statement, that it is foreign to the essential nature and purpose of a Court to entertain matters of a *purely* political character, begs a major question at issue between the Parties.

If Respondent's obligations in terms of Article 2, paragraph 2, are obligations of a legal nature, as Respondent appears to concede in another context, and if, as this honourable Court has held, the Applicants "have a legal right or interest in the observance by the Mandatory of its obligations" toward the inhabitants of the Territory, it must follow that the obligations in question are *not* of a "*purely* political character".

The Applicants, of course, would agree that it is foreign to the nature and purpose of the judicial process to pass upon matters of a "purely political nature". If the Applicants conceived that the dispute relating to the interpretation of Article 2, paragraph 2, were of such a nature,

the Applications filed with this honourable Court would have included no submissions in relation to that Article.

The Applicants, accordingly, have sought to penetrate the language in which the passages quoted from the Respondent's Counter-Memorial was couched, in order to ascertain some significance germane to the issues in dispute.

In the course of such a quest, the Applicants noted, or thought they did, that Respondent perhaps was in fact endeavouring to establish the proposition that, in the light of the broad formulation of the sacred trust, and the many elements which necessarily must underlie the duty to promote the welfare and progress of the inhabitants, that the Court as a judicial, rather than a political organ, could not and should not, as the Respondent says in another context, "venture on to [the] terrains", in Respondent's phrase, of "social, ethnological, economic and political considerations". I quote from the Counter-Memorial, **II**, at page 391.

From closer analysis of Respondent's contention, however, it appeared to the Applicants that Respondent's submission that this honourable Court should not venture on to such "terrains", was based on at least two antecedent propositions:

1. that the scope and content of Respondent's obligations under Article 2, paragraph 2, were limited to a showing "that a particular exercise of Respondent's legislative or administrative powers was not directed in good faith toward such a purpose", i.e., the purpose of promoting to the utmost the well-being and progress of the inhabitants; and
2. the proposition apparently antecedent to that, again, in Respondent's words:

> "If the Court were to decide whether in fact a particular policy promoted the 'well-being' of the inhabitants 'to the utmost', it would have to consider that policy and weigh it against other policies which might be followed in an attempt to achieve such a purpose."

I have quoted from the Counter-Memorial, **II**, at page 391.

Having set such a task for the Court, to consider one policy and weigh it against any other conceivable policy which might be followed in an attempt to accomplish the same purpose, a task which the Applicants concede is indeed a formidable one—the Respondent reaches the conclusion that such a function "would be one which is, in its very nature, not a judicial one". With that the Applicants would readily agree; in fact, it would not be a suitable function even for an administrative organ or any other type of agency to be in a position in which it would have to evaluate one line of action or policy against "other policies which might be followed in an attempt to achieve such a purpose". There is nothing uniquely impossible of a judicial nature in such a task; it is just an impossible task, generally, for any organ of any kind.

The Applicants, in their quest to find the "true nature" of Respondent's contention, reached certain conclusions thereon, which may be described as tentative, though not, it is thought, fairly to be characterized as "misapprehensions", to say nothing of "misrepresentations".

The Applicants' conclusions centre upon the consideration that the needle of Respondent's logic oscillates from premise to conclusion and then reverses its direction, travelling from conclusion back to premise.

Respondent's line of argument seems to run as follows. Respondent's

legal obligation, in terms of Article 2, paragraph 2, consists of a discretion unreviewable except on the basis of Respondent's good or bad faith in exercising such discretion. No legal norms or criteria exist by which the discharge of such a good faith obligation can be judically appraised. Hence, the obligation is a "purely political" one, which is foreign to the essential nature and purpose of a Court. Accordingly, the obligation is not justiciable. Alternatively, if it is justiciable, the only basis upon which a Court can adjudicate a dispute concerning asserted breaches of the obligation is a test of bona or mala fides, that is, the subjective motivation, or *mens rea*, of a shifting group of individuals who may from time to time compose Respondent's government.

The needle of Respondent's logic points in opposite directions at the same time.

The Court's judicial function to adjudicate disputes of a legal nature concerning the application or interpretation of Article 2, paragraph 2; *inter alia*, of the Mandate, it is respectfully submitted, cannot properly be negated by stripping the obligation of all qualities which give it a legal character. This is precisely the consequence of Respondent's first alternative contention, namely that disputes concerning asserted breaches of that Article are not justiciable, or at the most, that they are "legal rights" which are not enforceable and for which there is no remedy.

Respondent's second alternative contention, in essence, is a different way of stating the first one, as we understand it; this is true, at any rate, on the basis of major premises which appear to underlie both of them. Under the "good faith test" alternative contention, there are said to be no legal criteria by which the Court can exercise a judicial function. If that is not the same as saying that the rights are not justiciable, the distinction eludes the Applicants.

The Applicants find justification for this assertion, that the major premises underlying both of Respondent's alternative contentions are common, by reference back to the basis upon which Respondent emphasizes the so-called "true nature" of its contention in regard to the proposition that the obligations of Article 2, paragraph 2, were not intended to be justiciable. The basis of that contention, it will be recalled, was that a court of law could not "entertain matters of a *purely* political and technical nature". (Rejoinder, V, p. 143.)

In elaborating its second alternative contention, the "good faith test", Respondent likewise argues that a Court cannot adjudicate upon Respondent's obligations under Article 2, paragraph 2, of the Mandate, inasmuch as the only test is one of "good faith" in the discharge of those obligations and no legal criteria or norms exist by which such "good faith" can be judically appraised. Or, in Respondent's own words: "No legal criteria can be used in such adjudication." (**II**, p. 391.) If no legal criteria can be used in such adjudication it would seem synonymous with saying that the dispute is not justiciable.

The distinction between the formulations underlying the contentions appear to the Applicants to be purely verbal; any difference is so unsubstantial as to be meaningless. However, Respondent does endeavour to spin a thread from each of these so-called alternative contentions, and the Applicants, with the President's permission, will now endeavour to follow each thread to a conclusion.

[Public hearing of 24 March 1965]

Mr. President and Members of the honourable Court, at the conclusion of our last session I had stated that the distinction between the formulations underlying both of the Respondent's alternative contentions appeared to be purely verbal, that any difference would be so unsubstantial as to be meaningless. I was referring, as the honourable Court may recall, to the first alternative contention of Respondent that the obligations under Article 2, paragraph 2, of the Mandate are not justiciable and its second alternative contention, to wit, that if such obligations are justiciable, they nevertheless are limited to, and measurable by, a so-called test of "good faith" of mala or bona fides on the part of the Respondent, in administering the Territory in terms of Article 2, paragraph 2.

I had said, Mr. President, that in view of the fact that Respondent does spin a thread from each of these so-called alternative contentions, the Applicants now will endeavour to follow each thread to a conclusion.

With the permission of the President, I turn to a consideration of Respondent's first alternative contention. That contention is not grounded upon evidence with respect to the history of the events and transactions attending the formation of the mandates system, in respect of jurisdiction of the Permanent Court to adjudicate disputes regarding interpretation or application of Article 2, paragraph 2, of the Mandate.

Respondent's first alternative contention, rather, is that, given the generality of formulation and the "political or technical nature of the obligations envisaged" (I quote their language), it could not have been the intent of the authors of the Mandate to confer upon the Court the power of judicial review of disputes involving the interpretation or application of the Article in question. I have quoted the phrase "political or technical nature of the obligations envisaged" from the Counter-Memorial, **II**, page 384 (repeated in the Rejoinder, **V**, p. 143). The essence of what I have said is in the cited passages of the written pleadings of Respondent.

The reasoning adduced by Respondent in support of its interpretation of the intentions of the founders of the mandates system, in respect of the justiciability of obligations under Article 2, is not, in the Applicants' view, persuasive.

In the first place, Respondent has devoted considerable space to an analysis of certain comments by the late Judge Sir Hersch Lauterpacht, with respect to international judicial review. Respondent, however, has quoted from this learned authority without regard to the proper context of his comments.

Judge Lauterpacht's commentary principally was concerned with difficulties inherent in international judicial review of the internal policies of States, rather than such review of governmental policies carried out under international agreements. Although Respondent, on the one hand, concedes that "in more recent times the concept of international judicial review of internal policy is not generally regarded as being quite as startling as formerly" (**V**, p. 156), Respondent concludes, on the other hand, that, in the circumstances existing at the time of the founding of the mandates system, it was "unthinkable" that the Permanent Court could have been authorized to review issues such as those arising from alleged breaches of Article 2, paragraph 2, of the Mandate.

Inasmuch as the issues in dispute in the present proceedings do not relate to international judicial review of internal State policies, but to international judicial review of actions taken pursuant to international undertakings, Respondent's discussion of international judicial review in this context appears to be largely irrelevant. The international status of the Territory for South West Africa, as well as the international nature of the rules regulating the Mandate (an international institution) have been upheld by this honourable Court, as we have sought to bring out in Part C of our presentation in this phase of the proceedings.

Contrary to Respondent's analysis, scholarly authority has found little difficulty with the proposition that the authors of the mandates system contemplated that the Court would exercise powers of judicial enforcement with respect to disputes relating to the interpretation or the application of any or all provisions of the Mandate, including Article 2, paragraph 2, thereof.

Thus, Professor Quincy Wright, celebrated authority on the mandates system, comments as follows:

> "Courts act (1) by nullifying illegal acts of the administration through power of review or injunction, (2) by requiring performance of legal duties through mandamus or other process, (3) by holding the administration financially responsible for illegal acts, (4) by holding officials criminally or financially responsible for illegal acts, (5) by performing administrative functions themselves. In all but the last of these methods, courts have no initiative. They can act only incidentally to the settlement of controversies initiated by individuals, by government agents, or by the State itself. The League clearly has no functions of the fourth or fifth class in relation to mandates . . . It would seem that the Permanent Court of International Justice might employ any of the first three methods in litigation before it arising out of the interpretation or application of a mandate." (*Mandates Under the League of Nations* (1930), p. 194.)

Professor Wright indicates no doubt concerning the Court's power of adjudication of disputes relating to asserted breaches of Article 2, paragraph 2, of the Mandate. Indeed, in the same work, the learned author expresses the view that—

> "League members have rights in the mandated territories not only for the protection of their national interests, and the interests of their nationals, but also for the protection of the interests of the inhabitants of the area.
>
> Every member of the League can regard his rights as infringed by every violation by the mandatory of its duties under the mandate, even those primarily for the benefit of the natives, and can make representations which if not effective will precipitate a dispute referable to the Permanent Court of International Justice if negotiation fails to settle it." (*Ibid.*, p. 475.)

Furthermore, Mr. President, in the light of the fact that all mandate charters have been treated by the League, by judicial tribunals, and by scholarly authority as organic law for the mandated territories, there is no reason to doubt that the founders of the mandates system did indeed intend the Court to adjudicate disputes relating to the interpretation and application of obligations embodied in the several mandates, in-

cluding Article 2, paragraph 2, of the Mandate for South West Africa. Thus, again quoting from Professor Wright's work:

> "The mandate texts or charters have been regarded by the League and the mandatories as the fundamental law for the areas. Legislation contrary to their terms has been criticized by the League Council and usually considered void by the mandatory's own courts. They are, it is true, documents of international law, resting on international agreement and interpretable by the Permanent Court of International Justice, but they are also the fundamental constitution from which internal governing authority in the areas derives. In each of the areas there is also a local constitution . . . These documents . . . are considered subordinate to the mandate texts, by the League organs and also in most cases by the mandatories' courts. They usually recite that document as the basis of authority, are interpreted in accord with it, and are void in violation of it." (*Ibid.*, pp. 516-517.)

Although neither the Permanent Court nor this honourable Court has had occasion to exercise such powers, disputes concerning the interpretation and application of mandate instruments frequently have been adjudicated in municipal tribunals.

The Applicants have cited, in this regard, the case of *District Governor, Jerusalem-Jaffa District* v. *Murra* (1925-1926, *Annual Digest 46*, No. 34), in which an Ordinance of the Government of Palestine was examined in order to consider whether it was in any way repugnant to the terms of the Palestine Mandate. *Murra's* case involved the question whether the Ordinance was consistent with Article 2 of the Palestine Mandate, pursuant to which the mandatory power was responsible for "safeguarding the civil . . . rights of all the inhabitants of Palestine irrespective of race and religion".

Respondent seeks to distinguish this case on the ground that the provisions involved therein are "not analogous" (in Respondent's words) to Article 2, paragraph 2, of the Mandate for South West Africa. The Applicants submit, however, that these provisions are indeed analogous, in relevant respects, to Article 2, paragraph 2, of the Mandate. Like the latter Article, the provision of the Palestine Mandate in question was humanitarian and protective in purpose, general in formulation, and involved day-to-day administration of the mandated territory, and accordingly a wide degree of discretion on the part of the mandatory. Similar considerations apply with regard to *Altshuler's* case, cited by the Applicants in our Reply, **IV**, at pages 480-481.

The case of *Winter* v. *The Minister of Defence*, a case coming from the South African Appellate Division of the Supreme Court, is likewise relevant to the issue in question here. The *Winter* case dealt with an issue arising under Article 2, paragraph 2, of the Mandate for South West Africa. (**IV**, p. 481.)

Although Respondent seeks to distinguish *Winter's* case on the basis that the Court in that case referred to the reasons for the issuance of the Proclamation without conducting an enquiry into questions of the soundness or justifiability thereof, the Supreme Court of South Africa, Appellate Division, said:

> "The Proclamation in question . . . recites as one of the reasons for its issue that, under the circumstances therein set out, the

> ordinary law of the land is inadequate to enable the Government to fulfil its duty in safeguarding the welfare of the inhabitants and in ensuring the security of the State. That being so, it cannot in my opinion be said it is in conflict with the duty to promote the well-being of the inhabitants of the territory." (1938-1940 Ann. Dig. 198. 1939.)

The Court in that case, therefore, did not refrain from adjudicating the issue whether legislation was in conflict with the obligations of Article 2, paragraph 2, of the Mandate. The Court expressed or indicated no doubt concerning the justiciability of Article 2, paragraph 2. The Court did not intimate a view that it was in any way, in Respondent's language, "foreign to the essential nature and purpose of a court to entertain matters arising under that Article".

The concept of judicial review of international obligations was familiar to the founders of the mandates system. One illustration among many is to be found in the area of State responsibility for denial of justice.

This legal doctrine often had been applied to policies and practices of executive and legislative authorities, as well as to decisions of judicial tribunals.

Inasmuch as the doctrine of denial of justice applies to treatment of aliens, international statal responsibilities often are involved in the application of the doctrine. International judicial review of governmental policies and actions with respect to aliens involve considerations of law and of justiciability analogous in important respects to governmental policies and practices affecting inhabitants of mandated territories.

There is, accordingly, no substantial basis for Respondent's assertion that it was "unthinkable" that the authors of the mandates system should bestow upon the International Court power of judicial review over governmental policy in terms of obligations such as those embodied in Article 2, paragraph 2, of the Mandate.

Applicants also have set out, in the Reply, examples of the exercise of the power of judicial review over governmental acts and policies taken with regard to broadly formulated international obligations, including those encompassing political, economic, ethnological or social considerations if and when such considerations are relevant to a legal dispute concerning the interpretation or application of international undertakings. It is, of course, in this connection and for this purpose that the Applicants also cite decisions of high domestic tribunals, including, *inter alia*, the decision of the United States Supreme Court in the case of *Brown* v. *Board of Education*, which has been discussed in this same context in Part A of the Applicants' presentation in this phase of the Oral Proceedings.

As has been noted, the Applicants conceive the *Brown* case to be relevant to the proposition that courts do not hesitate to "venture onto [the] terrains" of "social, ethnological, economic or political" matters, in Respondent's words (**II**, p. 391), when such considerations are relevant to legal issues in dispute. That case shows, moreover, that courts venture upon such "terrains" when necessary to interpret broadly formulated constitutional-type obligations, and that in doing so they apply current, contemporary standards rather than the presumed intentions of the parties at the time that the relevant obligations were conferred and accepted. These points are brought out, Sir, in our Reply at **IV**, page 515.

In this context the Respondent comments as follows:

> "Applicants in the Reply also refer to the testing power exercised by the Supreme Court of the United States of America in determining the legality or otherwise of measures alleged to contravene the provisions of the Constitution. There is, however, no reason to think that the authors of the Mandate System intended to bestow a similar power on the Permanent Court." (V, p. 150.)

Mr. President, needless to say, the Applicants had no such point in mind by their citation of the *Brown* case as well as of other cases of domestic tribunals.

In the area of international jurisprudence the Applicants also cite in their Reply several examples, including the minorities treaties.

Respondent seeks to distinguish between the judicial interpretation of such treaties, and of the relevant provisions of the Mandate, on the ground that no general grant was made in the minorities treaties pursuant to which all Members of the League of Nations could invoke the Court's jurisdiction. Respondent seeks also to differentiate the two systems on the ground that the minorities treaties were imposed on conquered nations whereas, in Respondent's language, the mandates were conferred "upon the conquerors by themselves". From this, Respondent concludes that it was unlikely that the great powers would voluntarily have granted legal interests and competence to invoke jurisdiction to a wider number of States in respect of mandates than in respect of minorities treaties. This is brought out in Respondent's Counter-Memorial, II, page 187.

Mr. President, an answer to such a contention was given as long ago as 1930, again by the learned scholar whom I have quoted, Professor Quincy Wright. Professor Wright, in commenting upon the minorities treaties, wrote in 1930—

> ". . . the system was 'intended to prevent that questions concerning minority protection should acquire the character of a dispute between nations', and 'to insure that States with a minority within their borders should be protected from the danger of interference by other powers in their internal affairs'. These reasons hardly apply to the mandated areas and also the compromissory clauses of the mandates evidently foresee the possibility of disputes between a mandatory and a League Member in respect to the mandatory's application of his mandate . . ." (*Mandates Under the League of Nations* (1930), p. 522, footnote 74a.)

Inasmuch as the minorities treaties system was peculiarly concerned with preventing disputes concerning minorities from acquiring the character of a dispute between nations, a limited right of judicial recourse was an appropriate method of achieving that objective, of keeping to a minimum the international disputes which might arise with regard to this question.

No such consideration, however, applies to the mandates system. The compromissory clause of Article 7 conferred upon all Members the capacity to seek judicial recourse in respect of "any dispute whatever" relating to the interpretation or application of the Mandate in the circumstances envisaged in that Article. Had the considerations underlying the restricted grant of the right of judicial recourse in the minorities treaties been regarded as relevant to the mandates system, clearly the

compromissory clause itself would have been couched in similarly restrictive terms.

The Applicants also have referred, in the Reply, to the Constitution of the International Labour Organisation, as well as conventions concluded thereunder on the issue of justiciability.

Respondent seeks to distinguish between justiciability of disputes arising under the conventions of the I.L.O., as well as its Constitution, and disputes arising under Article 2, paragraph 2, of the Mandate, on the ground that the International Labour Organisation Constitution and conventions thereunder are not "motivated solely by a humanitarian interest", but that in addition international regulation of labour conditions within a State has a bearing upon international competitive advantage or disadvantage.

On this basis Respondent concludes that it is not surprising that the I.L.O. Constitution provides means whereby a State can enforce compliance with conventions to which both it and an allegedly non-complying State Member are parties. (**II**, pp. 189-190.)

With respect, the Applicants conceive such a purported distinction between the I.L.O. system and the mandates system as a captious one. The I.L.O. Constitution made manifest the humane objectives of that system and this was made clear in the separate opinion of Judge Jessup appended to the 1962 Judgment (*I.C.J. Reports 1962*, pp. 426 ff.).

The learned judge referred to the complaint brought by the Republic of Ghana against Portugal, alleging non-observance by the latter of Convention No. 105, the Abolition of Forced Labour Convention, 1957. No consideration of competitive advantage or disadvantage between Ghana and Portugal was relevant to any issue in that proceeding.

Respondent also seeks to distinguish the case of the *Customs Régime between Germany and Austria*, cited in the Reply at **IV**, pages 485-486. The question before the Permanent Court there was whether a proposed customs union was consistent with an international obligation undertaken by Austria not to "violate her economic independence by granting to any State a special régime or exclusive advantages calculated to threaten this independence". Respondent argues that the Opinion of the Permanent Court was not based upon an assessment of future political contingencies, as asserted by the Applicants, but "purely on the contents of the régime created by the Austro-German Protocol of March 19th, 1931". (**V**, p. 151.)

The distinction sought to be drawn by Respondent between these two situations is unsubstantial. Judicial consideration of the question whether a customs regime would be a breach of Austria's obligation not to "violate her economic independence" clearly encompasses issues heavily charged with political, economic as well as technical considerations. The Court, nonetheless, perceived no obstacle to justiciability of the question in that case, which is the consideration relevant to Respondent's contention at issue in the context of the present discussion.

The Applicants also refer in the Reply to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Respondent seeks to distinguish that Convention from Article 2, paragraph 2, in the aspect under discussion here, on the ground that the broadly formulated rights under the Convention are—in Respondent's words—"defined with reasonable exactness". Respondent, however, offers no comment with regard to the Applicants' reference to the case of *Lawless*

v. *Ireland*, adjudicated by the European Court of Human Rights. In that case, the tribunal held that an Irish Proclamation of 1957 was justified by a "public emergency threatening the life of the nation". It would be difficult, Mr. President, to find a clearer example of international judicial review of governmental action encompassing political, as well as social questions.

In the premise then, Mr. President, it is not at all surprising, given the numerous examples and wide knowledge and acceptance of the principle of international judicial review of governmental policies, including those encompassing political, economic and technical aspects, that the authors of the mandates system not only should have bestowed a like power upon the Permanent Court, but that they did so without objection and even without discussion. Indeed, in the light of the nature and purposes of the mandates system—a novel institution embodying the sacred trust of civilization—omission of the right of judicial recourse would have struck at the very heart of the mandates system. Such a result would have been, indeed, unthinkable.

Mr. President, with your permission, I turn now to a consideration of Respondent's second alternative argument which is set out at **V**, pages 157 to 174 of the Rejoinder. As I have noted already, Respondent's second alternative contention, in effect, is that the only limitation upon the discretionary powers assertedly granted to Respondent in Article 2, paragraph 2, of the Mandate, is the requirement of good faith in the exercise of such powers.

I have referred earlier, Mr. President, to the Respondent's five so-called "simple propositions" in which Respondent has formulated its second alternative contention. These are set out in the Rejoinder, **V**, pages 157 to 158.

Propositions *(a)* and *(b)* appear unobjectionable to the Applicants, subject only to the cautionary comment that Respondent's reference in proposition *(a)* to "discretion" does not imply that such discretion is not reviewable on the basis of objective criteria and legal norms, and subject to the comment that Respondent's reference in proposition *(b)* to the absence of "regulatory provisions" does not exclude the international regulations of the mandates system itself.

Propositions *(c)* and *(d)*, however, are destructive of the sacred trust and rob the obligation to submit to international supervision of any meaningful reality.

Respondent's proposition *(c)* is formulated in its own terms as follows:

> "The only limitation placed by Article 2, paragraph 2, on the discretionary power vested in Respondent was that such power should be exercised for the purpose of promoting to the utmost the well-being and progress of the inhabitants of the Territory." (**V**, p. 157.)

Respondent's insertion in the formulation of the phrase "for the purpose of promoting" is, of course, a gratuitous gloss on Article 2, paragraph 2, and vitally alters its character. The actual terms of that Article embody no such express or implied limitation, contain no reference to the purpose of promoting, but state a flat and unqualified obligation that Respondent "shall promote to the utmost", and so forth, in the words of the Article. In view of that fact, it may be fair to comment that Respondent's formulation is not merely a gratuitous

gloss, but implies a unilateral and off-hand modification of the terms of that provision.

The consequence of such an amendment of Article 2, paragraph 2, injecting the concept of "for the purpose of", is made explicitly clear in Respondent's proposition *(d)* which is formulated in the following terms:

> "Consequently the Court can determine whether a legislative or administrative act or policy constitutes an infringement of Article 2, paragraph 2, only by examining whether or not the exercise of discretion involved in such act or policy, was directed at the purpose of promoting to the utmost the well-being and progress of the inhabitants. Such an examination would, in the circumstances, involve an enquiry as to the good or bad faith of the Mandatory." (V, pp. 157-158.)

Therefore, the amendment of Article 2, paragraph 2, implicit in proposition *(c)*, is a vehicle for importing into the Article the good or bad faith test, as is made explicitly clear in proposition *(d)* which I have just quoted.

But, Mr. President, Respondent's plan for re-formulating Article 2 includes the elimination of any vestige of meaningful international accountability which might survive propositions *(c)* and *(d)*, by reference to its next, fifth, "simple proposition" *(e)*, which I read in Respondent's own terms:

> "The conclusion set out in sub-paragraph *(d)* is strengthened by the consideration that, whenever there is scope for honest difference of opinion (as there often must be) on the question whether a particular legislative or administrative measure or policy *does or does not, or will or will not, in fact promote well-being and progress to the utmost*, there are no legal norms as distinct from political or social views or theories—which a Court can apply for giving preference to any of the conflicting opinions to the exclusion of the others. Consequently, the only legally prescribed basis upon which the Court can determine whether the Article has been violated, is to enquire whether such measure or policy was *intended to promote well-being and progress to the utmost." (Ibid.)*

The foregoing proposition is said by Respondent to strengthen the conclusion set out in proposition *(d)*, but it appears to embody both cause and effect in one package.

Having posited an interpretation of Article 2, paragraph 2, which involves amending it in a substantial respect by importing gratuitously the reference to "for the purpose of", and deducing from such unilateral amendment a limitation of supervision to an enquiry as to good or bad faith, Respondent then concludes that no legal norms exist by which a court can judge Respondent's *exercise* of good or bad faith. The last blow, indeed, in proposition *(e)*, need not have been struck, inasmuch as the Article had already been drained of vitality by force of propositions *(c)* and *(d)*.

Mr. President, Respondent's contention that the scope and content of the obligation entrusted to Respondent in terms of Article 2, paragraph 2, is to be measured by its so-called good or bad faith in the exercise of discretion under that Article, embodies its own built-in *reductio ad absurdum*.

Without any purpose or intimation of comparison, or suggestion of

analogy to facts in the cases at bar, the lesson of history teaches that the greatest excesses of policy, and the most reprehensible doctrines, frequently are propounded and executed with professions of good faith and lofty purpose. Indeed, human experience and all of history shows that when sincerity of purpose is carried to unreasonable lengths, or improper ends, it is often difficult to distinguish from obsession.

If governmental policies and actions merely are to be weighed upon the scale of a subjective intent of persons charged from time to time with official responsibility, and if no objective tests are relevant for the appraisal of the actual consequences of such policies and actions, it would necessarily follow, we submit, that organs of administrative supervision and of judicial protection would confront the necessity of passing upon the conscience, rather than upon the conduct, of the authorities concerned. With all respect and serious intendment, Mr. President, it is submitted that such a task is neither an appropriate nor feasible one, on the terrestrial level at any rate, for any tribunal.

Moreover, as also has been noted, the Applicants would be at a loss to know how to marshal evidence tending to prove subjective motivation of bona fides or mala fides in respect of carrying out a policy which, in the Applicants' view, is inherently and demonstrably illicit in terms of the obligations of the Mandate itself. Proof of subjective motivation of that sort would, in any event, if relevant at all, be presumably based upon the examination into the views of individual persons, whose testimony on the point could not but be influenced by *a priori* judgments peculiar to themselves.

There is, indeed, an imperative logic underlying Respondent's proposition *(e)*, namely that there are no legal norms by which such subjective motivation could be judicially appraised or—Respondent might have added—administratively determined, for that matter. The only legal concept relevant in this context, as the Applicants have submitted, would be the universally accepted principle that persons or entities must be presumed to intend the reasonably foreseeable consequences of their policies and actions. It is only in this sense that the Applicants have used the word "intent", or any other word indicating or implying motive or purpose.

In the Counter-Memorial Respondent seeks to attribute to the Applicants the contention that Respondent's policies and practices are impermissible in terms of Article 2, paragraph 2, because they are improperly motivated. Respondent finds words and phrases—in our respectful submission, over-reaches for them—in its effort to attribute to the Applicants what is essentially a part of Respondent's fundamental case. In the Reply the Applicants have sought to make clear, and now reaffirm, that Respondent has misconceived the purport of the Applicants' relevant submissions in this regard. To the contrary, the Applicants have submitted, and continue to submit, with respect, that the legal nature and consequences of Respondent's policy and practices of apartheid in the Territory, as described in the Applicants' pleadings, may, and should be, adjudicated by this honourable Court on the basis of objective criteria, reflecting widely accepted standards of a political, moral and scientific character, as well as universally accepted and minimum international legal norms, which are derived from, and based upon, such standards. Such standards and legal norms are elaborated by the Applicants in their Reply. These are relevant, of course, to

both of Respondent's so-called alternative contentions—equally relevant to the contention of non-justiciability as to the good faith test. Such legal norms, Mr. President, do not partake of a "purely political character", in Respondent's phrase. They are, to the contrary, legal obligations of the most compelling nature, the application of which is essential to the accomplishment of the sacred trust embodied in Article 2, paragraph 2, which is the very heart of the mandates system and in the absence of which the Mandate for South West Africa would have little real meaning or interest to the organized international community.

In the Reply, at **IV**, pages 268 and following, under the heading "Analysis of Respondent's Policy", the Applicants set forth certain major premises underlying Respondent's policies and practices of apartheid. Such premises are derived entirely from Respondent's pleadings. Respondent's premises, which are undisputed in the record, include, *inter alia*, such basic assumptions as that: "Differences between the groups concerned are of so profound a nature that they cannot be wiped out", and that it is "desirable to accept the position as it is and not put idealism before realism" (**IV**, pp. 271-272). This is in respect of and in purported justification of, along with other explanations, the policy and practice described by the Applicants of allotment to individuals of status, rights, burdens and privileges on the basis of membership in a group without regard to individual capacity, quality, merit, or potential. I refer the honourable Court to the Reply, **IV**, at pages 268-271.

The Applicants draw their conclusion on the basis of the premises and assumptions which are essentially undisputed, out of the mouths of Respondent's highest officials and largely quoted in Respondent's written pleadings, and on the basis of public laws, administrative regulations, and admitted practices. The conclusion of the Applicants is as follows:

> "... Such a premise of governmental action, and the policy of apartheid by which it is effectuated, are furthermore repugnant to the generally accepted political and moral standards of the international community, as well as violative of norms, as accepted by international custom and as reflected in the general principles of law universally recognized by civilized nations.
>
> Such assumptions and their implementation, moreover, are neither factually valid nor logically tenable. Such 'differences' as may be inherent in 'ethnic classification' are in no way relevant to, nor can they properly be advanced to justify, denial of equality of opportunity based upon individual merit or capacity, or denial of equality before the law, or of fundamental rights and freedoms." (**IV**, p. 272.)

At this stage of the Oral Proceedings, Mr. President and Members of the honourable Court, the Applicants forbear from engaging in a lengthy exposition, indeed any exposition at all, of the practices and policies of which complaint is made, and with respect, Mr. President, the Applicants would reserve the right to revert to these considerations of a legal nature in the context of the discussion of facts which the Applicants understand will follow conclusion of this phase of the Oral Proceedings.

In order to obviate any possible source of confusion on this matter, the Applicants respectfully draw to the Court's attention the expanded discussion by the Applicants in the Reply with respect to both these

clearly enunciated concepts, as summarized in the passage I have quoted from the Reply, **IV**, at page 272.

The Applicants conceive that legal principles and legal norms are based upon, and reflect, human experience and the human condition. In the celebrated maxim: "experience is the life of the law."

The standards referred to in the Reply are of course of a political, moral and scientific character. They are set out with numerous illustrative examples in the Reply, in the following contexts.

At **IV**, pages 293 to 302, the Reply sets out representative statements of official governmental positions of a dozen representative States, Members of the United Nations, reflecting the views of governments in all parts of the world, on the subject of Respondent's policy and practices of apartheid. Of course, the policy and practices which are the subject of complaint in these proceedings relate solely to those applied by the Respondent in the Territory of South West Africa. It is, however, not disputed in the record of these proceedings that such policies are, on Respondent's own showing in its written pleadings, substantially identical with those in the Republic of South Africa itself, and indeed, in numerous contexts in its written pleadings, Respondent refers to its policies in the Republic by way of justification or explanation of its policies and practices in the Territory. The Applicants in no way intend to present to this Court policies pertaining to the Republic of South Africa itself, but it is respectfully pointed out that the Respondent has, in its own written pleadings, made repeated references to the policies pursued by Respondent in the Republic of South Africa itself and has sought to draw inferences therefrom. Numerous examples will be further presented to the Court in connection with the discussion of factual issues.

On this basis, the views of governments, representative examples of which are set forth in the Reply at **IV**, pages 295 to 302, are relevant to issues in these proceedings, even though not all of them relate explicitly to Respondent's policies in the Territory of South West Africa.

It does not appear to the Applicants, Mr. President, to be warranted in the present discussion of the essentially legal issues to burden the Court with extensive quotations from such official views of governments. It may suffice—with one or two illustrations added, if I may be permitted to quote them—it may suffice to note that their uniform tenor reflects a criticism and condemnation of the policy and practices of apartheid which can perhaps be most fairly described as revulsion.

With respect to the Territory itself, for example, the Representative of the United States to the Fourth Committee of the General Assembly of the United Nations reflects the official view of the United States Government, with respect to the policy in question, as follows, *inter alia*:

> "By extending the apartheid laws to South West Africa the mandatory power is, in the view of my Government, *clearly delinquent in its obligations to the international community and to the population of South West Africa*. These obligations are set forth explicitly in Article 2 of the mandate which states that South Africa 'shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory'.
>
> Mr. Chairman, *my Delegation believes not only that there is neither legal nor political basis for the apartheid laws in South Africa;* there is also no moral basis for such laws anywhere in the world, let alone

in a territory such as South West Africa which has a clear international character, which was given to the government of South Africa as 'a sacred trust of civilization'." (IV, p. 296.)

The Representatives of the United Kingdom to the Fourth Committee of the United Nations General Assembly reflect similar views on the part of their Government. Thus, in a statement to the Fourth Committee at the Seventeenth Session of the General Assembly, the United Kingdom Representative stated, as reflected in the summary record of the proceedings:

> "... *apartheid was morally abominable, intellectually grotesque and spiritually indefensible.* Thus, the Government of South Africa was sufficiently to be blamed for the existence in South West Africa of a situation in which the rights of the individual were set at nought unless his skin was of the right colour." (IV, p. 298.)

It may be noted, Mr. President, parenthetically, that Respondent in its Rejoinder characterizes the foregoing statement by the British delegate as "perhaps the most offensive passage quoted by the Applicants under the heading 'Views of Governments' ". That is from the Rejoinder, V, at page 383.

Mr. President and Members of this honourable Court, the Applicants hardly consider it necessary to assure this honourable Court that their purpose in citing the views of Governments was conceived to be part of their duty to inform the Court concerning the political standards by which widely representative governments of the world view and measure the policy and practices at issue in these proceedings. If Respondent wishes to, or is in a position to, clarify the matter further by informing this honourable Court of views of governments, less "offensive" than those views available to the Applicants, Respondent of course has the privilege of doing so. The Applicants do not deem it necessary to draw inferences from the fact that Respondent has, in its written pleadings, cited no views of governments.

Another Representative of the United Kingdom to the Fourth Committee reflected views of his Government again as follows:

> "The people and Government of the United Kingdom were opposed to *apartheid* or to racial discrimination wherever they were practised; they considered them to be reprehensible morally and calamitous politically. *The equality of men before the law was a fundamental principle upon which the democracy of Britain rested ... The Government of the United Kingdom was opposed to the policy of apartheid wherever it might be found.*" (IV, p. 298.)

Finally, the Delegate of Ireland to the Special Committee of the Sixteenth General Assembly stated, *inter alia*:

> "*The unanimous repugnance of the civilized world to 'apartheid' as reflected in the Committee from year to year, was in itself a condemnation of the inherent unwholesomeness of 'apartheid'.*" (IV, p. 300.)

This suffices, I believe, Mr. President. Statements of similar import are quoted in the Reply on the part of the Governments of France, Norway, Poland, Malaysia, Greece, China, Mexico, the Netherlands, Pakistan. These are cited at IV, pages 298 to 302, and are only a handful of the many which could have been cited in the Reply as reflecting the views of governments.

Mr. President, if virtually unanimous views, officially expressed on the part of governments, widely representative throughout the world, do not reflect currently accepted political standards with regard to the question at issue here, it is difficult to know where to find sources for such standards.

In addition to universally accepted political and moral standards, as reflected in the official views to which I have referred, the Applicants likewise set out in the Reply, at **IV**, pages 305-312, the weight of contemporary scientific authority in relation to patterns of human behaviour relevant to the premises underlying Respondent's policy of apartheid, as well as to the practices by which such policy is effectuated.

Respondent's premises are couched for the most part in the form of generalizations, and are set forth, *inter alia*, at pages 302 to 305 of the Reply. I refer to Respondent's premises as *they* formulate them.

Among the clearest examples in Respondent's written pleadings is the statement of the *rationale* of its policy of educational apartheid, which is set forth in Book VII of the Counter-Memorial at **III**, pages 527 to 530 and as quoted in the Reply at **IV**, pages 266 to 268. I have already drawn the Court's attention to this illuminative passage in Part A of this phase of the Oral Proceedings; that may be found in the verbatim record, page 115, *supra*.

As fairly summarized and excerpted in the Reply, the basic contentions of Respondent which are expressed in pages of the Counter-Memorial, which I shall cite, are the following and are in the Applicants' formulations with occasional quotes from Respondent:

> ". . . that historical circumstances have created a situation in which members of different 'groups' prefer to 'associate with members of their own group'; that 'many Europeans, in all probability the vast majority, are not prepared to serve in positions where Bantu are placed in a position of authority over them'; that these are 'social phenomena which exist as facts, independently of any governmental policy, legislation or administrative practices'; and 'whatever the moral rights or wrongs pertaining to them in particular situations, there can be no denial that such group reactions exist as facts of which due cognizance must needs be taken by any realistic government'". (**IV**, pp. 302-303.)

In their analysis of scientific authority, the Applicants show that basic to Respondent's premises is the primary contention that its "policy is not based on people being inferior but being different". (**II**, p. 471.)

Mr. President, the preponderant weight of world scientific authority, as set forth in the Reply, holds that "no scientific evidence supports an assumption that groups or races differ innately". (**IV**, p. 306.) The alleged "difference", in Respondent's words, between "people" in South West Africa is not defined by Respondent in any meaningful terms, other than on a basis which serves to further its pre-determined racial policies, although purporting to justify and require such policies. The policy of apartheid and the practices which effectuate it, in the Applicants' submission, are falsely premised on a perceived difference, from a legal point of view, between races and groups as such. Such an official policy, in the Applicants' view, is irreconcilable with any scientific premises accepted by the overwhelming weight of scientific authority.

In their Reply the Applicants also summarize a second premise of

Respondent's policy underlying apartheid, and this the Applicants describe as the "contention of inevitable 'frustration' if all inhabitants of the Territory are accorded equal opportunity". (**IV**, p. 306.)

The concept of "inevitable frustration", if it may be called that for simplicity, is expressed in statements by Respondent's highest officials, quoted by Respondent itself. For example, Respondent's Prime Minister has declared that a—

> ". . . class of educated and semi-educated [Natives] . . . has learned that it is above its own people and feels that its spiritual, economic and political home is among the civilized community of South Africa, namely the Europeans, and feels frustrated that their wishes have not been complied with".

Or again,

> "By simply blindly producing pupils who were trained in European ideas the idle hope was created that they could occupy positions in the European community in spite of the country's policy [of apartheid]." (**VI**, p. 41.)

The Applicants show, in a section of the Reply analysing the views of scientific authorities, that—

> "The basic fallacy of Respondent's contention consists in the scientifically demonstrable fact that the greatest 'frustration' is caused by denial of equal opportunity inherent in the policy of apartheid itself." (**IV**, p. 306.)

Again Respondent posits the premise that as a "realistic Government", it must support what it describes as existing "group reactions". This is set forth, *inter alia*, in the same section of Book VII of the Counter-Memorial to which I have previously referred, in the following terms:

> ". . . [these] social phenomena [namely 'group preferences' and 'group differences', together with 'inevitable frustration'] . . . exist as facts, independently of any governmental policy, legislation or administrative practices—as indeed they manifest themselves, to a greater or lesser extent, in mixed or plural communities throughout the world". (**III**, p. 528.)
>
> "Whatever their exact nature or causes, and whatever, the moral rights or wrongs pertaining to them in particular situations, there can be no denial that such group reactions exist as facts of which due cognizance must needs be taken by any realistic government." *(Ibid.)*

Applicants concur that "due cognizance must needs be taken" of such "group reactions" indeed, but not it the sense or towards the end which mark Respondent's policy and practices.

In all civilized societies there prevail standards of conduct and legal norms of governmental policy which are directed towards amelioration and adjustment of the "social phenomena" to which the Respondent refers, rather than towards their perpetuation in the framework of "group preferences" accorded to a minority of the population, or indeed a majority, for that matter. The overwhelming weight of scientific authority in regard to this question is set forth at pages 308 to 312 of the Applicants' Reply (**IV**), and such authority shows, in our respectful submission, that—

". . . inasmuch as attitudes of prejudice, discrimination and fear are generated by individuals through their social structure and processes, such attitudes likewise can be modified through the social structure and processes and, in particular, through governmental action". (**IV**, p. 308.)

And, as I have said, Mr. President, the Applicants respectfully reserve the right to revert to these considerations in the context of the illustrative and elaborative discussion of the essentially fact issues now being deferred at this phase of the Oral Proceedings.

As I have stated, Mr. President, the Applicants, in the Reply at **IV**, pages 493 and following, have also set out the legal norms which, in the Applicants' respectful submission, are relevant and applicable to judicial determination of the nature and scope of the admittedly legal obligations of Respondent in terms of Article 2, paragraph 2, of the Mandate.

The attention of this honourable Court is respectfully drawn to the fact that in their Memorials, at **I**, page 107, the Applicants state, *inter alia*, as follows:

"It is submitted that the terms of the second paragraph of Article 2 of the Mandate and Paragraph 1 of Article 22 of the Covenant . . . read in the light of the terms and stated purposes of Chapters XI, XII and XIII of the Charter, establish clear and meaningful norms marking the duties of the Mandatory. In accordance with these legal norms, the Mandatory's duties to safeguard and promote the 'material and moral well-being', the 'social progress' and the 'development' of the people of the Territory must reasonably be construed to include certain objectives specified in the Memorials." (**I**, p. 107.)

As the Court will note, this includes specific reference to "clear and meaningful norms", which are described as "legal norms".

In the Counter-Memorial, Respondent refers to the foregoing quoted passage from the Memorials and quotes the phrase "clear and meaningful norms marking the duties of the Mandatory". (**II**, p. 395.)

However, in the Counter-Memorial in that context, Respondent essentially limits its discussion of the point involved to the proposition that the principle of *pari materia* is not justified as an aid to interpretation in the present case.

Respondent does not discuss in that context the Applicants' basic contention that the relevant provisions of Article 22 of the Covenant and of the Mandate establish clear and meaningful norms of a legal nature marking Respondent's duties. The reference is made in the Memorial to such norms "read in the light" of relevant chapters of the Charter of the United Nations.

In the Counter-Memorial, nevertheless, Respondent has set out an extensive "Statement of the Law", as it is called, in which it seeks to establish, *inter alia*, that the only question before the Court in respect of Article 2 is "one of intentions, or purpose, or good faith", in the words of the Counter-Memorial (**II**, p. 392). Respondent elaborates the point by the conclusion that—

"Whatever the Court may think of the merits of a particular legislative or administrative act, practice or policy, if it was devised and performed or practised in the exercise of the Mandatory's discretion with the bona fide intention of benefiting the inhabitants of the Territory, it would not constitute a violation of Article 2 of the Mandate." (**II**, p. 392.)

It is readily apparent, Mr. President, that the foregoing passage, quoted from the Counter-Memorial, embodies the contention more fully elaborated in the Rejoinder in Respondent's so-called "second alternative contention", to which reference has been made. Furthermore, as I have previously stated, Respondent in the Counter-Memorial has contended:

> "The Court is a judicial organ and can accordingly not come to decisions otherwise than in accordance with legal norms. If the Court were to decide whether in fact a particular policy promoted the 'well-being' of the inhabitants 'to the utmost', it would have to consider that policy and weigh it against other policies which might be followed in an attempt to achieve such a purpose. In order to arrive at a decision, the Court would thereupon have to decide which policy it considers best. The Court's function in so deciding would be one which is, in its very nature, not a judicial one. No legal criteria can be used in such adjudication. The decision can only be based on social, ethnological, economic and political considerations." (II, p. 391.)

As I have respectfully submitted, any distinction between the major premises underlying Respondent's conclusion in the passage just quoted, in the context of its second alternative contention, is indistinguishable in any meaningful sense from the premises underlying Respondent's first alternative contention that its obligations under the Article are not justiciable.

However, in the light of Respondent's contentions in the Counter-Memorial in respect of the absence of relevant legal norms, and its denial of justiciability of its legal obligations under the Article in question, the Applicants conceived it to be appropriate, and indeed necessary, in the Reply, to make clear the respect in which Respondent's contentions, as aforesaid, were erroneous and untenable. To that end, as a proper function of their Reply (IV), the Applicants have set out at pages 491 to 510 thereof relevant legal norms or legal standards which may, and should, in our respectful submission, be applied by this honourable Court in adjudicating the legal dispute concerning the nature and scope of Respondent's admitted legal obligations in terms of Article 2, paragraph 2. In the Reply the Applicants introduced their analysis of the relevant minimum legal norms by defining the sense of the principal terms used in the analysis. Thus, in the words of the Reply:

> "In the following analysis of the relevant legal norms, the terms 'non-discrimination' or 'non-separation' are used in their prevalent and customary sense: stated negatively, the terms refer to the absence of governmental policies or actions which allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential: stated affirmatively, the terms refer to governmental policies and actions the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons as such.
>
> As is shown below, there has evolved over the years, and now exists, a generally accepted international human rights norm of non-discrimination or non-separation, as defined in the preceding paragraph. Such a norm is evidenced by international undertakings in the form of treaties, conventions and declarations, by judicial

decisions, the practice of States and constitutional and statutory provisions by which such a norm is incorporated into the body of laws of States." (IV, p. 493.)

In the light of the nature of Respondent's contentions in the Counter-Memorial, to which I have referred, and the clear requirements of a reply thereto, some cause for surprise may be found in Respondent's comment in the Rejoinder that, inasmuch as the Applicants have elaborated certain "contents and sources of the suggested norms", the Reply "seeks to make out an entirely new case".

Mr. President and Members of the honourable Court, I have said that in the light of the nature of Respondent's contentions in the Counter-Memorial, to which I have referred, and of the clear requirements of a reply thereto, cause for surprise may be found in Respondent's comment in the Rejoinder that, inasmuch as the Applicants have elaborated certain contents and sources of the suggested norms, the Reply seeks to make out an entirely new case.

Respondent apparently, and no doubt unwittingly, misinterprets the contention made by the Applicants in the Memorials that the terms of the relevant Articles of the Covenant and of the Mandate "establish clear and meaningful norms marking the duties of the Mandatory", as we said in the Memorials (I) at page 107. The Applicants' reference to the terms and purposes of Chapters XI, XII and XIII of the United Nations Charter was not, of course, intended to imply that these terms and purposes marked the full measure and extent of the legal norms applicable to the Covenant and relevant to the interpretation of the Mandate. Indeed, the chapters of the Charter of the United Nations referred to in this context are of particular relevance in the light of the fact that they deal with non-self-governing territories. (Chapter XI, the International Trusteeship System, Chapter XII, and the Trusteeship Council, Chapter XIII.)

Determination of any legal questions or disputes which might arise concerning the interpretation or application of these chapters of the United Nations Charter would, likewise, necessarily involve consideration of the same, or similar, legal norms which are applicable to disputes concerning the interpretation or application of Article 22 of the Covenant or provisions of the Mandate, including Article 2, paragraph 2.

Even more surprising perhaps is the statement in the Rejoinder that, by elaborating the legal norms relevant to judicial interpretation of Article 2, paragraph 2, of the Mandate, the Applicants have, in Respondent's phrase, "introduced a new cause of action". (V, p. 105.)

The only "cause of action" involved in the present proceedings, Mr. President, in the view of the Applicants, is that embodied in their Submissions Nos. 1 through 9, and the Prayer for Relief, all of which are set out in the Memorials at I, pages 197 and 198. That has been, and remains, the "cause of action".

In the context in which Respondent refers to an asserted "new cause of action", by virtue of the elaboration of the relevant legal norms and standards upon which they are based, Respondent has deemed it appropriate, I regret to say, to incorporate tendentious and unwarranted comments concerning the Applicants' asserted motivations in bringing these proceedings. The Applicants do not perceive it to be appropriate, or consistent with the dignity of this high Tribunal, or relevant to the important legal issues raised in these proceedings, to engage in a controversy

which may divert from consideration of the legal issues. It may suffice to reaffirm, Mr. President and Members of the honourable Court, that the Applicants have sought recourse to the judicial processes solely for the purpose of seeking a just, peaceful, and judicial resolution of the legal issues involved in the long protracted dispute between themselves and the Respondent which, as the Court has said, involves legal issues identical with, although separate from, those involved in the dispute between the United Nations, on the one hand, and the Respondent, on the other.

It is relevant, however, to note and to advert to the fact that there has been no major, or indeed any other, "shift from the stand taken" in the Memorials, to use Respondent's phrase.

Whether or not the legal norm, for which the Applicants contend, appropriately may be described or labelled, as we respectfully do describe and label it, a "norm of non-discrimination" or of "non-separation", appears to the Applicants to be a question of no moment. This is a mere characterization of a legal norm, the contents of which are relevant to these proceedings, and not a caption. The important points are whether the legal norms and objective criteria which are elaborated and analysed by the Applicants exist, and, if they do exist as the Applicants submit, whether they are applicable to Respondent's admittedly legal obligations in terms of Article 2, paragraph 2, of the Mandate and of Article 22 of the Covenant of the League of Nations.

The Applicants, accordingly, and with respect, turn to a summary consideration of such legal norms and objectively determinable legal criteria which, as I have said, are set out in the Reply, at IV, pages 476 to 519.

Mr. President, the concept of discretionary powers limited by legal norms is well known to international judicial tribunals. The concept was equally well-known prior to the time of the establishment of the mandates system itself. Thus for example in 1910, Mr. Elihu Root, of the United States of America, stated to the American Society of International Law, with regard to denial of justice, the following points and principles:

> "The rule of obligation is perfectly distinct and settled. Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less; provided the protection which the country gives to its own citizens conforms to the established standards of civilization.
>
> There is a standard of justice [said Mr. Root in 1910] very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens . . . It is a practical standard and has regard always to the possibilities of government

under existing conditions." (Root, *Proceedings, A.S.I.L. 1910*, pp. 16, 20-22.)

The discretionary powers of governments indeed are very wide with respect to aliens living within their borders, but they are limited by international norms, rather than by any asserted test of good faith or *mens rea*.

It would serve little purpose to burden the Court by citation of the many examples of analysis of such norms, or of decisions of international tribunals applying them.

The Government of the United Kingdom made the following comment in its Observations, transmitted to the Secretary-General of the United Nations on 24 August 1948, concerning the Draft Declaration on the Rights and Duties of States which had been presented by Panama to the first session of the General Assembly:

> "There is much international authority [says the British statement] for the existence of a minimum international standard, with which States are obliged to comply in their treatment of foreigners, whether or not they do so in the treatment of their nationals. If, and in so far as international law develops so as to limit the domestic jurisdiction of States in the treatment of their nationals to such an extent that every treatment of a national, which falls below the international standard, is a breach of international law (and therefore a matter on which other States may intervene), then the existing principle of international law with regard to the 'international standard' will apply to both nationals and foreigners. Unless and until that position is reached, His Majesty's Government consider that the doctrine of the minimum international standard, with regard to the treatment of foreigners, remains part of international law and that agreement to abolish that doctrine will not be attained." (U.N. Doc. A/CN 4/2, 15 Dec. 1948, pp. 20-23, 71, 188.)

It should also be noted, Mr. President, that the concept of standards capable of guiding policy and action in the mandated territories, and providing a basis upon which the conduct of the mandatory might be judged, has been analysed in some detail, again by the same scholarly authority to whom I have previously referred, Professor Wright, in his same study of 1930 on the mandates system.

In a chapter, which indeed is entitled "Establishment of Standards", Professor Wright comments: "The evolution of general standards will be perhaps the most important development of the mandates system." (*Mandates under the League of Nations*, p. 225.)

After quoting from Article 22 of the Covenant of the League of Nations, and referring to several relevant general conventions, Professor Wright comments as follows:

> "To what extent has the League developed this inchoate material into standards capable of guiding policy and action in the mandated areas?
>
> For establishing such standards [Professor Wright answers his own question], three distinct procedures have evolved: *(a)* the growth of a jurisprudence from decisions on particular questions, *(b)* the agreements on principles for its own use by the Commission [that refers to the Permanent Mandates Commission, of course], and

(c) the passage of formal resolutions by the Council of the Assembly." (*Ibid.*, pp. 219-220.)

In respect of judicial protection, Professor Wright comments that—

"... . the Permanent Court of International Justice has no immediate control of mandatory policy but the fact that it is the final authority on disputes over the interpretation of the mandates is a valuable safeguard against destructive interpretations by the mandatories". (*Ibid.*, p. 191.)

And, further, Professor Wright says:

"The League gives validity to general rules by confirming and interpreting the mandates and judges the acts of the mandatories according to their conformity with these rules, possibly in extreme cases sanctioning its judgment by transferring a mandate, but at the same time it gives general advice on policy and criticizes the activity of the mandatory according to its results. The first type of activity is mainly performed through the Council and the Permanent Court of International Justice; the second through the Council and the Permanent Mandates Commission." (*Ibid.*, pp. 192-193.)

And, continuing in this valued work, in the course of the chapter entitled "The Establishment of Standards", the learned author stresses the power of the Court to judge the administration in mandated areas in the light of such standards, which includes references to matters within the scope of Article 2, paragraph 2, of the Mandate, such as so-called "Native" participation in government, economic and social policy, and education policy.

The validity of the Applicants' contention that the obligations of Article 2, paragraph 2, of the Mandate are to be regulated by the application of minimum legal norms, rather than by an asserted good faith test, is confirmed also by the terms of Article 6 of the Mandate. Article 6 reads:

"The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the Territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5."

The phrase "indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5" makes clear, in our submission, that the authors of the mandates system envisaged no distinction of a legal character between the obligations under Article 2, as distinguished from Articles 3, 4 and 5. As I have said before, any such distinctions are made by statements in the nature of a gloss which, in effect, amends the clear terms of Article 2.

The Respondent, in the Counter-Memorial, contends that although the obligations under Articles 3, 4 and 5 are, in their words, "couched in relatively clear and precise language", the wording of Article 2, paragraph 2, is "in keeping with its nature as an expression of an idealistic objective". (**II**, p. 387.)

The Respondent leans heavily upon this purported distinction between the "relatively clear" formulation of Articles 3, 4 and 5 (in its words) and the broader formulation, in terms of Article 2. This is heavily relied upon by Respondent, particularly in support of its contention that its

discretionary powers are limited only by the requirement of good faith. But the wording of Article 6 of the mandate agreement indicates, in our respectful submission, that *no* distinction was drawn or perceived by the authors of the Mandate between, or among, these Articles on the basis of the method of their formulation.

The fact that no such limited scope, as contended for by the Respondent in the good faith test, was ever thought by the authors to be implicit in the sacred trust provisions, clearly appears from the purposes which were envisaged by the authors of the Mandate as to be served by the reporting requirements.

The crucial importance, as well as the scope, of such reporting may be seen from the report submitted to the Council of the League of Nations by the Belgian representative to the Council, Mr. Hymans. As mentioned by my colleague, Mr. Moore, in his presentation to the honourable Court in Part B of this presentation, the Hymans report was adopted unanimously by the Council. Mr. Moore has referred to this matter in the verbatim record, at page 145, *supra*.

The report stated, in relevant part, as follows:

> "Is the Council to content itself with ascertaining that the mandatory Power has remained within the limits of the powers which were conferred upon it, or is it to ascertain also whether the mandatory Power had made a good use of these powers, and whether this administration has conformed to the interests of the native population?
>
> It appears to me that the wider interpretation should be adopted. Paragraphs 1 and 2 of Article 22 have indicated the spirit which should inspire those who are entrusted with administering peoples not yet capable of governing themselves, and have determined that this tutelage should be exercised by the State in question as mandatories and in the name of the League. The annual report stipulated for in Article 7 should certainly include a statement as to the whole moral and material situation of the peoples under the Mandate. It is clear, therefore, that the Council also should examine the question of the whole administration." (League of Nations Council, P.V. 20/29/14, 8th Sess., p. 187.)

It will be noted that no reference is made in the Hymans report, any more than reference is made to any proceedings of which the Applicants are aware that took place during the formation of the Covenant or of the mandates system, to purpose, motive, intent or good faith or bad faith governing Respondent's officials in discharging their trust. As was logical to expect, in the light of the purposes and nature of the sacred trust, the Council was concerned, in the words of Mr. Hymans in the report unanimously adopted by the Council, "whether the administration has conformed to the interests of the native population", which in all respects is quite a different standard than to say or to ask whether the interests of the "Native" population have been served according to the best judgment or good faith of the Mandatory. The covenant, as Mr. Hymans said, indicated the spirit which should inspire the Mandatory; good faith of course was axiomatic, it was presumed to be an axiomatic condition. It would be inconceivable that the authors of the Mandate would have reposed such responsibilities in the hands of governments which were thought to be capable of bad faith. The Mandate was to be discharged in a manner conformable to the interests of the population,

objectively determined. What was for examination was, in the words of Mr. Hymans, the question of the whole administration, not the conscience of the administrator.

As I have noted, Respondent, in the Rejoinder, elaborates upon a distinction between norms and standards. In Respondent's analysis norms and standards differ not in their content but in their legal effect, if the Applicants understand the discussion in the Rejoinder, particularly at V, page 167. Thus, while norms are legal rules which in objective terms define Respondent's obligations under the Mandate, standards, in so far as they "refer only to practices, policies or theories of governments applied by States, or advanced or propagated by politicians, experts, authorities, scientists, moralists, etc." are not legal rules objectively enforceable against Respondent and "cannot *per se* and in the absence of consent on Respondent's part, render such standards legally binding upon Respondent". And as is to be expected in the light of Respondent's basic contention with regard to the good faith test, Respondent treats such standards, as defined by it, as relevant only in so far as they provide a basis for judging Respondent's good or bad faith. (V, p. 167.)

Respondent's distinction thus drawn appears to the Applicants to be quite unrealistic, as the Applicants have endeavoured to show. Legal principles and norms, as has been said, are of course derived from and reflect generally accepted standards of social behaviour. As I have said, experience is the life of the law. Standards are the sources from which the law derives its application to the human condition.

Although, of course, it is true that some sources of the law are looked to by judicial tribunals and accorded greater weight than others, it is true likewise that a court of law will look to any appropriate source relevant to the purpose of interpreting and applying a legal obligation, whether generally formulated or not. It is not in the nature of the judicial process that courts make a conceptual distinction between legal norms on the one hand and standards on the other, from which such legal norms are derived and which they reflect.

In the Reply, at IV, pages 485 and following, the Applicants refer to judicial decisions in which concepts of the sort described by Respondent as standards have been applied not for the purpose of showing good or bad faith, but rather for the purpose of measuring and limiting the discretionary powers of governmental authorities on the basis of objectively ascertained and determinable standards.

Thus, in the *Corfu Channel* case this honourable Court held that the obligations incumbent upon the Albanian Government were based "on certain general and well-recognized principles, namely elementary considerations of humanity" (*I.C.J. Reports 1949*, p. 4). And in a separate opinion Judge Alvarez stated that the "characteristics of an international deliquency are that it is an act contrary to the *sentiments of humanity*" (*ibid.*, p. 45). These are standards.

The learned and late distinguished Justice of the United States Supreme Court, Felix Frankfurter, concurring in a celebrated opinion entitled *Louisiana ex rel. Francis* v. *Resweber*, commented that—

> ". . . a State may be found to deny a person due process by treating even one guilty of crime in a manner that violates *standards of decency* more or less universally accepted".

He commented further—

> "... the application of *standards of fairness and justice are very broadly conceived* [and these are relevant to the issue of cruel and unusual punishment, which was the constitutional question involved in that case]. *They are not the application of merely personal standards but the impersonal standards of society which alone judges, as the organs of Law, are empowered to enforce.*" (**IV**, p. 487.)

The use of standards in the sense in which Applicants have viewed that concept, for purposes of measuring legal limits upon discretionary powers, in objectively determinable ways, rather than for the purpose of judging good or bad faith, also is found further in the denial of justice cases to which I have referred in principle. To give but one example, in *United States (Roberts Claim)* v. *Mexico*, the General Claims Commission held that—

> "Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization." (*Opinions of Commissioners* (1927), p. 100.)

It is pertinent also to cite the comment of Alwyn Freeman, a scholar of the United States, who in his study on the *International Responsibility of States* comments as follows:

> "The doctrine of standards is essentially one of the reasonable activity fairly to be demanded of a civilized State, and whatever vagueness or indefiniteness may be said to surround it proceeds from this fact. Yet neither this vagueness, nor the possibility that the notion of 'international standards' may vary with deciding agencies constitutes a juridical defect, since even in municipal legal systems liability is frequently made to depend upon concepts which are equally vague and variable. An illustration in point is the concept of the ordinary, prudent man in the Anglo-Saxon common law of negligence. Such uncertainty is always present in dynamic, living phases of the law and is especially noticeable in the unplowed soil of the international standard." (P. 569.)

For all of the foregoing reasons, Mr. President, it is respectfully submitted that the distinction sought to be drawn, in terms used by the Respondent, between norms and standards, is in this context based upon a misapprehension on the role of standards in the judicial process in accordance with its true nature.

On the other side of the equation between norms and standards—we have been discussing standards up till now—the legal norms upon which Applicants rely are not to be distinguished from standards upon the basis of an artificial conceptual basis. It is our submission, Mr. President, that Respondent's legal obligations under Article 2, paragraph 2, of the Mandate, are to be measured by legal norms which are derived, *inter alia*, from political, social and scientific sources and standards. This is the correct relationship of the concepts of standard and norm, in the appreciation of the Applicants.

Among such sources of legal norms are the standards established by

competent organs of the United Nations and by the International Labour Organisation.

As I have pointed out, the Applicants likewise rely upon the views of authorities, including those of governments, of social and political scientists and other experts, as and among the sources contributing to and illuminative of the generally accepted international human rights norm, defined by the Applicants in their Reply at **IV**, page 493, and which prohibits the official allotment of rights, privileges and burdens upon the basis of membership in a group or race, rather than on the basis of individual quality or capacity.

I should now like with your permission, Mr. President, to consider more specifically the minimum international standard of non-discrimination or non-separation.

Mr. President, having shown that the founders of the mandates system intended to bestow upon the Permanent Court of International Justice the power of judicial review over governmental policy carried out under obligations such as those contained in Article 2, paragraph 2, and having shown that Respondent's discretionary powers in the Mandated Territory are not limited by good faith, but rather by minimum international standards, it remains to discuss the nature of the minimum standards upon which the Applicants rely as sources of the legal norms which the Applicants contend exist and are applicable in these proceedings.

As shown in the Reply, at **IV**, pages 493 and following, there has evolved over the years and now exists a generally accepted international human rights legal norm of non-discrimination or non-separation on the basis of membership in a group, class or race. As also is shown in the Reply, such a norm which, as I have said, the Applicants have chosen to describe as a norm of non-discrimination or non-separation, is a basic minimum norm, and that to fall short of such a minimum is *a fortiori* to fall short of the more demanding obligation to promote to the utmost the welfare and progress of the inhabitants of the Territory of South West Africa.

Notwithstanding universal acceptance, save by Respondent itself alone, so far as Applicants are aware, of such a minimum international norm of governmental conduct, Respondent contends that the Mandate must be interpreted in accordance with Respondent's intentions of 1920, and that a contemporary norm is, in the absence of new agreement by Respondent, not capable of what it calls "subsequent insertion" into the terms of Article 2, paragraph 2. (**V**, p. 123.)

Respondent seeks to support its contention by reference to the principle of contemporaneity and by a somewhat obscure distinction between the interpretation and the application of documents. In the Applicants' view, for reasons which have already been elaborated in the regard to sound application of relevant principles of treaty interpretation to the "novel international institution" which is the Mandate, Respondent's arguments are untenable.

In view of the widely accepted, if not universally acclaimed, present international rules with respect to non-discrimination, set out in Chapter V of the Reply at **IV**, pages 493 to 512, it is not necessary to comment further upon Respondent's conclusion that:

> "The only basis upon which *interpretation* of the relevant texts could produce a result whereby current norms govern the content of

the Mandate, would be if Article 2 was *ab initio* subject to some qualification such as:

> 'The Mandatory shall, when exercising its full power of administration and legislation, give effect to such standards or norms as may at the time of such exercise be generally applied by other States'." (V, p. 140.)

Respondent characterizes such a "qualification" as being "an obligation of uncertain content, posing . . . many difficulties of application and giving rise to the possibility of interminable dispute". Mr. President, the Applicants submit that the legal dispute now presented to this honourable Court is occasioned, *inter alia*, precisely by Respondent's failure to apply currently accepted norms and standards to its administration of the Territory.

Respondent's contention that when it accepted the Mandate it would never be bound or prepared to accept the authority of the clearly expressed view of the civilized community with respect to elemental aspects of administration of the Territory in terms of Article 2, paragraph 2, would in itself effect a decisive alteration of the nature and purpose of Article 22 of the Covenant and of Article 2, paragraph 2, of the Mandate.

It should be noted that Respondent has conceded that this basic and minimum international standard "would, if it existed, provide an objective criterion for measuring Respondent's policies" (V, p. 165). It also is conceded by Respondent that if the Mandate contains such a minimum basic standard, then, again in Respondent's words, "Respondent's admitted policies of differentiation would constitute a contravention of the Mandate". (V, p. 119.)

Further, although Respondent refers to this basic minimum standard as a "so-called" or as an "alleged" norm, no serious attempt is made by Respondent to deny the existence *per se* of the standards relied upon by Applicants. Rather, Respondent appears to content itself with attempting to demonstrate that the norm which we have labelled non-discrimination or non-separation does not exist *as part of the Mandate.* Indeed, Respondent states explicity that ". . . 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". (V, p. 119.) Indeed, Respondent's arguments with regard to the basic minimum standard, set out at V, pages 119 to 141 of the Rejoinder, seek to demonstrate that the standard referred to does not exist as an element of Article 2, paragraph 2, of the Mandate.

Respondent commences its discussion of the meaning of Article 2, paragraph 2, with the comment that the generally accepted standard of non-discrimination or non-separation was not "*contained in* Article 2 of the Mandate as at the date of its execution". (V, p. 123.) Applicants, of course, have never contended otherwise; the issue is its *interpretation,* not its *language.*

Referring to the several minorities treaties following the First World War, Respondent correctly states that it was "completely contrary to the spirit of the times to sanction any measures directed at destroying national or cultural groups by their forced absorption into larger or stronger groups". Respondent deduces that, inasmuch as the minorities treaties were designed to protect the existence of separate national groups, they "necessarily involve a *differentiation* in the treatment of these respective groups . . .". (V, p. 124.)

In the Applicants' respectful submission, Respondent's contention is completely wide of the mark. The minorities system was designed to provide a free choice to members of minority groups; that is to say, such people could, if they wished, become assimilated into larger, or stronger, groups. If they did not so wish, they could look to the minorities treaties to "protect their existence as separate groups". Such a concept is the very antithesis of Respondent's policy, which is the subject of these proceedings in terms of Article 2, paragraph 2. Respondent's policies eliminate any such, or tend to eliminate any such, element of free choice —the inhabitants of the mandated territory are allotted rights, burdens, privileges and status on the basis of their membership in a group, class, or race, without regard to their individual quality, capacity, or merit.

Respondent, in an attempt to demonstrate that a generally accepted norm of non-discrimination or non-separation was not regarded as binding at the period of the inception of the mandates system, contends that the principle of "protecting the identity of national groups . . . was also basic to the mandate system". (**V**, p. 125.) Respondent elaborates what appears to be an irrelevant argument designed to demonstrate that various degrees of group differentiation were approved by the Permanent Mandates Commission, that other Mandatory Powers "also applied policies involving various forms and degrees of differentiation", and that the policy of indirect rule, as it was known, necessarily involved such differentiation. Such considerations, however, appear irrelevant to the question at issue here. The question of differentiation as such does not arise; if it did, the minorities treaties themselves would be subject of attack, which they clearly cannot be. What is at issue here is, as has been said, the official governmental policy of allotting rights, duties, burdens, etc., upon the basis of membership in groups. Neither the League of Nations, nor other Mandatory Powers, nor governmental authorities generally, have approved a policy which protects the identity of "national groups" by a policy of compulsory separation of such groups, and the allocation to individual members thereof of status, rights, burdens and privileges on the basis of their membership of such a group, and without regard to the wishes, merits, or needs of the individuals.

During that period there were, moreover, "fore-runners" of the now generally accepted norm, and I speak now in a positive sense, prohibiting official discrimination or separation on the basis of group or race. The Applicants, in their Reply, have referred to several examples.

Among these is Article 4 of the Albanian Agreement of 2 October 1921: "All Albanian nationals shall be equal before the law, and shall enjoy the same civil and political rights without distinction as to race, language or religion . . ." (**IV**, p. 496.)

Similarly, in 1929 the Institut de Droit International adopted a Declaration of International Rights of Man, which included provisions in regard to the equal right of every individual to life, liberty and property, "without distinction as to nationality, sex, race, language, or religion", and which stated, *inter alia*, that:

> "No motive based, directly or indirectly, on distinctions of sex, race, language, or religion empowers States to refuse to any of their nationals private and public rights, especially admission to establishments of public instruction, and the exercise of different economic activities and of professions and industries."

And as will be shown in the discussion of the policies and practices at issue here, the quoted statement is directly relevant and applicable.

But the point relevant in the context of the discussion at this moment, Mr. President, is that although the concept of genuine "group protection" for those who desired and required it—protection as distinguished from coercion—was widely accepted, as it is today, such a concept has, in the process of evolution, now become a generally accepted, basic, international, human rights norm, which is described by the Applicants as a norm of non-discrimination or non-separation. Such a norm, needless to say, far from being inconsistent with the concept of "group protection", is complementary thereto, both in purpose and in effect.

In their Reply, the Applicants have set out relevant instruments, declarations, agreements and resolutions of international bodies which establish the existence of such a legal norm of non-discrimination or non-separation in the sense of these terms employed by the Applicants in their written pleadings, specifically in the Reply, at **IV**, page 493. That definition, or description, the Court may be pleased to recall, is:

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

This is our description of the legal norm.

Applicants further stated in their Reply that the—

> "... generally accepted international human rights norm of non-discrimination or non-separation ... is evidenced by international undertakings in the form of treaties, conventions and declarations, by judicial decisions, the practice of States and constitutional and statutory provisions by which such a norm is incorporated into the body of laws of States". (**IV**, p. 493.)

Numerous sources for the norm of non-discrimination and non-separation are set out in enumerated sections in the Reply, at **IV**, pages 493 to 510. These, it is submitted, demonstrate the existence and wide acceptance of an international legal norm of non-discrimination applicable to the interpretation of Article 2, paragraph 2, of the Mandate, and give to that Article "a concrete and objective content" which is justiciable.

First, during the League of Nations period—this is covered in the Reply at **IV**, pages 493 to 497—the substantive content of the practice of the Permanent Mandates Commission recognized and applied the principles of "equal and regular justice to all" and of the protection of fundamental human rights. This was consistent with the status of the mandates themselves as "human rights documents". Likewise the protective provisions of the several minorities treaties to which I have referred established international rules for the protection of fundamental human rights, without distinction as to race, and for equality of all persons before the law. Further, private bodies during this period gave expression to the norm of non-discrimination or non-separation. I have referred to the 1929 Declaration of International Rights of Man by the Institut de Droit International, and the Declaration on the Foundations

and Leading Principles of Modern International Law, as approved by the International Law Association, the Académie Diplomatique Internationale and the Union Juridique Internationale in 1936, which are both referred to in the Reply as well. Both these Declarations prohibit discrimination on account of race.

Second, we cite the United Nations Charter at pages 497 to 501 of the Reply (IV). The norm of non-discrimination is clearly enunciated in four Articles of the Charter, namely Article 1 (3), Article 13 *(b)*, Article 55 *(c)* and Article 76 *(c)*. Furthermore, Article 56 provides that all Members are pledged "to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55", and one of the purposes of Article 55 is that of promoting—

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

The legally binding character of the human rights provisions of the United Nations Charter has been adverted to and confirmed by the highest scholarly authority, which the Applicants point out in their Reply from IV, pages 498 to 500. Such authorities include, for example, Judge Spiropoulos and Judge Jessup of this honourable Court, Professor Quincy Wright, Paul Guggenheim, Dr. C. Wilfred Jenks and Professor James Brierly. Furthermore, the Applicants have referred to two decisions of United States high courts—*Oyama* v. *California* and *Fujii* v. *California*—which have upheld the proposition that the aforementioned provisions of the United Nations Charter "contain legally binding commitments prohibiting Member States from discriminating or distinguishing on the basis of race".

Then the Applicants refer to the Universal Declaration of Human Rights, at page 501 of the Reply (IV). Adopted by the General Assembly of the United Nations in 1948, the Declaration states in its Article 2:

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status ..."

Then the Applicants refer to the Draft Declaration on Rights and Duties of States, cited at page 501 of the Reply; the Declaration was adopted by the International Law Commission in 1949, and provides in its Article 6 that—

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

Also, Mr. President, we cite the Trust Territories Agreements at pages 501 to 502 of the Reply (IV). Each of the 11 Trust Territories Agreements contains or contained provisions recognizing and accepting the universally adopted norm of non-discrimination or non-separation. The several provisions are all worded with reference to Article 76 *(c)* of the United Nations Charter, which states that one of the basic objectives of the trusteeship system is "to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".

Resolutions of the General Assembly of the United Nations are referred

to at pages 502 to 503 of the Reply. The Applicants have ventured to list 33 resolutions of the General Assembly of the United Nations, all of which specifically condemn racial segregation or discrimination. Almost all of these resolutions expressly state that racial discrimination, including the policy of apartheid, is in violation of the United Nations Charter. Futher, most of the resolutions relating to the Territory of South West Africa state that the policies of racial segregation or apartheid are in violation of the mandate agreement itself.

And then, Mr. President, resolutions of the United Nations Security Council are referred to at pages 503 to 504 of the Reply **(IV)**. The Security Council has on three occasions expressed the view that apartheid is in violation of the United Nations Charter. In the resolution of 4 December 1963, the Security Council expressed "*the firm conviction* that the policies of *apartheid* and racial discrimination . . . are abhorrent to the conscience of mankind . . .", and the Council urgently requested the Respondent, with respect to South Africa itself, to cease the application of its policies which, in the words of the Council resolution—

> " . . . are contrary to the principles and purposes of the Charter and which are in violation of its obligations as a Member of the United Nations and of the provisions of the Universal Declaration of Human Rights . . .".

And then, Mr. President, we cite the Human Rights Covenants at pages 504 to 505 of the Reply **(IV)**. The Third Committee of the General Assembly has, by overwhelming majorities, approved the relevant Articles of the Draft Covenant on Civil and Political Rights and of the Draft Covenant on Economic, Social and Cultural Rights. These Articles are referred to at pages 504 to 505 of the Reply, and clearly reflect and reinforce the international norm of non separation or non-discrimination on account of race or colour.

We come to the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, which is referred to at pages 505 to 507 of the Reply **(IV)**. The 18th Session of the General Assembly adopted, by unanimous vote, the Declaration on the Elimination of All Forms of Racial Discrimination in November of 1963. The first seven operative articles of the Declaration are set forth on pages 505 to 506 of the Reply. They include Article 2, paragraph 3, which specifically prohibits the justification of racial segregation by the implementation of special measures to develop it, and Article 5, which expressly condemns apartheid and "all forms of racial discrimination and separation" resulting therefrom.

And then, Mr. President, the International Convention on the Elimination of All Forms of Racial Discrimination is referred to at pages 507 to 508 of the Reply. The General Assembly in 1963 requested the United Nations Commission on Human Rights to give what it termed "absolute priority" to the preparation of a draft international convention on the elimination of all forms of racial discrimination. A draft convention had been adopted by the Human Rights Commission, and was to be considered by the General Assembly in its 19th Session. The approved Draft Convention condemns *in expressis verbis* "policies of *apartheid*", and reflects with clarity the internationally accepted human rights norm of non-discrimination or non-separation on the ground of race or colour. It also reflects, in its Article I, paragraph 2, the illegality of official

sanction or imposition of measures of development which "lead to the maintenance of separate rights for different racial groups", a concern which was also reflected in the Declaration on the Elimination of All Forms of Racial Discrimination which I have just discussed.

With regard to United Nations standards and findings, in their written pleadings the Applicants have summarized certain findings of United Nations organs or agencies which deal with the adverse effects of the policy and practice of racial separation in education, *inter alia*, in dependent territories; these are cited in the Reply at **IV**, page 398 and following. As is noted in the Reply, the conclusion has been reached by United Nations organs that segregation on the basis of race, as a matter of principle, is incompatible with *(a)* the broad goals of education, *(b)* the basic meaning of education, *(c)* the principle of equal opportunity, and *(d)* the goal of unification of dependent territories. Respondent includes in its reply to these conclusions of the United Nations the irrelevant comment that it "is in no way obliged to comply with the said 'requirements' in the case of South West Africa"; this is the characterization in the Rejoinder, **VI**, p. 161. The implication that Respondent has adduced seems to be that the United Nations findings or conclusions to which I have referred are asserted by the Applicants to impose specific legal requirements. This is gratuitous interpretation on Respondent's part. The Reply makes it explicitly clear that the conclusions of the United Nations agencies are referred to as indicative of "the purposes and principles of administration of dependent territories". Respondent, I submit, distorts even more the Applicants' reason for adducing the conclusions of the United Nations agencies on these matters by the protestation by Respondent that the propriety, on the part of the Court, of—

> ". . . inquiry by it as to compliance or otherwise by other Governments with 'requirements' or 'standards' which have been laid down by United Nations organs in respect of territories administered by such Governments must be open to serious doubt". (**VI**, p. 161.)

Respondent thus protests the "propriety" of an "inquiry" "as to compliance or otherwise by other Governments with 'requirements' or 'standards' which have been laid down . . .", etc. The Applicants fully concur that this honourable Court may not appropriately be requested to consider or pass upon, or enquire into, policies or practices regulating the affairs of any State, territory or society other than the territory in question in this proceeding. It has not been, and it is not now, the intention of the Applicants to suggest otherwise, and that of course was not the purpose for which reference was made in the Reply to the findings of the United Nations agencies.

Respondent, in its written pleadings, quarrels with the application by United Nations organs of their conclusions in respect of particular areas (**VI**, pp. 161-163). Respondent's comments here seem to be wide of the mark.

The point is that these purposes and principles, which are set forth in the Reply at **IV**, page 398 are embodied in constitutions of agencies of the international organization legally vested with supervisory functions over the Mandate. They are clearly relevant and, indeed, persuasive, as sources, along with others, which evidence the existence of a widely and, in this case, officially accepted standard, irreconcilable with governmentally enforced separation on the basis of membership of a race or group, without regard to individual merit, quality or capacity.

Then the Applicants cite the International Labour Organisation Constitution and Conventions, at pages 508 to 509 of the Reply **(IV)**. The Declaration of Philadelphia was adopted by the International Labour Conference in 1944 and was incorporated into the Constitution of the International Labour Organisation. It contains an unequivocal recognition of the principle of equality of opportunity and treatment, without regard to race—a principle enunciated in greater detail by the Convention concerning Discrimination in Respect of Employment and Occupation—which was adopted by the International Labour Conference in 1958—and expressed with complete specificity in the Convention concerning Social Policy in Non-Metropolitan Territories of 1947. The relevant provisions of these Conventions likewise are set forth in the Reply, at **IV**, pages 508 to 509.

Then, Mr. President, regional treaties and declarations are cited at pages 509 to 510 of the Reply. In further exposition of international legal instruments, embodying and expressing the norm of non-discrimination and non-separation on account of race, Applicants have set forth the relevant, and unequivocal, provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Organization of American States, and the American Declaration of the Rights and Duties of Man—adopted at the Ninth International Conference of American States. These are cited at pages 509 to 510 of the Reply.

That the norm of non-discrimination, or non-separation, should have been codified as a fundamental minimum standard by regional associations of States of the world, serves again to confirm its character as an internationally recognized minimum of conduct and of obligation in the interpretation and application of international undertakings, including the Mandate, of a human rights character.

The Applicants respectfully submit, on the basis of the foregoing instruments, declarations, agreements and resolutions of international bodies to which I have referred, that:

(a) an international legal norm does exist which may fairly be described as a norm prohibiting official governmental allocation of status, rights, duties and privileges upon the basis of membership of a group class or race, without regard to individual merit, capacity or quality;

(b) that such legal norm is applicable to, and determinative of, Respondent's obligations in terms of Article 2, paragraph 2, of the Mandate; and

(c) that this honourable Court should apply such legal norm in the light of the standards, which have been referred to, in adjudicating the legal dispute which the Court has held to exist between Applicants and Respondent, in respect of the interpretation and application of Article 2, paragraph 2, of the Mandate.

In conclusion of this Part D, Mr. President, therefore, the Applicants respectfully submit, for the reasons set forth in the Applicants' Memorials and in their Reply, as well as those adduced, and to be adduced, in the Oral Proceedings, and on the basis of the norms relevant to a determination of Respondent's obligations as stated in Article 2, paragraph 2, of the Mandate, that Respondent's conduct has been, and is, in violation of these obligations.

In Applicants' submission the policy and practice of apartheid is *ipso facto* a violation of international law, in terms of Article 38, paragraphs 1 *(b)* and *(c)*, of the Statute of this honourable Court.

The international custom outlawing discrimination and separation, together with the wide introduction of such a norm into the general principles of law recognized by civilized nations, warrants a determination that the policy of apartheid, as defined in the pleadings of the Applicants, strikes at the heart of the Mandate and Article 22 of the Covenant of the League of Nations, and is a violation of international law.

Even in the absence of such a determination, however, Mr. President, it is submitted that the policy and practice of apartheid or separate development, as defined and analysed in the Memorials and in the Reply, violates Respondent's obligations, as stated in Article 22 of the Covenant and Article 2, paragraph 2, of the Mandate, as measured by the relevant and generally accepted legal norms and standards described in the Memorials, the Reply and these Oral Proceedings.

Having concluded the Applicants' presentation of Parts A, B, C and D, of this phase of the Oral Proceedings, the Applicants would, with the permission of the President, state their submissions upon the basis of the relevant allegations of fact and statements of law set out in the written pleadings and in the Oral Proceedings herein, and supplemented by such other statements of fact and law as hereinafter may be made.

May it please this honourable Court to adjudge and declare that:

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

2. The Republic of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted.

5. The Republic of South Africa, by word and by action, in the respect set forth in Chapter VIII in the Memorials, has treated the Territory in a manner inconsistent with the international status of the Territory, and has thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment is in violation of the obligations of the Republic of South Africa as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant; that the Republic of South Africa has the duty forthwith to cease the actions summarized in section C of Chapter VIII of the Memorials and to refrain from similar actions in the future; and that the Republic of South Africa has the duty to accord full faith and respect to the international status of the Territory.

Next submission:

The Republic of South Africa has failed to render to the General Assembly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate; that such failure is a violation of its obligations as stated in Article 6 of the Mandate; and that the

Republic of South Africa has the duty forthwith to render such annual reports to the General Assembly.

Next submission, Mr. President.

8. The Republic of South Africa has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of its obligation as Mandatory; and that the Republic of South Africa has the duty to transmit such petitions to the General Assembly.

Finally.

9. The Republic of South Africa, by virtue of the acts described in Chapters V, VI, VII and VIII of the Memorials, coupled with its intent, as recounted therein, has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of the Republic of South Africa directly or indirectly to modify the terms of the Mandate.

The Applicants respectfully reserve the right to request the Court to declare and adjudge in respect of events which may occur subsequent to this phase of the Oral Proceedings, including any event by which constitutional or juridical relationships now existing may be changed if, and to the extent that, relevant to the issues herein.

In conclusion, Mr. President, with my profound gratitude to the Court for the patience it has shown in this rather lengthy discursive exposition, I terminate, on behalf of the Applicants, the first phase of these Oral Proceedings, and reserve to the subsequent phase a fuller discussion of issues involved in Article 2, paragraph 2, of the Mandate, including the legal issues there involved and the submissions relevant thereto, which I have not now presented to the Court, and all other issues and prayers for relief which may seem to the honourable Court to be appropriate to grant.

Thank you, Mr. President.

6. ARGUMENT OF MR. DE VILLIERS

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA AT THE PUBLIC HEARINGS OF 30 MARCH TO 14 APRIL 1965

Mr. President and honourable Members of this Court, it is hardly necessary for me to say that this case raises issues of the greatest importance, not only for the governments involved, but also, and in particular, for the very large number of human beings whose very lives may be affected by the outcome.

At the heart of these proceedings there lies the Applicants' charge that the Government of the Republic of South Africa has violated its fundamental sacred trust obligation under the Mandate, that is the obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory of South West Africa. All other issues and aspects of this case are subservient to this particular one, at any rate as far as their practical significance is concerned. That this is so, Mr. President, is apparent first of all from the antecedent history leading up to this litigation. That is a subject on which I shall have some more to say at a later stage. Secondly, it emerges from the written pleadings which have been filed, about which I shall also have some more to say at a later stage. But most important, Mr. President, it emerges also from the oral addresses of the Applicants' representatives to which we listened last week and the week before, although these addresses were, in the main, intended to be confined to the legal issues between the Parties.

At the very opening of his address on Thursday, the 18th of this month, my learned friend, Mr. Gross, stated as follows:

> "... seldom in the history of judicial administration can there have been involved legal issues, the determination of which more profoundly will affect the 'material moral well-being and the social progress' of a multitude of individual human persons". (P. 107, *supra*.)

Mr. President, at least in that one respect, if in no others that I can see for the moment, there seems to be agreement between my learned friend and myself. He added, very shortly afterwards, on the same page of the record:

> "The Applicants have not sought judicial recourse in order to requite a narrow material or selfish interest peculiar to themselves. [I skip somewhat] The Applicants' legal interest encompasses nothing less than observance by the Respondent of the totality of its legal obligations under the 'sacred trust' of the Mandate."

That, then, Mr. President, is the fundamental issue—alleged violation by the Respondent of the sacred trust regarding the well-being and progress of the inhabitants of South West Africa. There are of course certain legal issues to be dealt with before this fundamental, crucial issue is reached. Depending on the outcome of those legal questions, it may be that this particular charge may not arise for decision at all.

But, Mr. President, there can be no doubt about it that that is the *pièce de résistance* at which the Applicants have set their targets.

My learned friend, Mr. Gross, in his opening oral address summarized this charge concisely in these words—"The policy of apartheid, as practised in South West Africa, is repugnant to the Mandate". (P. 113, *supra.*) I repeat, Mr. President, "The policy of apartheid, as practised in South West Africa"—a fundamental, factual question that is alleged to be "repugnant to the Mandate".

My learned friend proceeded to refer to criteria on which he submitted that this charge was legally determinable. I shall deal with those criteria in the course of our legal argument which we also intend to present before dealing with the factual considerations involved in the issues on the merits, in terms of the general arrangement at which we have arrived.

But, Mr. President, there is one respect in which I should like to depart from that general scheme of things. There is one aspect of the canvassing of the factual side of this case to which I would like to refer straight away because of the effect it may have on practical arrangements for the further conduct of these proceedings—arrangements which may have to be made well in advance in order to serve their purpose and in order to avoid unnecessary delay. I refer, Mr. President, to the possibility of an inspection *in loco* as a means of assisting this Court in coming to a just conclusion on the factual aspects of the case. The Court will no doubt be aware that we were desirous of raising this matter at the very outset of the proceedings, even before the presentation of the Applicants' case, but, in view of the fact that the necessary agreement could not be reached in that regard, we have had to await our normal turn, which has now arrived. We have considered waiting with this application until after disposal of the legal arguments, but that would appear to involve a further delay of possibly some weeks and consequently, Mr. President, in view of the time factor I have mentioned, we have considered it best not to delay the matter any further but to raise it straight away.

On Saturday morning, during the Court's recess, we advised the representatives of the Applicants that we would raise this matter this morning and we also advised them that we would add in one respect to the proposal as previously communicated to them. We also informed them that we would have no objection to a deviation from normal procedure so as to enable them to reply at once to this proposal, if they should wish to do so, or as soon afterwards as it might suit them, even if that should mean breaking into our legal argument. But that, of course, Mr. President, is a point on which they will have to please themselves, subject of course to the wishes of the Court. Our respectful suggestion is that this is a matter which should not be delayed unduly.

Now, Mr. President, before I put the exact content of the proposal to the Court, may I be permitted some brief observations as a background thereto, and in support thereof.

In their pleadings, the Applicants go so far as to assert that, in regard to the Native inhabitants of the Territory of South West Africa, the South African Government has not only failed to promote their well-being and progress *to the utmost* but that it has failed to do so *to any significant degree whatever.* Those words which I have stressed I quote from the Memorials, I, at pages 108 and 162. The Applicants proceed to allege that Respondent's efforts *have in fact been directed to the opposite*

end. That we find in the Memorials, **I**, at page 108. Now these charges are, of course, strenuously denied by us. In the pleadings that have been filed we have dealt at some considerable length with the efforts and the progress that have actually been made in pursuit of the civilizing mission undertaken by the Respondent Government, especially as regards the Native inhabitants of South West Africa.

With special reference to the practical realities of the situation in South West Africa, Mr. President, the South African Government has attempted to demonstrate why it is sincerely convinced that its much-maligned policies are in fact those best suited to the ideals of the sacred trust. In these expositions we have not spared any effort whatsoever to give the Court the fullest measure of information possible, in presenting all the relevant facts that the Court might consider helpful in coming to a decision. And, Mr. President, we are not leaving the matter at that—at the presentation of the written material to the Court. As we have already notified the Court, we intend presenting the testimony of witnesses and experts, testimony that can be tested by the ordinary processes of cross-examination and the like, in order to assist the Court in coming to a just conclusion.

But, Mr. President, in all these expositions, as well as in the issues with Ethiopia and Liberia which have emerged therefrom, one factor has arisen constantly, a factor with which it is almost impossible to deal adequately on paper or in speech, and that factor, Mr. President, is the question of difference between African circumstances, African realities and African standards and those pertaining to, say, American, European or Asian countries and peoples. These differences, in so far as they are relevant to the present proceedings, are, in some respects, of very great significance—in some respects they are of lesser importance; in part, they are readily apparent to the searcher after truth, but in part, Mr. President, they are extremely subtle. And in our submission it is quite clear that, in view of its very nature, African reality is something which cannot be conveyed properly and adequately merely by the spoken and the written word. *African reality requires to be seen in order to* be appreciated properly and effectively. And that, Mr. President, is a fundamental aspect, a fundamental reason, in support of this application which I am putting to the Court.

It is, in our submission, no doubt important in any law suit that the court is to be informed as fully and as adequately as possible of all relevant facts which could have a bearing on each decision. But, Mr. President, that truism can hardly be demonstrated in a more vivid perspective than in the present case because this is no ordinary case. The issues involved in this case, and the decision which the Court is called upon to make, have implications which extend very far beyond ordinary limits.

The proceedings, as the Court would know from the pleadings, are the culmination of a vehement campaign which has been waged against the South African Government for a long period and persistently in the international political arena, particularly in the United Nations. The leaders of that campaign, who are represented herein by the Applicant States, like to portray that campaign as something in the nature of a holy crusade of modern times—as something required to liberate fellow human beings from conditions which are said to be worse than slavery. That is the way in which this campaign is portrayed from the

side of the adversaries of the South African Government in this respect.

From the South African point of view we see that campaign as being one of abuse and vilification, motivated on the part of its leaders by purely political objectives with very little, if any, bearing on the real merits of administration of the Territory of South West Africa, or the real interests and needs of the population of that Territory. I know, Mr. President, that that is a point on which my learned friends are particularly sensitive and I fully expect protestations to high heaven about this. But protestations or no protestations, this is what we are going to demonstrate. The record is, in our submission, particularly clear on that point. I do not want to elaborate it now. I shall do so in the presentation to the Court of our case on the merits. At this particular stage my only concern is to point out to the Court the extraordinary implications of this dispute of which a phase is now being conducted in this Court in the present proceedings.

Mr. President, in regard to this campaign, moreover, we also point out in the pleadings that the South African Government has hardly ever had a proper opportunity of defending itself. The reason for that is that the campaign was waged in organs of the United Nations under circumstances where there was a dispute about the fact whether those organs had any supervisory jurisdiction in respect of South West Africa at all. The South African Government was put in this difficult position that it had to guard itself against what it regarded as an assumption of jurisdiction on the part of organs that did not have such jurisdiction, and an assumption moreover of power which could be extremely dangerous in the circumstances.

Those were the conditions under which South Africa had to defend itself, if at all, against the merits of these attacks made upon it, and those are the circumstances under which, as I have said, it was hampered in the presentation of its case on the merits.

Mr. President, it is not only in regard to these antecedents of the case and in regard to the motivation behind it that there is such an extreme divergence between the attitudes of the Parties. When we come to the merits on the policy aspects, when we come to the policies which are suggested should be pursued by the South African Government in pursuit of the sacred trust, we find an equal if not a greater, divergence between the Parties.

We find that the Applicants advance that a multitude of people is suffering as a result of a policy which they allege to be oppressive and tyrannical. On the other hand, the Respondent denies these allegations. The Respondent says that its policies are aimed at the *upliftment* of all the peoples concerned, at making it possible for *all* of them to live together in circumstances of friendship, harmony and co-operation, on the basis of full recognition of the human dignity of *all* of them. The Respondent says also, Mr. President, that although the situation and the problems attaching to it are admittedly very difficult, and although no solution can be said to be perfect, very real, steady and substantial progress is in fact being made in the Territory with the people concerned in pursuit of these ideals and in pursuance of the policies of the Respondent.

The Respondent goes further, Mr. President; it points to the alternative policy which the Applicants very clearly suggest in the pleadings as the one that ought to be adopted and pursued by the South African Government in South West Africa. That is a policy of attempting to

treat all the peoples of South West Africa as an integrated political unit with universal adult suffrage. Respondent states, Mr. President, as its firm conviction, that this alternative is likely to lead to untold misery and strife to the probable extent of violence, bloodshed and chaos, of a nature similar to what is unfortunately experienced in other parts of Africa.

In Respondent's view, Mr. President, this would be a situation that might be pleasing to revolutionaries and their associates, but hardly to anybody else. And, Mr. President, Respondent points out that this campaign, of which these proceedings form part, is quite openly aimed not only at conditions in South West Africa, but also at conditions over the whole of southern Africa, with the same implications and prospects for all of the peoples concerned. When we take those factors into account, Mr. President,—these crucial issues and their practical significance—then it becomes evident, in our submission, that this case can indeed, in my learned friend's words, be said "profoundly to affect the well-being and progress of a multitude of individual human persons", in a much larger sense than the representatives of the Applicants are apparently prepared to acknowledge.

It is hardly necessary to add, Mr. President, that in these circumstances it is, in our respectful submission, imperative in a particularly meaningful sense that no stone should be left unturned to place at the Court's disposal every possible means of enlightenment in order to enable it to come to a just conclusion on these issues with these implications I have mentioned.

Mr. President, in making these comments we realize full well that the Applicants have indicated a certain attitude in regard to the facts on the record which may in a sense be said to tend towards curtailing the issues of facts to the minimum. They have, as the Court is aware, indicated that, subject to argument as to relevance, they do not dispute any of the facts, as distinct from inferences from facts, which are set out in the Respondent's pleadings, save in so far as they may indicate otherwise in their pleadings or in their presentation of their case to the Court. But as I have just pointed out, Mr. President, the Parties have arrived at tremendous extremes of divergence as to the evaluation of these facts; as to the conclusion at which the Court is to arrive in regard to policies to be applied with a view to promoting the well-being and progress of the inhabitants of the Territory. This very extreme divergence makes it evident, in our submission, that the major sphere of contention between us relates to the *meaning*, to the *value* and to the *weight* to be attached to the facts in coming to a conclusion about policies.

Mr. President, it is self-evident that for the purposes of deciding such an issue the facts have to be properly *known*; they have to be properly *understood* and they have to be viewed in proper *perspective* in relation to one another and to policies, theories and principles that may be raised for consideration. Only then, in our submission, can proper weight and value be attached to the facts, and it is, amongst others, this whole process of weighing, of analysing and understanding in perspective that we refer to under the term "evaluation and adjudication". It seems to us to be a task on which any court would welcome any assistance it could get, and it is mainly for this very important purpose, Mr. President, that we intend to call witnesses and experts and for which we are proposing this inspection *in loco*.

It may also be desirable for me, Mr. President, to refer very briefly to the different attitudes taken by the Parties in regard to the basis upon which there can be adjudication of the charge regarding alleged violation of Article 2 of the Mandate—regarding the well-being and progress of the inhabitants. As the Court knows, our first contention in that regard, as to the basis or criterion for adjudication, is that on a proper construction of the Mandate, and on viewing the probabilities in that regard, this Court was not intended to adjudicate on issues of that nature at all. Of course, if that proposition is to be accepted then no further question as to a decision of disputed facts, or of evaluating those facts, or of applying policies to those facts, would arise for this Court.

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

That is the nature of the charge as we understand it, as it was brought against us in the Memorials of the Applicants; that is the way in which we have analysed it; that is what we suggest as a matter of law to be the only possible basis upon which there could be adjudication on the question whether the discretionary power, the discretionary function, the discretionary obligation of the mandatory power, has in this respect been violated.

Now my learned friend Mr. Gross, suggested that if that basis were to be adopted for adjudication, then that also would be equivalent to no adjudication at all. I must frankly say that I do not understand that suggestion at all. The question whether, in the sense I have described, a governmental power is imbued with good faith directed at the authorized objective of the powers given to it, or whether it is imbued with bad faith directed at an unauthorized objective, that surely, Mr. President, must under *all* circumstances be a question of *fact*. It is a question of the type which arises regularly in municipal systems where there is an exercise of a power of review on the part of a court of the very question whether there has been a violation of a discretionary power or duty by some authority, some body, some individual person, some incumbent of an office.

In some legal systems, as far as we know, there are special courts which deal with this type of case—in deciding whether there has been an abuse of power on the basis of the type of principle I have mentioned—and particularly, in an appropriate case, on the basis of good or bad faith of the person or body concerned.

In some cases, ordinary courts of the land—the superior courts—fulfil that function and decide cases on the basis of this criterion. But, Mr.

President, the point I want to stress is this, that in all those instances the enquiry is one of fact. It calls for the determination of disputed issues of fact, where necessary. It calls also, and under all circumstances, for a proper *understanding*, for a proper *evaluation*, for a proper *assessment*, of *all* the facts involved in a given situation. Now, that is particularly the case where the allegation of the party alleging bad faith takes a particular form, which it very often does in proceedings of such a nature. The form of the allegation is very often this, that the action, or decision, of the person or body concerned, is so manifestly wrong, so obviously unfair, so clearly inhumane, or something similar, that that authority could not honestly and genuinely have come to its conclusion; that as a matter of inference there must have been something of the nature of bad faith, or an ulterior motive on the part of such an authority or person. That is the form that an allegation of this type very often takes.

It appeared to us to be the form of the charge which was brought against us also by the Applicants in the Memorials **(I)**, where they said, Mr. President, at page 104 thereof, that the issues regarding Article 2 "do not involve conjecture"—those are their words—so that "differences of opinion could arise" about them. They say that is not the type of situation that we have here at all, where there could be conjecture or differences of opinion. Their allegation is, as stated in the Memorials, that Respondent's violation of duty regarding the well-being and progress of the inhabitants is "beyond argument"—those were their words. Mr. President, it is hardly necessary to stress how important evaluation of the facts is with a view to adjudication upon such an averment and an enquiry along those lines.

Now it is true, Mr. President, that in their Reply the Applicants indicate a different line of attack. They say that the criteria for adjudication on the issue relating to well-being and progress are to be objective ones—objective criteria—for determining the question whether Respondent's policy and conduct are, or are not, in violation of its obligations under the Mandate. And they introduce for this purpose of objective evaluation so-called universally accepted norms and standards, as applied by civilized governments in the government of their peoples and territories. And they say, in effect, Mr. President, that South Africa is not complying with the minimum standards involved in these universally accepted practices.

Now our answer to that, Mr. President, is that the Applicants are, to a very large extent, confusing in their submission a question of method with a question of principle; the principle being the factor that relates to standards, the method being something completely different.

We are dealing with the problem of a number of different peoples, with different cultures, with distinct identities, living in one geographical territory. The principle involved, the objective, the standard or the norm—if you like—is the ideal of promoting the well-being and progress of everybody concerned; of making it possible for them to live in happiness, in harmony and full self-realization. That is the principle. The method is the question "How does one set about that?"—"How does one set about achieving that principle?" Does one set about it by attempted integration, as is suggested in this particular case by the Applicants, or does one set about it on the basis of recognizing the separate

identity of the various units comprising the whole, of respecting that separate identity, of developing upon that basis in order to find a sound method of future co-operation between the various peoples concerned. That is the question of method, as distinct from standard.

Mr. President, in all cases where there are plural societies of this nature, the answer to be arrived at on the question of method is not necessarily the same.

We find, Mr. President, that in regard to the situation in Ceylon, for instance, the Tamils have been, to a large extent, repatriated to the Indian continent. That is the method for a solution sought for the particular problem existing on that island.

In the case of Cyprus a different solution is being attempted, in the tragic circumstances that apply there. Whether that is the correct solution, whether it will prove to be the correct one in the course of time, I am unable to say. I do not suggest that I know enough of the circumstances there to be able to suggest an answer to that question, but the point I wish to make, Mr. President, is that the solution to be found to a problem of this nature depends upon the merits of each particular case. The very point I wish to make is that one is not to judge, or to prejudge, a problem of that kind without knowing all aspects of the facts involved in the particular situation.

It is, in our respectful submission, complete nonsense to say that there is a universally accepted standard applicable to the method to be applied in all circumstances where a problem of this kind arises. That is a complete confusion between the question of method and the question of standard or principle.

In so far, Mr. President, as these suggested universally accepted norms and standards do involve principles at all, they are indeed principles of a somewhat elementary character which are, in fact, universally accepted, such as principles to the effect that there is to be no oppression. Then, Mr. President, the only question involved is whether, in a particular situation, where a particular problem arises, the attempts at a solution for that problem are to be viewed as involving oppression or as involving avoidance of oppression. I am just using the example of oppression; there are other elementary norms of good conduct, of ideals, that one puts in that regard, which also, indeed, are accepted, not the least by the Respondent Government. I emphasize, however, that when it comes to a problem of finding a basis for different peoples to live in harmony with one another, then it becomes a question of method. If one thinks of standards in this regard at all, one has to investigate the facts of the particular situation very clearly in order to see whether there is indeed any violation of generally accepted standards, or whether there is full compliance with them and a mere difference of opinion as to what would be the best method of compliance with them.

So that, Mr. President, I emphasize that in whichever way the question of adjudication on the merits of the complaint regarding Article 2—well-being and progress—is considered, on whatever basis one approaches that adjudication, the one suggested by my learned friends on behalf of the Applicants, or the one we suggest, it comes back to the same theme every time, and that is that all facets of the factual situation are to be properly understood and seen in their perspective. Mr. President, it is against this background, and for these reasons which I have mentioned, that we propose this inspection. It is against the background of the

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

Mr. President, we submit respectfully, for these reasons, that an inspection of a certain minimum number of African territories is absolutely essential for a just and proper adjudication upon the factual aspects of the crucial issues regarding the promotion of well-being and progress.

We contend further, Mr. President, that if the purposes which I have mentioned are to be properly served, then various categories of States or territories ought to be included in the operation. We submit that, apart from South West Africa, and portions of the Republic of South Africa, there ought to be included African States falling both in the category of the Applicant States which have for a long time been independent, and, Mr. President, in the category of newly independent States which were until recently under colonial rule or trusteeship administration. It seems evident that considerations pertaining to these categories of States—long-independent ones or newly independent ones—would not necessarily be the same.

Mr. President, on the specific authority of the South African Government, I hereby propose that such an inspection be undertaken, either by the Court, or by a committee of the Court, whichever may be preferred, and at an opportune time to be decided by the Court, after consultation with both Parties. Likewise on specific authority, Mr. President, I hereby offer every practical assistance and co-operation at the command of the South African Government with a view to putting this proposal into practical effect.

To be more specific and to clarify the proposal fully, I emphasize that it falls into three parts, the first of these parts being itself sub-divided into two sub-parts—if I may call them that.

Firstly, we propose and offer to the Court, or to its committee, as may be decided, an inspection of the Territory of South West Africa. We do not wish to impose any restrictions in that regard. In addition to matters to which the Respondent itself would wish to draw the attention of the Court, or the inspecting committee, this part of the inspection made in the Territory may include anything which the inspecting body itself may wish to see, or which the Applicants may wish to bring to its attention.

Mr. President, while the South African Government does not lay any claim to perfection—no earthly government could do that—it certainly considers that in relation to the issues in this case it has a great deal which it would like to show to such an inspecting committee in South West Africa, and nothing to hide from it. The invitation naturally includes provision for representatives of both Parties to accompany the inspecting body. Practical details about itinerary, the size of the travelling group and so forth could be arranged by discussion, or by such other means as the Court may think fit.

In addition to such an inspection of South West Africa, this part of our proposal encompasses, as a distinct sub-part thereof, a limited visit to the Republic of South Africa itself—limited, that is, in the sense of being confined to matters that are relevant in respect of South West

Africa. As the Court will readily appreciate, there are reasons of principle and relevancy why this part of the proposal cannot be so completely unlimited and unqualified as in respect of South West Africa itself. The Court is asked in this case to adjudicate regarding policy and conduct in respect of South West Africa, not South Africa. Apart, therefore, from precepts of relevancy which the Court itself would no doubt wish to impose and observe for that reason, the South African Government considers that it has a special responsibility itself in this regard, namely to guard against the danger that an act of courtesy on its part may be misconstrued as submission of its domestic affairs to adjudication in proceedings such as the present—something which of course would be wholly inappropriate and has never been intended. At the same time, Mr. President, as the pleadings show, there are matters within the Republic which, within a limited sphere, are relevant to the adjudication in respect of South West Africa. In the circumstances our proposal is that the extent and particulars of a visit to the Republic be determined in consultation with the South African Government, with due regard to any wishes that the Court and any of the Applicants may express in respect thereof. What applies to the Republic applies also to the area of Walvis Bay, which is part of the Republic and not part of the Territory of South West Africa.

Secondly, Mr. President, we propose that a visit to the Applicant States Ethiopia and Liberia be included, for the purpose, and to a sufficient extent, to enable the Court or its committee to form a general impression of comparable conditions and standards of the material and moral well-being and social progress of the inhabitants concerned; a limited purpose, limited to what I have just mentioned. The South African Government is fully aware of the fact that it is its own policies and achievements in South West Africa that stand indicted, and not those of the Applicant Governments in their own countries. Nevertheless, Mr. President, in our submission a visit to these countries would yield information very highly relevant to the particular purpose, though a limited one, which I have mentioned. For the reasons I gave before, it is almost impossible for visitors from outside Africa to view and evaluate well-being and progress in an African territory like South West Africa fairly and in a proper perspective unless they have had an opportunity of observing comparable standards and conditions in other parts of Africa. In the absence of such an opportunity it stands to reason that there is a very great danger of perspective becoming warped, quite unconsciously, by the introduction of European, or American, or Asian standards into an African context. The Applicant States are the only sub-Saharan African States which have not to any extensive degree been subject to colonial, mandatory or trusteeship administration. Mr. President, on account of their avowed interest in the material and moral well-being and the social progress of the inhabitants of South West Africa, their Governments would no doubt be similarly concerned about the pursuit of these same objectives in their own countries relative to their own populations. We submit, therefore, that inspection by the Court, or its committee, of practical attempts, achievements, standards and conditions in the Applicant States, particularly as regards the large masses of the population, could therefore be of considerable assistance to the Court in evaluating the policies and practices of the South African Government in South West Africa. This is not a matter of introducing policies and their application in the African

States for adjudication by this Court; it is a matter of assisting the Court in properly fulfilling its task in regard to adjudication and evaluation of the policies applied in South West Africa. It seems highly reasonable therefore, Mr. President, in our submission, to expect of the Applicant Governments, which are asking the Court to make this adjudication, that they should render such assistance to the Court by making possible such a visit to their territories.

Thirdly, Mr. President, we propose that a visit should be included to one or two additional sub-Saharan countries of the Court's own choosing, also for the purpose of gaining a general impression regarding comparable standards of the same nature as I have just mentioned in regard to the Applicant States. While we do not wish to limit the Court's choice in any way, we would respectfully suggest that, by way of contrast, at least one of these territories should be a former mandated and trusteeship territory. It is in our submission quite obvious from the record that the Applicants are in these proceedings acting as the representatives of all independent African States. Consequently, in our submission, they ought to have no difficulty at all about obtaining, at the Court's request, the necessary invitations for an inspecting group to visit one or two of such territories, or in assisting the Court, as far as may be necessary, to obtain the necessary co-operation of the governments concerned.

That then, Mr. President, is the proposal which we respectfully make for the consideration of the Court. We shall await the Applicants' reaction to that with interest. Perhaps I should first, Mr. President, with your leave, give my learned friend an opportunity of indicating now whether he would like to reply now or at a later stage. I thank you.

Mr. President, I shall proceed now to deal with the legal issues which form the subject-matter of, shall I say, this first phase of the proceedings. The broad scheme in which we intend to deal with the various questions may be indicated shortly as follows. Firstly, we shall deal with the legal issues underlying the Applicants' Submissions Nos. 1, 2, 7 and 8—I refer to the numbers given to the submissions in their Memorials (I), at pages 197-198. Mr. President, these legal issues are whether the Mandate is still in force, and, if so, whether Respondent is obliged to report and account in respect thereof to the General Assembly of the United Nations, as it was obliged to report formerly to the Council of the League, and whether it is obliged for that purpose also to transmit petitions from inhabitants of the Territory to the General Assembly. There is, as we indicate in the pleadings, no dispute about the fact that the Respondent Government has refused to render reports and to transmit petitions to the General Assembly, as it was previously obliged to do to the organs of the League. The dispute therefore turns on a question of law—a question whether there is any legal obligation to render such reports and to transmit such petitions. That is the first part of the legal argument with which we shall deal.

The second part comprises the legal issues as distinct from the factual disputes concerning Applicants' Submissions 3 and 4, that is, regarding the charge of violation of Article 2, paragraph 2, of the Mandate, i.e., failure to promote to the utmost material and moral well-being and social progress. The legal issues, Mr. President, concern the questions whether the factual disputes in this regard as they have now emerged, are in law justiciable by this Court at all, and if so, on what basis or on what criterion.

Thirdly, Mr. President, we shall make brief reference to some of the legal questions pertaining to Applicants' Submissions 5 and 9, that is, regarding alleged violation of the Territory's separate international status and alleged attempts at unilateral modification of the terms of the Mandate. I have said "brief reference to some of the legal questions", Mr. President, because it seems to us that all the legal questions arising in this regard cannot appropriately be dealt with in full by us now, since some of them are intertwined with facts and with detailed aspects of the Applicants' charges which have not been elaborated by them at all in these Oral Proceedings. And we shall have to wait for a full elaboration in that regard in order to know exactly what case it is that we now have to meet in that regard.

Those are the three broad headings under which our treatment of the legal issues will fall, and I shall proceed now to deal with the first one, namely the issues underlying Submissions 1, 2, 7 and 8—the question whether the Mandate is still in force, and, if so, whether there is an obligation of accountability to the General Assembly of the United Nations.

The Court will recall that we deal with these legal questions in the Counter-Memorial, Book II. The whole of Book II is devoted to this topic, and we deal with it further in the Rejoinder, in answer to the Applicants' Reply (V, pp. 13-99).

Mr. President, the arguments relating to existence or non-existence of the Mandate and to existence or non-existence of an obligation of accountability to the General Assembly of the United Nations are to a considerable extent inter-related, and cannot be separated completely into watertight compartments. But, Mr. President, the conclusions on the two questions do not necessarily go hand in hand. If one concludes that the Mandate is still legally in existence, it does not follow, as a matter of course, that accountability must necessarily be in existence—accountability to the General Assembly of the United Nations. Vice versa, if one concludes that accountability is no longer in force, it does not necessarily mean that the Mandate is no longer in force. There is a possibility of divergent conclusions about these two questions—they do not necessarily go hand in hand. There are contentions before the Court, of course, that they ought to go hand in hand; we are not dealing with the merits of those at the moment. I am just pointing out that there is the possibility of diverging conclusions, and, therefore, the argument relating to the two questions is not entirely one integral whole—there are certain considerations which pertain to both questions, but there are also certain considerations which pertain separately to one and separately to the other. In so far as that kind of separation is possible and is desirable—it is desirable in our submission—I shall follow the same order as we did on the pleadings, and that is to deal first with the question of accountability and thereafter with the question of the existence or otherwise of the Mandate itself.

The reason for that is, Mr. President, the nature of our contention in this regard. Our contention is that accountability lapsed with the dissolution of the League, and that as a result of the lapse of accountability the further question arises, namely whether under those circumstances the rest of the Mandate could, in accordance with the intentions of its founders, survive, that is, without accountability. That is therefore the sequence in which the questions in this regard arise, in our submission,

on a proper approach to the question. Our first and main contention is that accountability lapsed.

Mr. President, it is first necessary to go to the foundations and to indicate as plainly as possible how these two questions arise. They emerge, of course, firstly from the terms of the compromise agreement which was arrived at between the interested parties at the peace settlements following on the First World War; and secondly they arise from the manner in which those terms—the terms of the compromise—were affected by new settlements which were made after the Second World War.

The original compromise agreement after the First World War concerned the disposal of certain conquered territories which were, in terms of the agreement, to become mandated territories. The agreement was set out in Article 22 of the Covenant of the League and was in consequential respects elaborated in the actual mandate instrument issued in pursuance thereof.

The terms of the compromise agreement are well known—the terms of Article 22—and of the mandate agreement. I merely want to stress, for purposes of the present argument, certain aspects thereof. In paragraph 1 of Article 22 of the Covenant of the League there is cited the agreement of the interested parties, viz., that to the colonies, territories and the peoples in question "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".

Paragraph 2 of Article 22 tells us some more about the method by which effect is to be given to this principle. It says that:

> "The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who . . . can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

So we find the principle of a sacred trust; we find the method of giving effect to it is a tutelage, a guardianship, by an advanced nation, and that that guardianship, that trust function, is to be exercised by the advanced nation concerned as a Mandatory on behalf of the League. That is the basic concept.

Now, Mr. President, paragraphs 3 to 6 of Article 22 proceed to indicate what different kinds of mandates there should be, the differentiation between them, and different substantive provisions and safeguards which are to be imposed in the various mandates. I skip those for present purposes, and I pass on to paragraph 7, which provides that: "In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge." Here then, the idea of an advanced nation, acting in a fiduciary capacity as a trustee or a guardian, and doing so as a Mandatory on behalf of the League; and in consonance with this conception of a Mandatory on behalf of the League—that particular Organization, the League of Nations—the Mandatory is to make a report to the *Council* of the League, a particular *organ* of that Organization specifically mentioned by name.

In paragraph 9 provision is made for the constitution of a Permanent Mandates Commission "to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates".

Now, Mr. President, we turn to the Mandate for German South West Africa, which was one of the mandate instruments issued in pursuance of Article 22 of the Covenant of the League. We find again, in the third preamble, that the fact is stated that the Mandatory "has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations . . .". That element is then firmly introduced into the Mandate itself.

In Articles 1 to 5 of the Mandate—I am not going to deal with them now—there are set out substantive powers, substantive obligations, to be imposed upon the Mandatory—substantive powers conferred, substantive obligations imposed. Article 6 provides: "The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5."

We find then, Mr. President, this concept of a Mandatory on behalf of the League, this specific international organization whose constitution, composition, conditions for membership, manner of operation and so forth, are all set out and determined in the very same instrument of which Article 22 forms a part.

In keeping with this concept of a mandatory on behalf of this particular Organization, we find an obligation to report and account to a specific organ of that Organization, viz., the Council of the League, *to its satisfaction*. More specific it could hardly have been—with a provision that that organ is to be assisted by another specific one, the Permanent Mandates Commission.

Now, Mr. President, following on the Second World War, we know that the League was dissolved and that there was no longer a Council of the League or a Permanent Mandates Commission, and now the question arises, firstly, must that obligation to report and account not now be regarded as having lapsed? The obligation is defined in respect of its very content, as relating to a specific body, a specific organ of a specific organization, the powers, constitution, and manner of operation which are described in the very same instrument. That Organization falls away, the organs fall away. On an application of ordinary legal principle, that obligation would become incapable of performance and would lapse. That is the first question that arises, and the second question is, if it then did lapse, can the rest of the mandate be regarded as having survived in law?

Now, Mr. President, consideration of these questions, and particularly the first one, whether there was a lapse of the obligation of accountability, is of course affected by the fact that a new international organization, viz., the United Nations was brought into existence at the conclusion of the Second World War. It was actually brought into existence some nine months before the dissolution of the League and it existed contemporaneously with the League for that period. That was a new international organization and we have the submission before the Court that, whereas the obligation of accountability was previously owed to the organs of the League of Nations, which I have mentioned, that obligation is now owed to a new supervisory authority, namely the General Assembly of the United Nations.

The fundamental question is, Mr. President, whether by some process or principle of law a substitution of supervisory organ has been effected in

such a way as to be binding in law on the mandatory; in such a way as to convert the original obligation of the mandatory to report to organ A into a new obligation now to report to organ B. That is the fundamental question. The Respondent's submission is that there has been no such substitution of the supervisory organ. The Applicants say there has been a substitution of the supervisory organ, and that is the fundamental issue with which I have to deal in this first part of my argument.

Now, Mr. President, where one party avers a positive, as the Applicants do in respect of this issue—they make the positive averment that there has been this substitution of the supervisory organ—and the other party makes a negative averment, or, shall we say, denies the positive averment, as we do in this instance, then it is customary to have regard first to the grounds advanced by the party making the positive averment, so as to see what are the grounds upon which he seeks to come to his conclusion, to analyse those grounds to see to what extent they are sound or not, and then to consider in relation to the case which has been made out, the case for the other side, the case which is to the effect that such a positive has not been established.

In this instance, Mr. President, in so far as this initial exposition of the broad issue between the Parties is concerned, I am going to invert that order, and I am going to do it for an elementary practical reason. The reason is that the statement of the Respondent's attitude in this regard, which we are now going to present first, is a simple, elementary one which can be set out concisely and clearly without any difficulty at all. On the other hand, if I am to state now to the Court, even broadly, what the Applicants' attitude is in that regard, then I will have to go into a good deal of analysis, of dissection, of reconstruction amounting in some respects almost to guesswork, in order to find out what exactly is the gist of the Applicants' present attitude. And I stress "present attitude" in that regard, Mr. President, because the matter does not stop there. I, unfortunately, have to point out also, and in advance, that the Applicants' case in this regard through the various stages of these proceedings has undergone very marked changes, very marked shifting of ground, and at the various phases of these proceedings the case, this positive case on behalf of the Applicants which we are called upon to meet, has changed, so that it is very difficult to know from time to time exactly what the case is now and what we have to meet.

I do not say this in any derogatory sense, Mr. President, or in order to be facetious about it. I say it because I submit that this factor has a strong bearing, although an indirect one, on the merits of the respective contentions. I submit that that reflects the difficulty of the Applicants in being able to submit to the Court a cogent and coherent case in this respect. They are clear about one thing, and that is the result at which they wish to arrive. They are anything but clear about the grounds upon which they wish to arrive at that result.

I can now put the Respondent's case to the Court very broadly. I shall deal with the various details at a later stage when it comes to weighing the Respondent's case against that of the Applicants.

The Respondent's case can be put by way of the following propositions. Firstly, Mr. President, there is this very basic fundamental principle relating to international obligations. What we are concerned with here is an obligation—an alleged obligation to report and account, in respect of

administration over a territory, to an international supervisory organization. From its very nature, Mr. President, that obligation is one which could not have derived from ordinary principles of civilized law, as applicable in various States, and as may have been seen to be incorporated in international law. There are, as far as I am aware, no principles of general law which oblige anyone to submit to supervision by any organization, unless there is specific provision to that effect. And specific provision in the international law context in this regard can only be an obligation incurred with the consent of the party on whom it is sought to impose this obligation. It can only be an obligation of the nature of a treaty obligation, something which has acquired the consent of the party said to be obliged.

Mr. President, I had begun with a very broad exposition of what our case is in regard to Article 6 of the Mandate, the obligation of accountability. The first point which I was emphasizing at the time of the adjournment was that the obligation is of such a nature that it could only have arisen from the actual consent on the part of the Mandatory in this case—on the part of the State upon whom it is sought to impose this obligation. When I say an obligation of the nature of a treaty obligation, it does not of course necessarily mean that the mandate instrument itself is to be viewed as a treaty or convention. The Court knows of the difference of opinion which was expressed in that regard in the 1962 proceedings on the preliminary objections, on the question whether the mandate instrument is not to be viewed as an international agreement or treaty in itself. The view is nevertheless that it proceeded from a treaty or convention, namely the Covenant of the League, that it was an instrument created in pursuance of powers granted in a treaty or convention and that it therefore possessed a "certain background of consent"—if I might borrow that phrase from the dissenting opinion of the honourable President of the Court and Sir Gerald Fitzmaurice. The view, as far as that point is concerned, is that it is completely immaterial whether one views the mandate instrument as being in itself a treaty. The fact is, however, that this obligation of reporting and accountability could not have arisen save in the manner of a treaty obligation, that is from the consent of the State concerned.

That is a fundamental consideration. I shall endeavour, in analysing the Applicants' case, when I come to that at a later stage, to point out the vagueness that exists in that respect, because this after all is the most important part of this particular aspect of the controversy, viz., whether there is an obligation arising from consent on the part of the Respondent, or whether it is sought now to impose an obligation upon the Respondent irrespective of its consent. And I submit that at certain phases of the presentation of Applicants' case in this regard, it has assumed the character of, in effect, wanting to impose an obligation upon Respondent independently of its consent, but I know of no principle of international law which would make such a result a possible one. That would destroy the very basis upon which the relationship between States works in international society—in international law.

The next important step in our reasoning, Mr. President, is the one which I have already foreshadowed, namely that in its wording and in its probable intent, when regard is had to the circumstances under which the mandate system was brought into existence, it seems quite clear that the obligation in its initial form related to a specific body, a particular organ

of a particular organization, and that the reporting and accounting had to be to its satisfaction.

This is so, Mr. President, in our submission, not only in a narrow or technical or formal sense. My learned friend, Mr. Moore, on behalf of the Applicants, suggested that the Respondent is incurring difficulties because of a narrow, formalistic approach. Our submission is that our approach is anything but narrow or formalistic, as far as this is concerned.

When we look at the wording of the particular obligation, in the places where we find it—the only places where we find it—in Article 22 and in the mandate instrument, we do not divorce it from its context, we read it in its context as part of the document of which it forms a part—part of the whole system of the concept of a mandatory on behalf of the League. We look at the wording. We do not prefer any particular meaning to any other particular meaning. It is not a matter of applying the rule that the natural construction of the natural meaning of the words in the context is to be preferred to any other meaning of which the words may be capable, because the mere application of that principle presupposes that the words are capable of more than one meaning. Here there is nothing of the kind. It is not a matter of preferring one meaning to another; it is giving effect to the *only* meaning which the words are capable of bearing. The words can only mean that particular body to whose satisfaction the report was to be made. It does not speak of international supervision in general. It does not speak of accountability to an organized international community or to a similar vague concept. It speaks only of this particular concept and there is no question of difficulty of interpretation—of preferring one meaning to another. As a matter of interpretation it can mean only one thing.

Then, Mr. President, as a matter of probable, practical intent, again it can mean only one thing. I am not going to deal with this aspect of the argument fully now—I shall elaborate it later in weighing our argument against that of the Applicants, but I do want to point out broadly that there were practical considerations in the League's system which pertained to the constitution and to the manner of functioning of the supervisory body, the Council of the League. And those considerations operated to protect a mandatory against the possibility of an abuse of the supervisory power or against the possibility of unfair interference with mandatory administration. There were very carefully devised checks and balances in the whole system so as to prevent abuse or to prevent unfair interference with mandatory administration.

The history shows, as we shall demonstrate later, that, in the negotiations which preceded the compromise agreement which went into Article 22 of the Covenant, very material weight was placed by certain of the Mandatories, including Respondent's representatives, upon the fact that the supervisory organ would consist of certain States, or representatives of certain particular States. The history of the negotiations shows, further, that marked weight was attached to the fact that, before there could be final consent on the part of the parties concerned—on the part of the mandatory States—to submit the particular territories in their possession to the mandatory system, they should know how this whole system—the whole League system—was going to work, and, therefore, there could not be any definite agreement upon that point until the whole League system and the manner of voting, the manner of functioning, was finally devised, all of which, in our submission, goes to show

and to emphasize that as a matter of practical importance, not as a matter of technicality, the obligation related to particular supervisory machinery and to none other.

Consequently, our submission is that consent on the Mandatory's part to supervision by that particular body cannot imply any consent on its part to supervision by any other international body. Supervision by any other international body would bring about an obligation of a different content to the one originally consented to by the mandatory power, and inasmuch as that would then be in essence and in substance a different obligation, therefore, a fresh consent on the Mandatory's part would be required in order to make it liable to such an obligation.

It is against this background that one has to view the events of the years 1945 and 1946—the end of the Second World War—and what further emerged therefrom. The United Nations, in our submission, and it seems to be entirely common cause, was not in any sense a general successor in law to the League of Nations or a continuation of the League of Nations. In fact there were political reasons, stressed by some of the leading founders of the United Nations Organization, why they preferred not to have any notion of a general successorship or of the United Nations being merely a continuation of the League of Nations. It was a distinct international society.

To a large extent there was overlapping as far as membership was concerned, the same States being Members of the United Nations and of the League of Nations at the time of its dissolution, but that was so only to some extent—it was not completely so. There were a number of States which were founder Members of the United Nations and were not at the time Members of the League of Nations. Conversely, there were a number of States that were still Members of the League of Nations at the time of its dissolution which did not become founder Members of the United Nations.

In the Charter of the United Nations no provision was made for supervision by any United Nations organs in respect of mandatory administration—administration under a mandate. The United Nations Charter, as the Court is aware, created its own system of trusteeships, but in order that any territory, whether mandated territory or any other territory, be brought into it, that would require new agreement—voluntary submission—by the State in control of the particular territory to place it under the trusteeship system of the United Nations. That appears to be common cause and that is also what the Court found in its 1950 Opinion.

In providing for supervisory organs for the purposes of this trusteeship system, the United Nations Charter created organs which would function in a materially different way from the supervisory organs in the League's system relating to mandates. The unanimity principle which applied in the Council of the League, whereby decisions could only be taken by unanimous vote, would not apply in the United Nations' organs. The principle which applied to the constitution of the Permanent Mandates Commission, that it was to be a commission of independent experts and not a political body, did not apply in respect of the Trusteeship Council.

These differences, Mr. President, in our submission, affected the very features which made the League supervisory system, as a system, more attractive and acceptable to Mandatories, and which ostensibly influenced them in agreeing to place themselves under the supervision of organs so

constituted and functioning in that particular manner. This emphasizes, then, the difference between what supervision by the United Nations organs would be as compared with supervision by the League organs, and again emphasizes that the distinction is not a technical one but one of great practical significance. Therefore, it becomes clear that the consent of the Mandatory to submit to supervision by the League organs in itself could not bind it to an obligation to submit to supervision and accountability to the United Nations organs.

In order to achieve that result, in order to achieve a substitution of supervisory organs for the purposes of this obligation of accountability, there would have to be new agreement, new consent, on the Mandatory's part.

Our next proposition is, Mr. President, that the events of the years 1945, 1946 and thereafter make it perfectly plain that no such consent to a substitution of supervisory organs was ever given by Respondent. In particular we submit—I am just putting the submissions broadly now—that Respondent's agreement to the United Nations Charter involved no such consent. I have made that point already.

Secondly, we submit that analysis of the events during the establishment of the United Nations and the dissolution of the League shows clearly a general understanding between the States concerned. The understanding was to the effect that outside of a trusteeship agreement or other special arrangement between a mandatory power and the United Nations, no Mandatory would be obliged to report and account to the United Nations regarding compliance with its mandate obligations. We submit that that general understanding emerges very clearly.

We submit further that the understanding is further confirmed by attitudes expressed shortly after 1945-1946, and in particular during the years 1947, 1948 and 1949, by United Nations Members in debates and proceedings of the United Nations. We submit that the analysis further shows that Respondent itself in fact never agreed, either expressly or by implication, either to a trusteeship agreement or to any other special arrangement involving accountability under the mandate to the United Nations; and, Mr. President, very important because it bears on the same point, that Respondent was never understood by other interested States to have agreed to such accountability.

That brings us to the 1950 majority opinion in this respect. Our submission in that regard is that, as presented to the Court already in the earlier phase of the proceedings and as we present it again, that opinion was on a clear interpretation based upon a finding of a tacit agreement in 1945-1946 between all the interested States concerned—the Members of the League at the time of its dissolution, the founder Members of the United Nations—all the interested parties, including Respondent—whereby Respondent was bound to report and account to the United Nations.

The analysis makes it clear that that was the view the Court took of the situation; that although there was no express agreement at that time, the conduct of the various interested parties showed a general understanding —a tacit agreement or arrangement on this point—that is, that there was to be a substitution of supervisory organ, or a transfer of powers, rendering the Respondent now bound to United Nations supervision.

Our submission is, Mr. President, that when regard is had to certain vital facts concerning events in that period, 1945-1946, and shortly

thereafter—facts which were not presented to the Court in 1950 and which therefore could not have been taken into account by the Court in arriving at its conclusion—if those facts are taken into consideration then, in our respectful submission, that conclusion of the majority could not have been arrived at in 1950.

These new facts are very important because they deal directly with the question of the intent of the interested parties during 1945 and 1946—the basis on which the Court came to the conclusion of a tacit agreement or understanding. They concern, firstly, the fact that, during the proceedings for the bringing into operation of the United Nations organs, there was an express proposal to create United Nations machinery for supervision of mandates not converted into trusteeships, and that express proposal was rejected and nothing was substituted for it. The significance of this point, in our submission, emerges from this: in various other respects, arrangements were made at that time in the United Nations for special steps to be taken in order to transfer some assets, some functions, some powers, from the League of Nations to the United Nations, but this particular subject, the powers of the League of Nations in respect of mandates, the obligations of the mandatory powers to report and account, was specifically raised as a proposition for possible special arrangements—for the possible creation of special machinery. It was raised and it was turned down and nothing was substituted in its place. That is, in itself, very significant as being indicative of what the intentions were on the part of the United Nations founders.

On the other hand, as far as the intentions on the part of the Members of the League were concerned, we find the very significant Chinese proposal at the Final Session of the League Assembly: that was a proposal that there was to be express provision for the League's supervisory functions regarding mandates to be transferred to the United Nations and for Mandatories to be obliged to report and account to the United Nations, outside of trusteeship. The facts that we now present to the Court, which we have presented in the proceedings already, which are now before the Court, but were not before the Court in 1950, show that there was this proposal and that it had to be abandoned because of opposition thereto. Again the significance is self-evident and need not be stressed.

Finally, we brought overwhelming evidence, not before the Court in 1950, of proceedings in the United Nations during the years 1947-1949, overwhelming proof, Mr. President, of a general understanding that there was no obligation on a Mandatory to report and account to the United Nations, outside of trusteeship. Those are the facts—some of the facts. They are not to be seen in isolation; they are to be seen in the total framework of the events of the time and I shall deal with them in that context in more detail later. But those are the significant new facts, which bear so pertinently and so directly upon the question which the Court decided and which it decided, in our submission, to the effect that there was a general understanding of the opposite nature, namely that there was to be a transfer of functions from the League to the United Nations in this respect: that there was to be an obligation on the Mandatories to report and account to the United Nations, even outside of trusteeship.

So, Mr. President, to summarize our attitude, our contentions are, firstly, that the original obligation was related to specific supervisory

machinery only. That being so, an agreement would be required in order to render the Mandatory bound in respect of new supervisory machinery but there was never any agreement, involving consent on the part of the Mandatory, for substitution of any other supervisory machinery. That plainly and basically is our case. It has always been our case in regard to accountability. We have never wavered from that. That is the way in which we have put it throughout these proceedings.

We now turn, Mr. President, to a consideration of the Applicants' case in that regard, as it has emerged through these proceedings. We start with the Applications filed by the Applicants, even before the filing of the Memorials. There it is quite clear that the Applicants pinned their faith entirely on the 1950 majority opinion of this Court, without presenting any argument in support of it. They simply said, in paragraph 5, at page 12 **(I)**, of the Applications:

> "the Union has violated, and continues to violate Article 6 of the Mandate, by its failure to render to the General Assembly of the United Nations annual reports . . .".

In a later passage the Applicants, when attempting to establish the existence of a dispute between the Parties, amplified their attitude as follows:

> "Ethiopia [or Liberia] has contended . . . that, as established by the Advisory Opinion of July 11, 1950, the supervisory functions over the Mandate are to be exercised by the United Nations . . ." (Applications, p. 14 **(I)**, para. 9A (1).)

That then is the position as far as the Applications are concerned. We now turn to the Memorials.

There, Mr. President, for the purposes of both their Submissions numbers 1 and 2—that the Mandate is in force and that the United Nations has supervisory authority—Applicants relied solely upon the Court's Advisory Opinion of 1950, which they asked this Court to reaffirm and they devoted pages 95 to 103 of their Memorials **(I)** to an argument as to why there is to be reaffirmation by the Court of a conclusion arrived at in an advisory opinion and to the general principle of that proposition of reaffirmation, without any argument on the merits of the question, relative to Article 6 of the Mandate.

So there we find no argument at all in support of the reasoning of the Court in its Advisory Opinion and no additional arguments for reaching the same result.

Then, Mr. President, came our preliminary objection, in which we found it necessary, in view of the form which the matter then took, to raise the whole question of the possibility of succession, or otherwise, by the United Nations to the League's supervisory functions. We there stated our attitude, broadly as I have just indicated it. We stated this attitude particularly in regard to the opinion of the Court which was founded, as we submitted, on tacit agreement, and that there were these new facts which cast an entirely new light on that factual question and which, if known to the Court, would, in all probability, have very materially affected its conclusion. That we stated in the Preliminary Objections at page 346 **(I)**.

Now the Applicants reacted to this and their first reaction we find in their Observations on the Preliminary Objections. There they stated what their interpretation was of the Court's Opinion in 1950 regarding

the continued operation of the provisions of Article 6 of the Mandate, and this is what they said (I am reading from the Observations, p. 429 (I)):

> "There *is* a certain interconnection between Articles 6 and 7, but it is not one which Respondent will wish to recognize.
>
> Both the Majority and the Minority in the 1950 Advisory Opinion held that the Mandate instrument did not lapse with the dissolution of the League ... Having achieved this common understanding, the Majority and Minority then divided on one question: succession of the United Nations to the League's supervision of the Mandate. The Majority found that there had been an automatic succession; the Minority did not agree. Although the Minority held that the instrument of Mandate continues in existence, in declining to employ the doctrine of succession, Judges McNair and Read held that Article 6 could not be enforced only for the mechanical reason that there is no Council of the League to which Respondent could report. Both Majority and Minority held, however, that Article 7 is in force. In this connection, Judges McNair and Read found no mechanical problem since Members of the League at the time of its dissolution clearly continue in existence.
>
> The interconnection, then, between Articles 6 and 7, is this: according to the Majority view of Article 6, Applicants have standing to invoke Article 7 by virtue of membership in the United Nations; according to the Minority view of Article 6, Applicants have standing by virtue of membership in the League at the time of the League's dissolution."

I draw attention to the expression "automatic succession". My learned friend, in these proceedings, if I understood him correctly, seemed to apologize for the use of that expression, particularly as far as the word automatic is concerned and he said it might be better to speak of the substitution of supervisory organs.

Mr. President, it is not quite as easy as that. It is not only a question of terminology; it is a question of notion. The two notions—the two concepts—are entirely different. In the passage which I have just read, the concept was quite clearly that of a devolution, of a transfer of powers, from the League organization to the United Nations Organization and, hand in hand with that, a transfer of competence to invoke the Court's jurisdiction from League Members to United Nations Members. That argument could not work without being seen in that light, as being a transfer of powers, of competence, of rights. That is the concept which the Applicants were advancing at that particular stage. As regards the word "automatic", my learned friend has made it clear now, that he did not have in mind in the use of that word, any concept of a general principle of international law, falling outside of consent or treaty obligation, or outside of ordinary principles of treaty interpretation: that much is now clear. Mr. President, on analysis of the attitude stated in the Preliminary Objections proceedings, in the Observations and afterwards in the oral argument, the word "automatic" had another significance. It had this significance, that there was no need for an agreement during the period 1945-1946, in order to bring about a substitution of supervisory organs, or a transfer of supervisory powers. The word "automatic" in the context quite clearly was intended to indicate that the institution—the obligation as originally agreed to by the Mandatory Power—had, in

itself, elements which brought about this substitution—this succession, this devolution of powers—when the events of 1945 and 1946 occurred. That is clear from various expressions used by Applicants, particularly in elaborating what they meant by this concept of automatic succession and in interpreting the majority opinion of 1950 as having rested upon such a notion of automatic succession.

I would like to refer the Court first of all to the Observations **(I)** themselves at page 481, where after reference to various authorities, various decided cases in which a broad interpretation, in the Applicants' submission, was given to instruments involving humanitarian objectives and high ideals, they made the submission that—

> "The implementing provisions of such agreements, being of such paramount importance, should, therefore, be interpreted liberally, in the spirit of the whole agreement."

They proceeded:

> "This mode of interpretation has already been accepted by the Court in interpreting Article 6 of the Mandate. [The reference is to the 1950 Opinion.] In the Advisory Opinion the Court concluded that Respondent is required to submit to the supervision of the General Assembly of the United Nations and render annual reports thereto. In reaching its conclusion, the Court interpreted Article 6 of the Mandate so as to accomplish its purposes. The Court thus established the effectiveness of one of the implements for the enforcement of this 'sacred trust of civilization'."

That is very convenient and very broad language, Mr. President, glossing over a host of difficulties. It says that merely by a process of interpretation—not saying how exactly it worked, how the conclusion was justified—by a process of broad, liberal interpretation of this initial instrument, of this initial obligation on the part of the mandatory power, provision was made for an automatic succession which then resulted in the obligation eventually being an obligation to report and account to United Nations organs.

There are further passages in the Observations which make this clear. At page 430 of the Observations **(I)** there is a reference to the Court's finding that Respondent has the duty to report and account to the United Nations, and I quote what the Applicants there said about it:

> ". . . when it did so [that is, the Court], it did no more than apply the principle of giving effect to a basic international instrument which has as its purpose more than mere contractual relations between two entities, but which creates an international institution —a sacred trust. The Court employed the same type of legal reasoning that a municipal court would employ if it were faced by the contention of a trustee or *tuteur* that his duty to account had 'lapsed'."

Mr. President, I emphasize that if one reads the whole of the argument as then presented, the whole purpose was clearly to avoid the necessity of facing up to the proposition of establishing an agreement in 1945 or in 1946 in order to bind the Respondent to United Nations supervision. That was the whole purpose of this type of reasoning; everything is to come under the interpretation to be put upon the initial instrument, and no reliance whatsoever need then be placed on the events of 1945 and

1946 as creating a new obligation. This becomes clearer as we go along. The Applicants interpreted the Court's Opinion of 1950, the majority opinion, relative to the events of 1945 and 1946, as being merely confirmatory of the interpretation which it gave to the basic instrument. We find this in the following passages of the Observations **(I)**, page 430:

> "The Court furthermore found, for purposes of confirmation, that the League of Nations relied on declarations of Mandatories, including Respondent, that they would continue to honour their obligations as mandatories; and that neither the League nor the United Nations intended the obligations of mandatories to disappear without their being replaced by new obligations under trusteeship agreements."

This argument about a succession or a devolution relative to the power of the Organization to supervise mandates under Article 6, was then transferred in the Observations to an argument relative to Article 7, the compromissory clause, suggesting then also that the competence of League of Nations Members to invoke the jurisdiction of this Court passed to the United Nations Members and became vested in them. We find in the Observations **(I)** at pages 442 to 443 this passage:

> "The Mandate is a creature of the organized international community, as well as the subject of a legal interest of such community and its Members. Its existence today rests upon the continued vitality of the authority conferred upon Respondent by the organized international community and by the continued vitality of the rights of such community and its Members to ensure that the Mandate is properly administered. The only question is, which representative of the organized international community does one look to, the League of Nations or the United Nations, the organ in existence when the Mandate was conferred or the organ now in existence? The Majority Opinion [in 1950] applied the doctrine of succession and looked to the United Nations. Judges McNair and Read declined to apply the doctrine and looked to the League."

Later in the Observations, at page 445, we find much to the same effect the following:

> "The Court [in 1950], in determining that the International Court of Justice has replaced the Permanent Court and that the United Nations has replaced the League of Nations for purposes of the Mandate, similarly applied the principle of succession, explicit in one case and implicit in the other, in order to give effect to the purposes of the Mandate."

So, Mr. President, it becomes perfectly clear from this analysis of the Observations—and I shall pass on from here to the oral argument in the 1962 proceedings just to determine the analysis of the Observations in this respect—that the Applicants, although not very clearly saying where they found their legal basis for this succession or devolution, make it perfectly clear that they had something in mind which operated independently, automatically; there was no need for a new consent in 1945 or 1946, no need on the Applicants' part to establish a new agreement; it was something which could be said to have resulted automatically from what was agreed to—from what went into the initial instrument in 1920.

I may point out also that in this part of its case, in the Observations,

the Applicants stated that in support of its reasoning the Court in 1950 referred to the purpose of Article 80, paragraph 1, of the Charter—that is in the Observations **(I)**, pages 444-445. I do not intend to refer now to the arguments concerning Article 80, paragraph 1; I am merely pointing out in passing that that was referred to by the Applicants in their Observations, and relied upon by them as being a factor which influenced the Court in 1950.

Now, Mr. President, looking at the Oral Proceedings on the Preliminary Objections, there we find the significant attitude on the Applicants' part in keeping with what I have just been trying to explain to the Court. We presented our argument first, as the Court will recall, and we presented full reasoning regarding Article 6 and—for the reasons which we then indicated—why we considered that that might be relevant for the purposes of deciding on the Preliminary Objections. We also repeated our contention about the manner in which the Court's Opinion of 1950 was to be interpreted, and of the important bearing which the new facts could have had on the conclusion at which the Court had then arrived. One will find that argument in the Oral Proceedings on the Preliminary Objections **(VII)** at pages 91 and following. In the course of this argument we also dealt, Mr. President, with the apparent significance which the Court attached—the majority of the Court attached—in 1950 to Article 80, paragraph 1, of the Charter. We stated that in our submission the Court was not seeking in 1950 to apply the content of that Article to the problem before it—that the Court was seeing behind the Article a presupposition, a probability, a certain contemplation on the part of the authors of the Charter, and that it saw in that a factor which tended as a matter of probability towards establishing this tacit agreement which the Court found to be established; that was our interpretation, as we put it, on the Court's reference in 1950 to Article 80, paragraph 1, of the Charter.

Now came the Applicants' reply in their Oral Proceedings. They started off by referring to the fact that the Court in 1950 relied on the "international rules regulating the Mandate", which "constituted an international status for the Territory"—those words were used in the Oral Proceedings **(VII)** at page 302 by the Applicants' learned Agent.

They then contended, Mr. President, that Respondent's subjection to the supervision of the Council of the League was "what the Court took as showing the essentially international character of the Mandate institution" **(VII,** p. 302). And they proceeded to say (at p. 303):

> "Going on from its finding that the international rules regarding both substantive rights and accountability, and again I quote, 'constituted an international status for the Territory', the Court said (at page 133 [of the Opinion]) and, I think, reached an inescapable conclusion by saying so, with respect:
>
> 'If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed'."

The Court will notice: still argumentation to the effect that this result contended for relative to Article 6 was something to be found in the international rules regarding this basic institution.

The argument proceeded. It referred to the Court's statement that "to retain the rights derived from the Mandate and to deny its obligations would not be justified", and the Applicants then contended that the Court in its Opinion—

"laid down as the law of the case that the machinery for implementation [that is, supervision], together with the substantive rights and obligations, survived the dissolution of the League". (**VII**, p. 303.)

Mr. President, this is the important point, that nowhere in the Oral Proceedings on the Preliminary Objections did Applicants attempt to justify the Court's finding, as interpreted by them, which according to their written Observations was based upon a so-called "doctrine" or "principle" of succession. The Applicants advanced no independent argument of their own in support of this so-called doctrine. They simply relied on the finding of the Court—the Opinion of the Court—which they interpreted as involving such a principle or doctrine, and they quite frankly, although rather surprisingly, in their Reply, stated as follows during the Oral Proceedings:

"But, Mr. President, it is not the Applicants who 'rely on' United Nations succession. The Court itself decided that issue in the Advisory Opinion of 1950. We draw the necessary inference from the Court's Opinion. We do not bear the burden of sustaining the validity of the Opinion of the International Court of Justice." (**VII**, p. 319.)

There we have it, the whole argument and reliance upon the Court's Opinion in 1950, the majority opinion, and an interpretation of that Opinion as being based, not upon an agreement in 1945 or 1946, but upon a special kind of interpretation of the basic international instrument.

Then, Mr. President, in addition to this argument regarding what they call the "law of the case" as laid down in the Court's Opinion, the Applicants addressed a very lengthy argument to the Court regarding the significance of Article 80, paragraph 1, of the Charter.

This argument was introduced with a survey of the history of Article 80, paragraph 1.

It might be advisable to revert again to the wording of that Article:

"Except as may be agreed upon in the individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

The gist of the article is that "nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples . . .".

It is quite clear, Mr. President, that that was merely a savings clause, a clause aimed at assisting in the interpretation of a particular chapter of the Charter. Now, how did the Applicants rely on that clause in their argument in the Oral Proceedings in 1950? They dealt with the history of the article at length in their argument at pages 269-270 of the Oral Proceedings (**VII**), and they placed this interpretation on the Court's use of that article—on the way in which the Court utilized the article in its 1950 Opinion:

"The significance of the Court's reference to Article 80, paragraph 1, of the Charter clearly appears from the stress of phrases used by the Court, such as: 'under all circumstances' and 'in all respects', phrases

characterizing the Article's pervasive intention to safeguard the rights, all the rights, of the inhabitants of Mandated territories." (**VII**, p. 304.)

In other words, there is ascribed to the Court an interpretation and application of this Article, giving to it a positive significance, not a negative significance of preventing a certain type of interpretation of the Charter, but a positive significance and effect of maintaining and safeguarding rights. The argument proceeded at page 305 of the Oral Proceedings (**VII**):

"The Court's emphasis concerning Article 80, paragraph 1, its scope and force and meaning, is reinforced by the Court's subsequent references in the Opinion to that paragraph of Article 80, particularly in the light of the context in which the subsequent references appear."

The Applicants then dealt in detail with every reference which the Court made in the 1950 Opinion to Article 80, paragraph 1, and interpreted the Opinion as having attached the following weight to that paragraph:

"The Court obviously is thereby construing Article 80 (1) in a sense which safeguards, for the people of Mandated territories, the right to have the protection of international judicial supervision . . . the Court thereby attributes to Article 80 (1) the positive quality of 'maintaining' the right of the inhabitants to petition to an international agency . . .

These four successive references to Article 80 (1), each in a different though related context, and each based on the same interpretation of the clause, have accumulative significance in our judgment. They demonstrate, it seems to us, that the Court was defining Article 80 (1) so as to give a full scope and an enduring vitality to the 'international functions' which had been entrusted to the Respondent, to the 'new international institution' which had been created by Article 22 of the Covenant and the Mandate and to the 'international status for the territory', which had been created by the 'international rules regulating the Mandate'." (**VII**, p. 307.)

Again, Mr. President, this whole argument regarding Article 80, paragraph 1, is brought into line with what I suggested before was the Applicants' sole argument—that argument being to interpret the 1950 Opinion as resting purely upon an interpretation of the original instrument and its application to the circumstances of change which came about in 1945 and 1946, without any necessity to find any fresh consent or any fresh agreement during that period of transition.

Now, Mr. President, we come to the Judgment on the Preliminary Objections and the various separate opinions and the further proceedings. I do not wish to deal in any detail at this stage with the 1962 Judgment, or with the separate opinions on the Preliminary Objections, but I merely want to point out this, Mr. President, that it seems fairly evident that not a single Member of this Court was in 1962 prepared to accept the Applicants' contention regarding a transfer or succession of rights—rights passing from the League organization to the United Nations Organization, and consequently from League Members to United Nations Members. That was the one basis, the Court will recall, and the main

basis—the first one relied upon by the Applicants—why they contended that Article 7 of the Mandate was still in force. They contended that "Members of the League", the expression used in Article 7, now had to be read as being "Members of the United Nations", because of this principle of succession—this automatic succession which had operated. But, although the majority of the Court—eight Members of the Court—rejected our contentions in regard to the Preliminary Objections, rejected our Preliminary Objections, and found that there was competence on the part of the Applicant States to institute the proceedings notwithstanding the dissolution of the League, not a single Member of the Court founded their judgment or their opinion on the basis of this succession argument. The basis was the alternative propounded by the Applicants at the time, namely that the competence remained vested, despite dissolution of the League, in the States that were Members of the League at the time of dissolution. No finding was therefore made on the basis of this suggested succession or devolution, by the Members of the Court who found in favour of the Applicants.

This matter is dealt with, Mr. President, in our Counter-Memorial, Book II **(II)**, pages 152-163.

Further, Mr. President, we point out that not one of the honourable judges in 1962 placed any reliance for the purposes of their opinions and judgment on the provisions of Article 80 of the Charter of the United Nations. In fact, Mr. President, Judge Basdevant in his separate opinion mentioned "the silence preserved in the reasoning of the Judgment with regard to the Applicants' reference to Article 80, paragraph 1, of the Charter". (*I.C.J. Reports 1962*, p. 459.)

We dealt with this matter also in our Counter-Memorial, Book II **(II)**, at page 128.

That is the only comment which I wish to make for the moment on the 1962 Judgment and opinions in this respect.

Then, Mr. President, in order of sequence came our Counter-Memorial in which we again set out our argument regarding Article 6—the argument basically the same as propounded before, basically the same as we are putting to the Court now. And we pointed out further this consequence in so far as the reaction of the judges in the 1962 decisions were concerned, regarding this contention of succession advanced by the Applicants.

And the Applicants deal with this new situation in their Reply—the Reply to the Counter-Memorial; there, we find, Mr. President, that they no longer used these expressions "automatic succession", "doctrine of succession", or "principle of succession", as they did in their earlier pleadings. That is not surprising, in the light of the purport of the Court's Judgment and opinions to which I have just referred. I may add that we also pointed out in regard to the Judgment and opinions in 1962 that certain Members of the Court positively found that there was no justification whatsoever for this contention relative to automatic succession or any devolution of powers from the League to the United Nations. Certain Members of the Court positively found it, and the other Members remained silent; not a single Member found in favour of it. This is the situation now which we find has to be dealt with in the further pleadings presented to the Court. And now we find that the Applicants do not use those expressions of "automatic succession", or "doctrine of succession", or "principle of succession", any more, as they did before. They now

put the matter in a somewhat different way. They say in their Reply that Respondent's obligation to report and account in terms of Article 6 was owed to the organized international community. From that point of view they argue further that during the existence of the League, the League was the organized international community, or was to be regarded as the representative of the organized international community, and that it was in that capacity that the League, and the League organs, performed supervisory functions with respect to mandates.

The argument is then rounded off by the contention which I quote from page 539 of the Reply **(IV)**:

> "The United Nations has replaced the League of Nations as such 'organized international community,' and Respondent's obligation of international accountability, accordingly, is owed to the United Nations in that capacity."

Mr. President, we then in our Rejoinder dealt with this argument. We dealt with it by indicating in the first place that, on analysis, the Applicants' case as it was now presented in the Reply in effect rested on an implication that had to be read into the mandate instruments. That one finds in the Rejoinder, **(V)**, pages 41-42. Our contention was that the express language of the mandate instruments talks about "specific supervisory organs". Here we are told that another effect is to be given to those provisions; they are to be read as if they referred not to those specific organs but as if they referred to organs in a certain capacity, as representing an organized international community—something of course which the article does not say—something which its language is not capable of meaning—and therefore it has to rest on an implication to be read into that Article.

We pointed out further, Mr. President, that as a matter of interpretation, having regard to all the surrounding circumstances, and as a matter of implication, the mandate instruments were not capable of any such construction; that there was no justification for interpreting the mandate instrument to that effect, nor for implying such a provision in the mandate instrument. In passing, I would point out that, although the name "automatic succession", or "doctrine of succession", or "principle of succession", was no longer applied to this argument, on analysis it really amounted to the same approach as before, in the particular sense that it was still an attempt at avoiding the challenge of establishing an agreement in the years 1945 and 1946. Again the approach was to find something in the original agreement—the original instrument as determined in 1920—which would of itself automatically cope with the situation which arose in 1945 and 1946. This is still the essence of the argument *which we find in the Reply*.

We pointed out, Mr. President, that that construction was not justified either as a matter of interpretation or as a matter of implication of any provisions not expressed in the terms of the original instrument. In addition, Mr. President, we pointed out that even if, as we disputed, the Applicants were correct in saying that the authors of the mandate intended to create an obligation of international accountability, or one to submit to international supervision, as distinct from submitting to the supervision of particular organs—even if they were correct in saying that the League organs were specified merely as the means for giving effect to such obligation—then that premise would still not lead them

to their desired conclusion of arriving at the substitution of supervisory organs in 1945 and 1946 without new agreement.

We contended that even on that premise which the Applicants put for themselves, the result in 1945 and 1946 would have been that with the dissolution of the League, the supervisory organs indicated for giving effect to the general obligation, would have fallen away. The obligation might possibly have survived on that premise. I do not concede that it did because I submit the premise is wrong. But I say following on that premise the obligation to submit to international supervision, or international accountability, might have survived, but then it would have become dormant in the absence of a new agreement for a substitution of a particular new supervisory organ.

In support of this contention we referred to the recent decision of this Court in the *Barcelona Traction* case. We did so in our Rejoinder, **(V)**, at pages 42-43.

We pointed out also in our Rejoinder, Mr. President, that the Applicants did not in their Reply contend that the events of 1945-1946 created any new basis for the succession or substitution of supervisory organs in respect of mandates.

In their Reply they merely relied on such events as:

> ". . . manifest[ing] the clear intention of all concerned to preserve and assure proper discharge by the organized international community with respect to its responsibilities toward the inhabitants of mandated territories". (**IV**, p. 539.)

They referred then to the events of 1945-1946 not as constituting a new agreement, but as being consistent with and confirmatory of this interpretation sought to be placed upon the initial mandate instrument. We deal with this point in the Rejoinder, **(V)**, pp. 53-54.

We also pointed out that in the Reply the Applicants did not refer at all to Article 80, paragraph 1, of the Charter. (Rejoinder, **(V)**, p. 35, footnote 5.)

That is how the matter then stood at the end of the written pleading. We found all along different names given to a concept and all along the attempt is to find something automatic in the original arrangement which would avoid the necessity for the Applicants to establish a new consent or a new agreement in 1945-1946.

How do we stand now, Mr. President, on the presentation of the Applicants' case regarding Article 6 in the Oral Proceedings—in the argument to which we listened last week and the week before.

Again, I am afraid, we have not complete clarity and precision in the formulation. On the one hand we are told, as I have pointed out before, that Applicants do not seek to show a general principle of international law as governing the mandate, other than general and applicable principles of treaty interpretation. That we find in the verbatim record at page 126, *supra*.

That looks quite promising because now it seems we have a straightforward case of interpreting what the basic instruments say, and possibly seeing whether there was any fresh agreement which could be regarded as an amendment of the original agreements in so far as that might be necessary.

Unfortunately, Mr. President, we find later on other elements which disturb this apparent clarity. First of all, we find affirmation of the fact

that no general principle of international law is relied upon in the verbatim record at page 132, *supra*. There my learned friend stated:

> "With respect to the international rules regulating the Mandate, the Applicants have never conceived, nor do they do so now, that the United Nations acquired title to the League's supervisory power over Mandates by virtue of some general international legal principle of devolution or succession, *aliunde* the Mandate."

Again they made it clear that there was no reliance on something outside the Mandate itself. The Applicants then expressed regret for having used the expression "automatic succession" in their written observations on the preliminary objections, in which, as we have already indicated, they also used the expressions "doctrine of succession" and "principle of succession".

As I have made clear, that does explain away any suggestion that they might have intended to rely on something outside of the Mandate. It does not explain away the fact, Mr. President, that they did, on the basis of interpretation of the Mandate, rely on a principle of succession which was to operate automatically: something coming out of the Mandate and having that effect.

Now, Mr. President, another respect in which they have now sought to eliminate misunderstanding as to the case which they make, relates to the relevance and significance of Article 80, paragraph 1, of the Charter.

The Applicants now express regret for the "incompleteness of presentation of this question during the preliminary objections phase of these cases" (p. 223, *supra*). It is a rather strange reference to the incompleteness of presentation during the Oral Proceedings, because I should have thought that nothing could have been more complete than their repeated reference in those proceedings to the significance of Article 80, paragraph 1—the significance which, in the Applicants' submission, was attached to it by the Court. But the Applicants now say they did not intend to intimate a view inconsistent with that which was expressed by the honourable President and Sir Gerald Fitzmaurice in their joint dissenting opinion when they said that "the sole purpose of the Article was to prevent any provision of Chapter XII of the Charter being construed so as to alter existing rights prior to a certain event". In other words, the Applicants indicate that with that view of the interpretation of the Article, they are in agreement and they do not advance any contention putting the matter higher than that (p. 223, *supra*).

The Applicants then say further on the same page:

> "Without venturing to interpret the meaning intended to be attributed to the Article in the Advisory Opinion of 1950, the Applicants respectfully submit that the inclusion of Article 80, paragraph 1, in the Charter serves to confirm the understanding of the authors of the Charter that certain rights, including those under mandates, did continue to exist, notwithstanding the dissolution of the League. The Article, in the Applicants' view, did not establish, constitute or maintain these or any other rights." (P. 223, *supra*.)

In other words, they do not rely on any positive effect on the part of Article 80, paragraph 1—the type of submission which they made to the Court in 1962 during the Oral Proceedings.

[Public hearing of 31 March 1965]

Mr. President and honourable Members, before I take the argument further from where we left off yesterday, may I be allowed to gather the thread somewhat as to what it is all about, otherwise you may lose me or I may lose myself. I was dealing yesterday afternoon with the rival contentions of the Parties regarding the continued existence or otherwise of the obligation of accountability under Article 6 of the Mandate. I referred in broad outline to what the attitude of the Respondent is in that regard—what it has always been throughout these proceedings.

Summarizing, in the end it amounts to this, that the Respondent says it was an obligation from the start to submit to the supervision of a specific supervising authority and no other. Respondent says further that when that supervising authority disappeared it was consequently necessary to enter into a new agreement—to have new consent on the part of the Respondent—in order to convert that obligation into a new obligation to account to a new supervising authority.

Respondent says further that such an agreement was never entered into, that such consent was never given by the Respondent.

I then dealt with the Applicants' case in the way in which it has emerged through the earlier stages of these proceedings until today. I indicated that initially the Applicants relied absolutely on the 1950 Advisory Opinion of this Court—the majority opinion of 12 to 2 relative to this question. The Applicants offered no argument in support of the Opinion or independent arguments supporting the conclusion arrived at. That was in the first stages of the proceedings.

Then came the Preliminary Objections in which we offered our argument, and on the basis of that argument we dealt with the 1950 Opinion. We placed an interpretation upon it to the effect that that Opinion was based on a tacit agreement arrived at in the years 1945-1946, and we placed further information before the Court which it did not have in 1950. This indicated, in our submission, that that conclusion could not stand because the information was directly relevant to the question of intentions during the years 1945-1946.

The Applicants had to react thereto, which they did in their Observations and in their oral argument on the Preliminary Objections. At that stage the attitude indicated by them was this. They placed an interpretation on the Opinion and they still rested purely on the Opinion, but on the basis of the interpretation placed by them on that Opinion. They indicated that the Opinion rested not, as we said, on a finding of a tacit agreement during the years 1945-1946, but on some construction to be placed on the original mandate instrument, or an implication to be read into it, to the effect that there would be provision automatically for succession relative to a supervisory authority in the event of dissolution of the League. That was the nature of the theory of succession, or doctrine of succession, relied upon by the Applicants in the Preliminary Objections proceedings, and they contended that that was the way in which the Opinion of 1950 had to be interpreted, so that there was no need at all for an agreement during the years 1945-1946. The transition —the succession—was provided for in something which had to be found in the original instrument itself. What happened in 1945-1946 was merely to be looked at as confirmatory—as being consistent with that interpretation placed upon the initial instrument.

On that basis, then, the Applicants attempted to exclude the relevance or significance of the further facts placed before the Court, which they call the new facts.

The Applicants further contended, Mr. President, that the Court in 1950 placed particular reliance on Article 80, paragraph 1, of the Charter of the United Nations. They contended, on the basis of the language used by the Court, that the Court gave to that Article a positive meaning and significance, viz. as having the effect of maintaining rights and obligations in respect of mandates even after the dissolution of the League. And they indicated that that was a very important part of the reasoning of the Court, leading it to its conclusion of a succession both in regard to the issues on Article 6 of the Mandate, pertaining to administrative supervision, and on the issues which were then before the Court relative to Article 7 of the Mandate, on the question of compulsory jurisdiction or the competence of another State to bring an action under the Mandate before this Court.

I was dealing at the adjournment yesterday with the attitude now taken by the Applicants after further development through the pleading stages—the attitude now taken by the Applicants on these various matters—and I was dealing in particular with their present attitude regarding Article 80, paragraph 1, of the Charter. That is where I wish to resume now.

I read to the Court immediately before the adjournment a passage from the oral argument now presented by my learned friend which concluded that the Article, in Applicants' view, did not establish, constitute or maintain these or any other rights.

Mr. President, there is a further passage which explicitly shows the Applicants' present attitude in that regard. It is to be found in the verbatim record at page 227, *supra*. It may be repeated, Mr. President, with respect, that the Applicants do not contend that any positive legal consequence was brought about by Article 80, paragraph 1. The language of the Court quoted from the 1950 Opinion might, with respect, imply a different view. In the Applicants' view, the Article simply confirmed the understanding of the authors of the Charter that there were rights. These rights included those under mandate. Those rights continued, despite the dissolution of the League, until other arrangements would be agreed to with the United Nations, and the Article being a savings clause it was intended to make clear that none of those rights could be amended, superseded or erased by a possible misconstruction of Chapter XII of the Charter.

Mr. President, we submit that this is a very significant change of attitude on the part of the Applicants. It is significant and strange, particularly when regard is had to their previous attitude in the proceedings on the Preliminary Objections to which I have referred: the absolute reliance which they placed on the 1950 Opinion, the fact that they asked this Court without more ado to reaffirm that Opinion, and their contention that the Court placed such particular significance in its reasoning on this Article in order to come to its conclusion about continued existence of the obligation of accountability and to link it to United Nations supervision.

In their Memorials, for instance, Mr. President, if I may recall, the Applicants said this in regard to Article 80—that is on the question of jurisdiction under Article 7 (as I have said, the attitude on the two

questions of Article 7 and Article 6 at the Preliminary Objections stage went hand in hand):

> "The Applicant founds the jurisdiction of the Court on Article 7 of the Mandate and Article 37 of the Statute of the International Court of Justice, having regard to Article 80, paragraph 1, of the United Nations Charter." (Memorials, **I**, p. 88.)

The Applicants quoted the text of the Article in the Memorials. They cited from the 1950 Opinion on the question of Article 7 of the Mandate, where the Court in the majority opinion also referred to Article 80, paragraph 1, and they asked the Court to reaffirm its ruling in regard to Article 7, including this reference to Article 80, paragraph 1.

In the Memorials **(I)** at page 89 the words they used were that they asked the Court to "reaffirm its aforesaid ruling and . . . hold that the said ruling sets forth the law of this case". The Court in that ruling had said:

> "Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that this clause in the Mandate is still in force." (*I.C.J. Reports 1950*, p. 138.)

The general attitude of the Applicants, as they stated it in the Oral Proceedings, is very well and concisely summarized in the following passage in the Oral Proceedings **(VII)** of 1962 at page 321.

[This is my learned friend, Mr. Gross, speaking.]

> "As I have pointed out, the Court, in its Opinion, has three times prior to this point cited Article 80, paragraph 1, as having been designed to conserve all rights of peoples of Mandated territories to international supervision and judicial protection."

I repeat, Mr. President, "as having been designed to conserve all rights of peoples of Mandated territories to international supervision and judicial protection".

Mr. President, we indicated yesterday in the quotations I gave to the Court that the Applicants dealt at length in those proceedings with Article 80. They stressed the positive quality of maintaining rights, which the Court assigned to the Article. They spoke of the significance of the Court's reliance on the Article; of the emphasis put on it by the Court; of the accumulative significance which the Court's repeated references to the Article bore—those references I gave the Court yesterday. Consequently, they played up the Court's reliance on this Article very highly—if I may put it that way. They attached a particular significance to that as an essential, or a highly important part, of the Court's ruling regarding both Articles 6 and 7—that ruling which they were asking the Court to reaffirm as the law of the case.

Now we find, Mr. President, we are told, firstly, that there was incompleteness of presentation of this question in 1962. Secondly, we are told that the Article has a very limited significance, to the effect that I have just read to the Court. Thirdly, we are told that the Court in 1950 apparently attached a higher value to the Article than the Applicants do now. Yet, Mr. President, they still ask the Court to reaffirm that Opinion of 1950 as the law of the case, despite the fact that this crucial role which they assigned to Article 80, in the reasoning of the Court, is no longer supported by them.

The question arises—"Why this change of attitude?" Our submission is that quite clearly it comes from this: the Applicants saw, as far as Article 80, paragraph 1, was concerned, a "writing on the wall" when the Judgment and the opinions on the Preliminary Objections were given in 1962. They saw, quite clearly, that nowhere in the majority opinions was any reliance placed at all—neither in the Judgment nor in the majority opinions—upon Article 80, paragraph 1; and that in the minority opinions—in passages containing, with respect, very cogent reasoning—it was indicated why no reliance in this regard could be placed upon Article 80, paragraph 1. Therefore, the Applicants had to find some way of getting away from this strong reliance which they had placed, through their interpretation of the Court's Opinion of 1950, on the effect of Article 80, paragraph 1, in this whole matter. They were faced with this dilemma: they either had to admit that their interpretation of the Court's Opinion in 1950 on this point was wrong, or they had to contend that the Court's reasoning on this point was wrong in 1950. They chose, apparently, the latter. They did not admit that their interpretation of the Court's Opinion was wrong. They suggested rather that there was incompleteness of presentation, on their part, on this question in 1962. They ended up by indicating that the language of the Court might, with respect, imply a different view.

In other words, Mr. President, they did not walk away from the Opinion; they crawled away from it. This is perhaps to be understood in view of the fact that they are still asking this Court to reaffirm that Opinion.

I shall deal later with the merits of the Applicants' present contention regarding Article 80, paragraph 1, and I shall submit to the Court that they still assign to it a meaning, or a value, which it cannot have—a meaning, or a value, regarding possible preservation of rights, or continued existence of rights, subsequent to the dissolution of the League. That is a question of merit—I shall come to that later.

At the moment I am merely concerned with indicating how the Applicants' case in this regard has changed, and the significance of the changed position in so far as the Applicants' reliance on the majority opinion of 1950 is concerned.

I revert now to the question of the substantive grounds, now indicated by the Applicants, for contending that Article 6 is still in force and that the obligation of accountability is now owed to United Nations organs.

The Applicants' contentions, Mr. President, are in my submission, still not clear, despite all that they have said in these Oral Proceedings. This is due mainly to the fact that, although the Applicants say that they rely on "general and applicable principles of treaty interpretation"—we find that in the verbatim record at page 126, *supra*—they still import into the argument matters which, strictly speaking, or shall I say, on the face of it, seem to fall outside the sphere of treaty interpretation, as if something from outside the Covenant of the League and from outside the mandate instruments themselves were being imported into the matter. They use expressions such as "international regulations [particular to and] governing the mandate institutions". That we find in the verbatim record at page 127, *supra*. They speak of "mandate law"—that is in the verbatim record at page 180, *supra*. They speak of "law of the mandates system" and "principles of objective mandate law"—that is in the verbatim record at page 207, *supra*. We find that my learned friend

speaks of the Mandate as a "novel . . . institution, endowed with essential attributes"—that is in the verbatim record at page 125, *supra*. He speaks of its "novel character as a new international institution"—that is in the verbatim record, at page 126, *supra*. He says "that the Mandate, although an agreement, also is an institution, which created and introduced new international regulations particular to itself"—that is in the verbatim record at page 126, *supra*—and he quotes the phrase "the international rules regulating the Mandate"—that is in the verbatim record at page 126, *supra*, and is a quote from the Court's Opinion of 1950.

Mr. President, all this, in my submission, is quite unobjectionable, provided we bear in mind that these mandate rules—these mandate regulations—did not come into existence mysteriously from nowhere, or at any rate from some source outside the Covenant or the mandate instruments. As long as we keep in mind that the only place where they are to be found, and where their extent and their meaning can be ascertained, is in the Covenant and in the mandate instruments made in pursuance of the Covenant, then there can be no objection to language of this kind.

Mr. President, that indeed is made very clear as being what this Court contemplated in 1950 when it used some of those expressions. If we refer to the 1950 Opinion at page 141 we find this passage:

> "The international status of the Territory results from the international rules regulating the rights, powers and obligations relating to the administration of the Territory and the supervision of that administration, as embodied in Article 22 of the Covenant and in the Mandate." (*I.C.J. Reports 1950*, p. 141.)

Mr. President, it stands to reason that this must be so. I know of no mysterious source of law outside the mandate instruments which could have brought into existence mandate regulations as a special status, as a special regime—with some special mystery attaching to it all—mandate regulations, which are not to be found in the instruments themselves but somewhere else, and the place where they are to be found is nowhere indicated by my learned friend.

If he indicates in his argument that he uses those expressions as something coming from the instruments and as merely being a figurative description of the provisions of those instruments and their legal effect, then I have no objection. It is not clear at all from his exposition that that is what he has in mind. At times, his language, in my submission, strongly suggests that he ascribes to such international regulations, or international rules, an origin and a legal force operating outside these instruments themselves.

I refer the Court, for instance, to the verbatim record at page 127, *supra*, where this passage occurs:

> "Interpretation of Article 6 of the Mandate, as is true of all its other provisions, is to be based upon both the international regulations governing the Mandate institutions, in the words of the Court, *and* the relevant principles of treaty interpretation, soundly applied in the light of the international rules thus regulating the Mandate."

In that passage, Mr. President—let us pause there—it starts off, not on a basis of saying: "Now, what are the provisions of the instruments and what effect is to be given to them, how are they to be interpreted?" It starts off with a reference to "the international regulations governing

the mandate institution", and it says that interpretation of the Article "is to be based upon" those regulations. I should have said, Mr. President, that when we interpret Article 6 of the Mandate, that is part of the interpretation of the regulations: there is nothing that is to be based upon these regulations; they are part and parcel of the same instrument. The passage proceeds "interpretation ... [also] is to be based upon ... relevant principles of treaty interpretation, soundly applied in the light of the international rules thus regulating the Mandate". In other words, the ordinary rules of treaty interpretation are also to be applied with some qualification—that qualification being the way in which they are affected by international rules regulating the Mandate.

Clearer evidence is afforded in later passages. We find the following in the verbatim record at page 169, *supra*:

> "Indeed, the requirement of international supervision is not inconsistent with a presumption that an administering power will, and must, endeavour in good faith to promote the welfare of the inhabitants; this would seem to be an axiomatic, primitive and basic requirement, underlying all international agreements, or any other agreements of any character. The submission to international accountability is based upon the premise that decisions affecting the destinies of dependent peoples should not be unilateral and unsupervised, however well-intended, or well-motivated, or ill-intended, or ill-motivated, such decisions, with respect to their destiny, progress, and welfare, may be."

Mr. President, where does it start? Not with a provision of the Covenant or of the mandate instrument, but with a presumption, obtained from where we do not know—a presumption that an administering power will do certain things; that it is axiomatic, primitive and basic that when there is a government of a dependent people, or government in the interest of the people, in a trust capacity, there is to be international supervision of some kind. This suggestion clearly is something coming from outside those instruments, something of the nature of a presumption, something appearing to be based on principles of law not to be found in the provisions of the instruments themselves. But I submit, Mr. President, that no basis whatsoever has been laid for thus approaching the matter. There is, as far as I am aware, no legal principle—no principle of international law generally recognized—applying to this particular matter in this substantive way, as suggested by the Applicants—no principle of that kind is to be found outside the relevant instrument at all.

In the verbatim record, page 170, *supra*, we find this passage in the argument of the Applicants:

> "... the unsupervised government or regulation of the territory, is, as a matter of mandate law, mandate regulation, *per se* a violation of the Mandate if, as we assume and as the Court has twice held, the Mandate continues in existence".

Again it is a matter of mandate law, mandate regulation, and there is no indication that that mandate law, mandate regulation, is to be found in the only way in which I submit it can be found, namely by ascertaining and interpreting the content of the relevant instrument.

Mr. President, the Applicants have at last, however, now taken note of the basic contentions of the Respondent in regard to Article 6, and

virtually for the first time we find an attempt on their part to meet our argument on the crucial aspects of the general attitude which we take. We welcome that. Previously it was almost a game of hide-and-seek to see where our argument is met, where it is evaded, where there is an attempt at side-stepping the whole issue. Now that an attempt is made to meet the argument, in its crucial aspects, it gives us an opportunity of discussing those crucial aspects further and of stressing their significance in answer to the attempt which has been put up to meet those arguments.

The Applicants begin by restating our contentions as they see them, and they state them as involving "two major premises"—the expression used by my learned friend in the verbatim record at pages 124-125, *supra*. And he proceeds to say, in the same record at page 131:

> "Under Respondent's premise, that is, that of a limited original obligation to report to a specific supervisory organ, the disappearance of such an organ without more would necessarily have ended the obligation."

That is a correct restatement of that premise in our argument.

The Applicants then proceed to concede the following, at the same page of the record:

> "It would legally follow from such a premise that a wholly new undertaking would have been necessary to amend the original agreement in a material and, indeed, essential respect. It likewise would follow that an amendment of such a nature would have to be established by evidence so unequivocally clear as to permit of no other reasonable conclusion."

That again, Mr. President, is a very fair statement—restatement—of the consequences that would flow from our basic argument as to the interpretation to be put on the obligation as originally described.

But then the Applicants go further, and contend that Respondent's propositions are "irrelevant because they proceed from a false premise regarding the essential nature of the Mandate which is before the Court" —I quote from the same page of the record. The correct premise, according to the Applicants, is that the authors of the mandates system intended to create, and did create, an obligation of "international accountability" as a "basic and integral feature of that system"—that we find in the verbatim record at page 126, *supra*. So here we have a meeting of two basic contentions—a contention on our part that the obligation related to specific supervisory machinery, and a contention on the other side to meet that, that the obligation related to "international accountability" as a general concept, as a basic and integral feature of the mandates system.

Now, Mr. President, on the basis of their premise of "international accountability", the Applicants then say the following—I read from the verbatim record at page 131, *supra*:

> "[They] do not think it necessary to make extensive and detailed argument to support the conclusion that the events and transactions during the relevant period do indeed permit of no other conclusion than that, had a wholly new agreement been necessary to amend the Mandate in an essential respect at that time, such a new agreement was, in fact, concluded among all the parties to those transactions and events".

It is a long and somewhat involved sentence, but on analysis, Mr. President, it seems to me to mean this: that the Applicants still do not accept the challenge of establishing or contending that the facts of the period 1945 and 1946 establish unequivocally and clearly that "a wholly new agreement", to use their phrase, was entered into relative to supervision of a mandate administration. They do not think it necessary to entertain an enquiry of that kind, or to embark upon an argument of that nature, because they submit that our premise is wrong. In other words, they seem to rest essentially on the difference between the basic contentions—the basic difference between a specific supervisory authority, on the one hand, and a general obligation of international accountability, on the other hand.

As we go along, however, we find that although they do not accept that they have to establish—and apparently they do not attempt to establish—a wholly new agreement in 1945 and 1946, they are prepared, it would seem—I am not perfectly clear about it, because there are, again, indications to the contrary—to accept that to a lesser extent. Flowing from their premise, there arises a question whether a consent was given to a substitution of supervisory organs, and they submit that such consent was in fact given in the period 1945-1946. But I shall come to that; perhaps I should take their exposition in that regard step by step. According to the Applicants the obligation of accountability which they say is an essential and an integral element of the Mandate "must survive so long as the Mandate itself endures". That is a contention which they make—we find it in the verbatim record at page 132, *supra*. I take it that that is a conclusion at which they arrive—they do not attempt to point at any language in the mandate instrument or in the Covenant which puts the Mandatory's obligation in that form.

They then argue that upon acceptance of their premise of a general obligation of international accountability, the only question for the Court to decide would then be "whether the function of supervision passed to the nearest equivalent of the League, to wit, the United Nations"—verbatim record, page 132. And they contend that if the function of supervision did not pass to the United Nations, Article 6 would not have lapsed but, in their words—

> "... would have become inoperative for lack of a supervisory organ with capacity to replace the League Council. In such a case, and pending establishment of an international administrative organ, if any, the only continuing method for insuring international supervision over the sacred trust would be that of judicial protection, as a first and only recourse, rather than as the 'final bulwark'." (P. 132, *supra*.)

And it is upon this line of reasoning that the Applicants conclude as follows. They say:

> "The answer to the question whether Articles 6 and 7, paragraph 1, of the Mandate became inoperable, or whether the United Nations replaced the League as the supervisory organ, hinges upon both a legal analysis of the 'international rules' regulating the Mandate, and upon ascertainment of the intentions of the parties with respect to the events and transactions which transpired during the period when the League was dissolved and the United Nations began operations." *(Ibid.)*

The two elements, then, are analysis of the international rules regulating the Mandate and ascertainment of the intentions of the interested parties during the period of transition. For the first time it seems now that this element of the intentions of the interested parties during that period of transition is introduced or acknowledged by the Applicants as being a relevant and significant aspect of their case regarding Article 6.

How is all this to be understood, Mr. President? On analysis it seems to us to mean the following. Firstly, that our premise is false regarding its obligation under Article 6, namely that it was obliged to report and account to a specific supervisory authority. That is the first proposition in the Applicants' case as presently advanced. This seems to be a necessary element in their case, because if Respondent's premise is held to be correct, the Applicants apparently do not take up the challenge of demonstrating that the events and transactions over the years 1945 and thereafter establish an unequivocally clear, affirmative agreement to accept the supervision of the new organ, that is the United Nations.

Secondly, on the basis that the Applicants' premise is correct, namely that the obligation under Article 6 was one of international accountability, they then say that the dissolution of the League could not put an end to the obligation, but would merely have rendered it inoperative, or dormant—they use the word "inoperative". That would be the position on their submission if the United Nations was not substituted as a supervisory organ.

And then, their third proposition is apparently that the events of the period 1945 and 1946 and thereafter established that there was in fact consent on Respondent's part that the United Nations would replace the League as supervisory organ. In other words, they do not accept the task of establishing a wholly new agreement, as they call it, but they do accept the task of establishing a new agreement, a new consent, directed at the more limited objective, as they put it, of getting a substitution of a supervisory organ for the purpose of keeping in operation a general obligation of international accountability which would otherwise become dormant.

Mr. President, unfortunately this proposition, that consent on the Respondent's part, even in this limited sphere, was necessary, and that it was in fact given during the relevant period, is not put explicitly and absolutely clearly in the Applicants' case, although it does appear on analysis that it is implicit in their case as they now formulate it.

They speak in this regard in the last passage which I quoted of "ascertainment of the intentions of the parties concerned during the period of transition", and on analysis of their arguments one finds that they in fact seek to find in such events and transactions consent on Respondent's part to acceptance of the United Nations as the new supervisory organ. Thus, after a lengthy review of the events and transactions over the years 1945 and thereafter, they seek to demonstrate manifestations of consent on Respondent's part, and they say first that: "Acceptance by Respondent of this resolution [that is the last resolution of the League Assembly] clearly involved an explicit undertaking of some sort." (P. 212, *supra*.)

On the same page we find this: "Respondent's undertaking must and can only be read as a clear commitment to submit to supervision by the United Nations."

In the verbatim record at page 212 we find that Respondent "agreed

to, or acquiesced in, an undertaking to carry on an obligation which this honourable Court has defined as the very essence of the Mandate", and on the same page: "The Mandatories, including Respondent, accepted the continuance of the existing regimes, including the substitution of the United Nations for the League as the supervisory organ."

These formulations then seek fairly clearly to attribute to the Respondent and, it seems, to the other Mandatories as well, a consent to accept the substitution of the United Nations for the League as supervisory organ, so that this obligation of international accountability under the Mandate would not become dormant but would continue in operation with this new substituted organ.

And it would seem from this analysis which I have just given to the Court that that consent on Respondent's part in the years 1945 to 1946 is now accepted by the Applicants as being a necessary element in their case.

Through all the phases through which this case has gone, this is the first time that we find that on the Applicants' part. Formerly the position was, as we have said, that they relied on the 1950 Advisory Opinion which they interpreted in such a way that our consent was not necessary —our consent during the years 1945 to 1946. They interpreted it, as I have pointed out, as resting on a doctrine of succession, or a principle of succession, which was to be found in the original mandate instrument and which then operated independently of any further consent; the events in 1945 and 1946 merely being referred to for purposes of confirmation. They did the same in the Oral Proceedings, and the Court will remember that in so far as this doctrine of succession was concerned, when we challenged the Applicants on that, they eventually said that they did not bear the burden of sustaining the validity of the Opinion of 1950.

The Applicants' Agent, my learned friend Mr. Gross, then said specifically, and this was a very important aspect of the presentation of the Applicants' case in 1962:

> "... the fact is that ... none of the decisive reasons underlying the Opinion of 1950 rests on a premise of 'tacit consent', whether on the part of the Respondent, the League of Nations, or the United Nations. The 'general considerations', as the Court itself describes them in its Advisory Opinion at page 136, which in fact underlay the Court's conclusion, proceeded from the very legal nature and legal consequences of the Mandate institution itself. These 'general considerations' ... involved the most basic concepts of the authors of the Covenant and the authors of the United Nations Charter." (**VII**, p. 299.)

Also, Mr. President, in their Reply—the final pleading filed on behalf of the Applicants—the Applicants still argued on the basis of an "organized international community" theory, the contention being:

> "The United Nations has replaced the League of Nations as such 'organized international community', and Respondent's obligation of international accountability, accordingly, is owed to the United Nations in that capacity." (**IV**, p. 539.)

That again, although it was not called a theory of succession or a principle of succession, involved the same thing. It involved that the instruments of 1920 were to be so interpreted, or there was to be read into

them an implication, to the effect that the supervisory authority would not be the League organs as such, but the League organs in a special capacity as representing or being the organized international community. The result was that there was an automatic succession of the supervisory organ in 1945-1946, independently of consent, because the United Nations was said to replace the League of Nations as the organized international community.

And they then also referred to the events of 1945 and thereafter merely as "manifest[ing] the clear intention of all concerned to preserve and assure proper discharge by the organized international community with respect to its responsibilities towards the inhabitants of mandated territories".

This, then, Mr. President, is in my submission the major point that emerges from this review of the Applicants' attitude through these proceedings, until we come to the statement of their attitude today. They now acknowledge the need for establishing consent on the Respondent's part, and they contend that the events establish consent on Respondent's part at this stage of transition. They still, in that respect, attempt to draw a distinguishing line between, on the one hand, establishing a wholly new agreement and, on the other hand, establishing something less—something merely involving a substitution of a supervisory organ.

Mr. President, in my submission, in principle there is no distinction. If new consent—a new agreement—has to be established, then a new agreement has to be established. Whether it relates to proposition A or proposition B does not matter, as a matter of legal approach. And all the requirements which are to be laid down for the establishment of a consent by implication apply to the one as much as it applies to the other, but that is a matter which I shall develop at a later stage of the argument.

First, I would like to indicate to the Court the possible reason why it seems to us the Applicants have now suddenly changed the basis of their case regarding Article 6, because this may throw some light on the type of difficulty with which they are faced in their case in this regard.

I must admit that what I am saying to some extent is speculation; I can only draw inferences from what we have before us. They themselves would best know why they have changed their case in this respect.

Mr. President, in our submission, the explanation lies in a combination of certain factors. The first one is that the Applicants, upon reading the 1962 Judgment of this Court and the opinions of the individual honourable judges concerned, found quite clearly that a principle or doctrine of succession found no favour whatsoever with this Court in 1962. I have already pointed out that in regard to their case on jurisdiction the Applicants' main line of argument was a doctrine of succession—a doctrine of succession to the effect that the powers of the League organization, as an organization regarding Mandates, were transferred to the United Nations as an organization, and that hand in hand with that devolution of powers there was also a transfer of the competence of League Members to invoke the jurisdiction of the Court to United Nations Members. That was the first of two alternative arguments upon which the Applicants sought to establish the jurisdiction of this Court, and although the majority of the Court found in favour of the proposition that the Court had jurisdiction, not a single judge based his opinion or judgment on that contention.

On the contrary, not only did three judges in the minority indicate

expressly that there was no justification for any doctrine of succession of that nature either in relation to Article 6 or in relation to Article 7, but there was also one of the judges in the majority—Judge Bustamante —who expressly said that in his view the theory of succession could not be established. We quote a relevant passage in the Counter-Memorial, **II**, at page 153. Judge Bustamante said:

> "The above findings do not in any way imply an intention to establish or to regard as established the principle of automatic or *ex officio* succession of the United Nations to the League of Nations. It has been sufficiently clearly shown, in the course of the written and oral proceedings in this case, that the theory of automatic succession is inconsistent with the historical background of the discussions and resolutions of the two great bodies during the transitional period in 1945-1946." (*I.C.J. Reports 1962*, p. 364.)

It is true that the Applicants still persisted in their Reply with a presentation of an organized international community theory which, however, they did not call a theory of succession or devolution. But, Mr. President, in our Rejoinder, **V**, where we went through this matter at pages 31-34, we demonstrated that that is the only possible way in which this theory, or contention, regarding an organized international community could be viewed. It could only be viewed as another form of putting a contention regarding a principle of succession which would operate automatically and independently of consent at the stage of transition. And we pointed out that if that theory was to be accepted, it would have to be on the basis of an implication to be read into the initial instruments, viz., the Covenant of the League and the mandate instrument. We pointed out, Mr. President, what difficulties there would be in the way of arriving at such an implication, rendering it, in our submission, an entirely impossible proposition. We referred in that regard to an extract from the opinion by the honourable President of the Court in the *United Nations Expenses* Opinion in July 1962, indicating the difficulty there is in the way of a contention that a basic instrument such as the United Nations Charter, which was being dealt with in that case (but the observations would apply also to an instrument of the nature of the League Covenant)—what difficulties there are in the way of *implying* in an instrument of that kind something which was not expressly stated, or is not clearly and implicitly conveyed by the words used.

Although such an instrument arises by way of processes of agreement, and to that extent then the ordinary processes of treaty interpretation and the ordinary approach of treaty interpretation are applicable, nevertheless, in the practical sense, these instruments are intended to operate virtually as statutes. They are to have a very long period of application; they are to affect a multitude of States and their interests; they are to affect not only the original contracting parties who brought the instrument into being, but also numerous parties who may become parties to the instrument at later dates and who had no part at all in the processes that brought those instruments into effect. Those factors were stated in the opinion of the honourable President in the *United Nations Expenses* case, and we refer to that in our Rejoinder, **V**, at page 32, in this particular context. We also dealt with the facts in our Rejoinder and pointed out how impossible it would be, in the light of the circum-

stances which existed at the time of the formation of the League of Nations and the establishment of the mandates system, to infer a common intent on the part of the parties concerned to have such a vague form of obligation which would render the mandatory powers bound to organizations which could not be contemplated at that stage, of the constitution of which they would know nothing, of which the only thing that could have been said to them would have been: "Well, as long as the organization could in some way conform to the description of being an organ of the organized international community, then you must be willing to submit to supervision by such an organ." We pointed out that, from a practical point of view, that was a completely impossible proposition to establish to overcome the difficulty, under all circumstances, of establishing an implied term in an instrument of the type with which we are dealing.

That was the position as it stood at the conclusion of the pleading. Before the Rejoinder, Mr. President, there was another development, namely the judgment of this Court in the *Barcelona Traction* case, and it seems that the Applicants realised their dilemma, viz., that for any theory or principle or doctrine of succession, they had to find something else. They thought that they could find a solution on the basis of the reasoning in the *Barcelona Traction* case, with which they now appear to attempt to identify their case.

In that case, if the Court will recall, the question at issue was the effect of a particular adjudication clause, and the effect on the adjudication clause of the dissolution of the Permanent Court, which was the tribunal referred to in that clause. The Court's construction of the clause itself in the particular instrument in which it occurred, and in the particular circumstances in which it came to be agreed upon, was as follows:

> "It was not the primary purpose to specify one tribunal rather than another, but to create an obligation of compulsory adjudication. Such an obligation naturally entailed that a forum would be indicated; but this was consequential.
>
> If the obligation exists independently of the particular forum . . . then if it subsequently happens that the forum goes out of existence, and no provision is made by the parties, or otherwise, for remedying the deficiency, it will follow that the clause containing the obligation will for the time being become (and perhaps remain indefinitely) inoperative, i.e., without possibility of effective application. But if the obligation remains substantively in existence, though not functionally capable of being implemented, it can always be rendered operative once more, if for instance the parties agree on another tribunal, or if another is supplied by the automatic operation of some other instrument by which both parties are bound." (*I.C.J. Reports 1964*, pp. 38-39 and V, p. 47.)

Mr. President, there then is the analogy which the Applicants now seek to apply by saying that the original obligation here was not tied up to a particular supervisory administrative organ but that it was a general obligation of international accountability; one that could become dormant upon the falling away of the organ, but would not disappear.

But now, having accepted that as their basis, the Applicants also had to accept the further implication as set out in this Judgment, i.e., they

had to accept the further implication that this obligation would remain dormant unless some new agreement was entered into regarding a substitution of supervisory organs, or unless some other instrument by which both parties were bound provided such an organ relative to the particular obligation. And that is why, it seems to us, the Applicants have now acceded to the position that they have to establish at least this substitution of supervisory organs by a process involving the consent of the mandatory, in order to bring them to a substantiation of their submission that we are now obliged to account to the organs of the United Nations.

But now, Mr. President, that placed the Applicants in a further dilemma as far as the 1950 Opinion was concerned. I may say, in parenthesis, I shall deal later with the merits of the Applicants' attitude as now based on this analogy of the reasoning in the *Barcelona Traction* case. I do not intend to deal with that now. I am just sketching the development of their attitude. What I want to stress now is that the Applicants were now placed in a dilemma as far as the 1950 Opinion was concerned. They had to abide by their former interpretation of the Opinion as having held that substitution of the United Nations for the League took place by virtue of a doctrine or principle of succession, in which case they would be taking up an attitude at variance with their own interpretation of the Opinion. They would then no longer be able to rely so strongly on the Opinion as such. In other words, they would then have to say "our earlier interpretation of the Opinion is still correct". The Opinion did not rest upon anything that happened in 1945 or 1946. The Opinion rested on a doctrine of succession which emanated from the original instrument. That is, too, their interpretation of the Opinion, but their own contention is now different—their own contention now is that the matter really rests on something which happened, or is dependent upon an essential link of something which happened, in 1945 or 1946. Then they could now no longer rest upon the Opinion as such.

That was the one alternative open to them, the one horn of the dilemma. The other one was this. They had to concede that their former interpretation of the 1950 Opinion was wrong and that the Court in fact, in 1950, based its finding that the United Nations had replaced the League as supervisory authority, not only on what they described as the international rules regulating the Mandate but also on tacit consent, on Respondent's part, in the years 1945 to 1946. And as soon, Mr. President, as they conceded that—that the Opinion in 1950 also rested on this necessary element of a new consent or agreement in 1945 and 1946—then the Applicants would at once acknowledge something which they were never prepared to acknowledge before, namely the potential relevance and significance of the new facts which we have brought before the Court, affecting the weight to be attached to the 1950 Opinion.

Now, Mr. President, how did the Applicants react to this dilemma? Their reaction is, in effect, in our submission, rather pathetic. In effect, they represent that they still rely on the 1950 Opinion but they give a new interpretation to it, away from the succession idea, and, as a basis for that, they adjust their own attitude so as to fit in with this new view of the 1950 Opinion as not being based on a succession idea but as being based on the objective elements of the situation, including consent on the Mandatory's part and as being aimed at the maintenance of the status quo.

So we find, Mr. President, that first they adjust their own attitude and they say in the verbatim record at page 132, *supra*:

> "Reference to 'succession' in the Applicants' pleadings is intended to refer to the fact that there was no mechanical or operational problem of succession. The terms 'replacement' or 'substitution', might, indeed, have better conveyed the intended sense, and the Applicants would have preferred to have used them and regret that they did not."

I have pointed out before, Mr. President, that this change now is not a mere change of terminology; it is a change of substance, and I do not have to explain again what the change of substance involves. It involves a complete departure from the concept of a succession operating independently of consent in 1945 or 1946, to acceptance of a proposition that new consent in 1945 and 1946 is a necessary link in the Applicants' case.

Then, Mr. President, they proceed to associate themselves with statements made by the then President of the Court, the honourable Judge Winiarski, and other judges—the other judges who gave a minority opinion—in 1956, in the 1956 Opinion regarding South West Africa, on the question of the further interpretation of the 1950 Opinion. And the Court will recall that there was in that Opinion (that was on the question of the oral hearing of petitioners at the United Nations) the question whether the granting of oral hearings to petitioners at the United Nations would be in keeping with that part of the Opinion of 1950 which said that the degree of supervision to be exercised by the United Nations organs was not to exceed that exercised by the League organs, or words to that effect. It was common cause that during the time of the League the League organs never gave oral hearings to petitioners. In fact, it was contended, and the majority of the Court found, that the League had the power to grant such oral hearings but never made use of it, and the question then arose as to the interpretation of the 1950 Opinion. Would this indication, that the degree of supervision is not to be more onerous than in the time of the League, refer to the powers which were vested in the League, or would it refer to the actual practice in the time of the League? Would the United Nations have to continue the actual practice and be bound by the limits of the actual practice, or could they go to the full extent of the limits of the powers actually vested in the League, whether the League exercised them or not? And the Court will recall that there was a difference of opinion between the members of the Court on the manner in which the 1950 Opinion was to be interpreted in that respect.

President Winiarski sided, in a separate statement, with the conclusion arrived at by the majority, namely that the United Nations organs were competent to grant oral hearings, but he arrived at his conclusion for different reasons from those stated by the majority in a joint judgment.

The majority's judgment rested on the proposition that there had been a succession or a devolution of powers from the League to the United Nations. Therefore, the United Nations had the same powers as the League had in this respect and the United Nations could exercise the same powers. The limit set was, therefore, the limit of the powers and not the limit of the actual practice in the time of the League. That was

the effect of the joint majority judgment—I am leaving out of account for the moment that separate one of President Winiarski.

The minority opinion was based on the proposition that there was no idea of a succession or a devolution of powers, that the whole idea was a continuation of the status quo of existing practice, and that part of the existing practice was the rendering of reports. The majority opinion indicated that the Court in 1950 (as the minority understand it) held that there was an agreement on the part of all concerned to maintain the status quo—that there was in that regard also consent on the mandatory's part.

I shall read a passage at the top of page 65 in the 1956 Opinion of the minority in this regard:

> "An important element of the situation then existing was referred to on a number of occasions by the Court in the reasoning of its Opinion: that is, the willingness expressed by the Union of South Africa to regard itself as continuing to exercise its Mandate, to continue to administer the Territory in accordance with the provisions of the Mandate and to continue to render reports to the United Nations."

I shall deal later with the question whether that view of the situation —whether there was any such expression of willingness as regards the rendering of reports—was factually justified. That is another matter. But that is as a matter of interpretation as to what the minority opinion in 1956 said regarding the Opinion of 1950.

President Winiarski sided with the judges in the minority as to this interpretation of the 1950 Opinion but, as I have said, for a different and distinct reason, came to the conclusion that it was nevertheless competent for the United Nations to exercise their power in regard to petitioners. The reasoning in that regard is not relevant to present purposes.

Now, that, then—the effect of the 1956 Opinions—demonstrates the significance of the Applicants' attitude where they say that they now associate themselves with the statements made by the then President Winiarski and by the judges who gave the minority opinion. The extract which they quote from President Winiarski is the following:

> ". . . the whole structure of the Opinion of 1950 was founded on the objective elements of the situation which arose as a result of the disappearance of the League of Nations, and that that Opinion found in the General Assembly the organ qualified to exercise those functions which could not be allowed to go by default". (Pp. 132-133, *supra.*)

The further passage quoted is this:

> "The Court, unattracted by the idea of succession, of the transfer of powers, based itself on the objective elements of the situation —the importance of international supervision under the Mandates System as well as the provisions of the Charter of the United Nations." (P. 133, *supra.*)

And the Applicants then state their own attitude so as to agree with this conclusion, as follows, that upon "evaluation and appreciation of the events and transactions and undertakings which occurred in 1946, and during this period . . .", "it becomes obvious . . . that all the parties, including the Respondent, the League of Nations, the United Nations,

acted in a manner entirely consistent with the 'objective elements of the situation which arose as a result of the disappearance of the League of Nations' ".

Mr. President, I pointed out that the Applicants now identify themselves with the view which was taken by the minority judges in 1956, together with Judge Winiarski, on the interpretation of the 1950 Opinion, as to whether there was a succession involved, or whether it was a maintenance of the status quo, and rest on objective elements of the situation, including consent on the Respondent's part to a substitution of the supervisory organ. The Applicants, having identified themselves with the attitude there taken up by the minority judges, and by Judge Winiarski, say that they will present to the Court—

> ". . . relevant events and undertakings which took place during the period when the United Nations Charter was formulated, the League of Nations was dissolved, and the United Nations commenced operations". (P. 133, *supra*.)

And what would be the purpose of this survey, Mr. President? In the Applicants' own words they indicate that they would show the following—

> ". . . that the League of Nations took all action which was appropriate under the circumstances, to make clear the intention of the Members, including the Parties to these proceedings, that despite its dissolution the obligations under the Mandate would continue—
>
> '. . . until other arrangements have been agreed between the United Nations and the respective mandatory Powers' ".

They say in the same record (p. 134, *supra*):

> "Respondent voted in favour of the 18 April 1946 resolution, thereby acquiescing in what the Court termed a presupposition of the League that the United Nations would take over the supervisory functions of the Mandate."

Clearly then, Mr. President, the object is to establish consent on the part of Respondent. This is in contrast to the previous attitude of the Applicants which was to the effect that—

> ". . . none of the . . . decisive reasons underlying the 1950 Opinion rests on a premise of tacit consent, whether on the part of the Respondent, the League of Nations or the United Nations".

Now if the matter had rested there one could state with some conviction that that is the position in which the Applicants now place themselves, but it is not quite so easy, Mr. President. It may be some policy on the part of the Applicants to keep one guessing, because they say something and then later on in the record we again find something which appears to be either contradictory or a qualification of what they said before. In this particular respect, the Applicants later in their oral presentation revert to an interpretation of the 1950 Advisory Opinion. There they seem to go back to the old story that consent in the period of transition was not necessary. I quote from the verbatim record at pages 207-208, *supra*:

> "This honourable Court in the 1950 Opinion defined and described the legal and organic relationship between the League and the United Nations in respect of the law of the mandates system.
>
> First, within the ambit of its general purposes and functions, the United Nations, in fact, was the only organized body capable of

performing an essential function under the Mandate. It was the only body in which the international accountability of the Mandatory could be satisfied. Hence, the power and capacity to perform the function of international administrative supervision was reposed in the United Nations, as a matter of international law, created by Article 22 of the Covenant, and the rules regulating the Mandate itself. This legal consequence was recognized in the finding of the 1950 Opinion, that:

> 'It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions.' "

Again we see, Mr. President, a statement to the effect that the Court's finding in the 1950 Opinion regarding Article 6 did not rest on a premise of tacit consent but on the law of the mandates system. But then, Mr. President, again, immediately thereafter, in dealing with Respondent's contention that the Court in 1950 had found, by inference, that Respondent had tacitly agreed to accept United Nations supervision, the Applicants say (on pp. 207-208, *supra*):

> "On the contrary, Mr. President, in the Applicants' respectful view, the Court's conclusion patently is based upon a series of interrelated reasons, all of which reflect objective principles of law arising from and, inherent in, the mandates system itself, as well as consent manifested appropriately by Respondent and others during the relevant period.
>
> Thus, in the 1950 Advisory Opinion, the Court's conclusion rested on both the objective situation created by the law of the Mandate in the light of the League's dissolution, and Respondent's consent made manifest in that situation."

Mr. President, I should have thought that when there was reference to the objective situation created, and that that was the basis upon which the Court made a finding, the Respondent's consent (to continue the previous situation in regard, *inter alia*, to reporting and to there being a new supervisory organ in respect of that) would be an element in that objective situation—that in fact the objective elements, of which the Court spoke in 1956, would really be evidential factors from which that element of consent on the Respondent's part would be inferred—that general agreement on the part of all concerned. Otherwise, I do not understand what legal significance the reference to objective elements of the situation could have. But here the Applicants speak of the objective situation as being something additional to Respondent's consent made manifest in that situation.

Mr. President, the question then arises, what do the Applicants mean exactly in this regard? Do they abide by their 1962 statement that none of the decisive reasons underlying the 1950 Opinion rests on a premise of tacit consent? If that is so—if they abide by that—then in admitting that they now have to establish consent they are departing from their interpretation of the 1950 Opinion. And that, in effect, would mean that they now disagree with that Opinion in two major respects. The one is in regard to the significance which they themselves say that that Opinion gave to Article 80, paragraph 1 (a matter with which I have dealt with before), and the other is in this respect, that they said the Opinion rested

on a doctrine of succession, rendering consent in 1945-1946 unnecessary, whereas the Applicants now reject a doctrine of succession and they accept a necessity of consent in 1945 and 1946.

That is the one possibility. The other possibility is, have they on reconsideration changed their mind as to the interpretation which should be placed on the Court's Opinion of 1950? And if they have, then they cannot reasonably contest, Mr. President, that that Opinion rested squarely on an interpretation of the 1945-1946 events, and inferring from that a tacit consent on the part of all concerned.

The mere fact that it has taken the Applicants two years—more than that—over four years from the start of these proceedings, Mr. President, in 1960—to find out what their case really is in regard to Article 6 and how it is to be justified in law, all this vacillation about it, all this uncertainty, really raises the question whether the Applicants could have much real confidence in their case in this regard.

On an analysis of what the Applicants now say, and stripping the verbiage from the essence, it seems to us that the conflicting contentions before the Court for consideration are now the following.

Firstly, the Respondent contends that the obligation undertaken by it in Article 6 of the Mandate was to report to, and to submit to supervision of, a specific organ of a particular organization, namely the Council of the League of Nations. The Applicants, on the other hand, contend that Respondent's obligation is one of international accountability, that is, that Respondent was subject to international supervision.

Secondly, Respondent contends that upon the dissolution of the League of Nations, the provisions in the Mandate for supervision by the League were not modified or replaced by others serving the same purpose, and that such provisions consequently lapsed. Applicants, on the other hand, contend that the obligation of international accountability did not come to an end at the dissolution of the League and that by consent, acquiescence, and so forth, on Respondent's part, the United Nations replaced the League as the supervisory organ.

Those are the basic issues, and I might add as a corollary that the Applicants apparently do not contend in the alternative that—

> "... the events and transactions during the relevant period do indeed permit of no other conclusion than that, had a wholly new agreement been necessary to amend the Mandate in an essential respect at that time, such a new agreement was, in fact, concluded among all the parties to those transactions and events". (P. 131, *supra*.)

So what does this review show, Mr. President? It has shown, I submit, on balance and wading through the bit of uncertainty which apparently still exists, that the former attitude relied upon by the Applicants as to an automatic succession—something operating from out of the original instrument rendering consent in 1945-1946 unnecessary—has now been dropped. That is no longer relied upon and the necessity for an element of new consent in 1945-1946 is accepted.

Secondly, Mr. President, in that same respect the Applicants' interpretation of the 1950 Opinion appears to have changed.

They now also interpret the 1950 Opinion to the effect that it rested, at least in part, on an essential link of consent in 1945-1946.

The third implication is (although the Applicants do not say so), that

in effect there is an acknowledgement of the potential value of the new facts, as they call them, which we introduced and which were not before the Court in 1950.

The fourth implication is that in saying that they are not dealing with the succession at all, that they associate themselves with the minority view in 1956, namely that it was reliance on objective elements, maintenance of the status quo, and so forth the Applicants now find themselves in this peculiar position that whereas they formerly rested on a view of a majority of 12 to 2 in the 1950 Opinion, they now have to rest on a minority view, as the judges separated on this question of interpretation in 1956.

Together, Mr. President, with the fact that they are now no longer pressing Article 80, paragraph 1, as having the positive force previously ascribed to it and which they apparently still say was ascribed to it in the 1950 Opinion, all these factors indicate how open the whole question now is as to whether this Court ought to follow the 1950 Opinion or whether it is to regard itself as free to reconsider all the relevant evidence —all the relevant arguments—that are now before it, and come to its own conclusion. I say that with the greatest respect to the authoritative weight that is normally given to a pronouncement of this Court. But in all these particular circumstances, and having regard to the fact of the inadequate presentation of facts in 1950—the significance of which now becomes apparent as well as all these other factors which I have mentioned, which come into operation jointly in that regard, I submit that clearly the Applicants, by their own change of attitude, have amply demonstrated the soundness of our contention that the matter is to be thoroughly reconsidered *de novo*, and that it is indeed an entirely open question on which this Court has to pronounce its judgment.

Now, Mr. President, we come to deal with the merits of the conflicting contentions, those as they have now emerged, and those as I have just summarized them. The Applicants said in that regard in the verbatim record at page 181, *supra*:

> ". . . appraisal of Respondent's first major contention rests upon analysis and interpretation of events, transactions and undertakings occurring during the period of the formation of the League and of the mandates system. Similarly, proper evaluation of Respondent's second contention, that is that when the League dissolved and the United Nations commenced operations the United Nations did not decide to assume supervisory authority, nor did Respondent agree to submit to supervision by the United Nations, proper evaluation of that contention involves analysis and interpretation of events, transactions and undertakings occurring during the period of demise of the League and the birth of the United Nations."

Now we quite agree with that statement, Mr. President, namely that it is necessary to revert to the events of those two relevant periods. As the Applicants did, we intend to cover both those fields in order to show the correctness of our contentions and the fact that the answer attempted to be given on behalf of the Applicants falls very far short of its mark.

But before I deal with the events themselves in those periods, I would like to say something on the general nature of the problems involved and on the general legal principles involved in a resolution of the particular issue.

The first issue is that which I might summarize as that of a specific organ versus international accountability; our contention being that the obligation related to a specific advisory organ only; the Applicants' contention being that it was a wider, and a vaguer, obligation of being obliged to submit to international supervision—in other words, an obligation of international accountability.

Mr. President, I have already referred to the assistance which the Applicants apparently seek to obtain from somewhat vaguely stated concepts, which might be intended to relate to something outside of the mandate instruments and the Covenant of the League itself—concepts such as mandate law, mandate regulations, rules of the institution, and so forth. I have made the submission and I confirm it—I cannot conceive of any source outside those relevant instruments for any rules, or regulations, or law, of this kind. The Court is, in terms of its Statute, Article 38, required—

> "... to decide in accordance with international law such disputes as are submitted to it, [and the Court is enjoined by the Article to apply] ...:
> *(a)* international conventions, whether general or particular establishing rules expressly recognized by the contesting States;
> *(b)* international custom, as evidence of a general practice accepted as law;
> *(c)* the general principles of law recognized by civilized nations;
> *(d)* subject to the provisions of Article 59, 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."

The last one is subsidiary, the real sources being stated in *(a)*, *(b)* and *(c)*. It does seem to me, Mr. President, that perhaps my learned friend could elucidate this aspect when he addresses the Court again. I could see no basis for classifying any mandate law, or any mandate regulations, under any of those headings, except in so far as they fall under heading *(a)*, namely the particular instruments agreed upon and emanating from those agreements—the Covenant and the mandate instruments.

In our submission, what is not part of the provisions of the instruments, what is not part of the agreements set forth in those instruments, expressly or by implication, cannot play any role in this matter. The foundation for this obligation sought to be imposed upon the Respondent, of accounting to the United Nations Assembly, must rest on consent on the Respondent's part.

In other words, Mr. President, the question to be determined in regard to this issue of specific organ versus international accountability, is a question which must depend either on the interpretation of the expressed text of the relevant instruments, or on an implication of a tacit agreement in those instruments—an implication of something which is not expressed in those texts—something which nevertheless could be said to be part of the actual, common intent of the parties as being part of their agreement.

Those are the only two concepts of law which, I submit, really come into operation here: interpretation of a text; and the concept of implication of something which is not set forth in a text.

It may be relevant to refer to one or two of the principles which may

come into operation, or under discussion, with regard to the present issues.

Before I refer to them, may I just indicate the nature of the dispute in regard to the events of 1945-1946. That is the second phase of the vital issues between the Applicants and ourselves. There again it seems to be common cause between us that there was never any express agreement—any express consent—to the effect that the United Nations was to be substituted for the League as the supervising body. Therefore, Mr. President, if such consent was given, as the Applicants allege that it was given, it would have to appear, in their own words "from something which is so unequivocally clear as to admit of no reasonable doubt, as to admit of no reasonable alternative".

In other words, the ordinary principles have to be applied there of reasoning by inference—reasoning from circumstantial evidence—and of finding whether that evidence establishes a certain proposition by inference—the proposition here being that such consent was, in fact, given, although it was not expressed.

In relation to that question, however, some of the submissions advanced on behalf of the Applicants would appear to suggest that the Respondent might be held bound on a basis of preclusion or estoppel—in other words, on the basis that, although it may not have actually consented to a certain proposition, it so conducted itself that it was understood by other persons or other interested parties to have consented, and on that basis, the other parties having changed their position to their prejudice, the Respondent must then be held bound to that proposition as if it had consented. That would seem to be what Applicants contend, although they have not introduced it by that name. Some of their contentions would seem to introduce a possible consideration of the principle of preclusion or estoppel, in that particular context. When we come to deal with that issue I shall also have to refer briefly to the relevant principles applicable there, but I do not intend to deal with those now. I shall, for the present, confine myself to the principles of interpretation and the principles of possible implications of a tacit consent, in so far as they relate to the original creation of the mandates system and the mandates themselves.

Now, Mr. President, we have the two concepts: the concept of interpretation of a text and the concept of possible implication.

As far as the first concept is concerned—interpretation of a text—I submit that it is really unnecessary to refer to any canon of interpretation at all, that is, with regard to the particular issue now confronting the Court—the issue of choosing between a conclusion of a specific supervisory organ or a conclusion of a vaguer concept of international accountability. That is so for the simple reason, Mr. President, that none of the texts speaks of international supervision or of international accountability: none of the texts is capable of bearing any meaning to that effect. It is not a matter of saying that the text is capable of meaning *(a)*, but possibly also of meaning *(b)*; that it is capable of meaning *(a)* and *(b)*, but the one is more natural than the other—that one is a more natural construction in the context and therefore that is to be preferred to the other as a general rule, in the absence of strong indications to the contrary, and so forth. No question of that kind arises because the only texts there are, are explicit ones—explicitly referring only to particular supervisory organs to whom there is to be accounting to their satisfaction.

So there is, Mr. President, no question of interpretation of an expressed text which arises here. When the suggestion by the Applicants is that the texts are to be construed as having the effect that the obligation imposed upon the Mandatory was a general one of international accountability, then they are seeking to read something into the texts which is not there. They are, in other words, seeking to imply an agreement supplementary to the agreement and to some extent, as I shall indicate, contradictory to the agreement as contained in the actual texts.

Now, Mr. President, in our Counter-Memorial, in Book II, as my learned friend has already stated, we give a review of certain relevant principles of treaty interpretation and of the principles applicable to a proposition of inferring a tacit agreement in particular instances. I do not wish to deal with those in full at all. I want to refer only to certain aspects emphasized there in regard to this particular question of inferring a tacit agreement in particular cases. I refer to page 111 of Book II of the Counter-Memorial **(II)**. We put the matter in this way, Mr. President:

> "The principle of actuality referred to above involves that the parties must *prima facie* be considered to have expressed their full agreement in the written text. Exceptionally, however, a conclusion may be warranted that something 'goes without saying', *i.e.*, that the parties were in fact agreed upon something additional to the text without giving expression to such agreement.
>
> Courts in all legal systems guard themselves against assenting to such a proposed implication on any but the most cogent grounds, realizing that implication on a basis of speculation, or of what the parties ought reasonably to have done, would amount to the making of a new bargain or compact for the parties, as distinct from the Court's true function of giving effect to the bargain or compact actually agreed to by the parties themselves. Consequently the requirement is stressed that an implication of such tacit *consensus* must arise *necessarily* or *inevitably* from the relevant facts, in the sense that all other reasonable inferences are excluded."

We submit that two further corollaries arise from the principles stated above: firstly—

> "The term sought to be implied must be capable of formulation in substantially one way only. If the content of the term sought to be implied is doubtful, then one cannot conclude that the parties tacitly agreed on anything at all." (**II,** p. 111.)

This may not be inapposite at all, Mr. President, to this vacillation in Applicants' case on the question of whether Respondent assertedly rendered itself liable to an organized international community, or whether it undertook a more vaguely formulated obligation of international accountability or to submit to international supervision.

The other corollary is:

> "Where the written document makes express provision for any eventuality, there is increased difficulty about finding that there must in addition be an implied term covering substantially the same ground as such express provision." *(Ibid.)*

Again not inapposite, Mr. President; where we find that there is express provision for a supervisory organ, a part of an organization intended by

its founders to exist for an indefinite time; where there is in fact no contemplation of that organization's going to terminate its existence; how any scope or room for implication of an additional provision there to the effect that even after dissolution of that organ there is still to be an obligation of international accountability—how that can be said to arise is, in my submission, not clear.

Mr. President, the exposition here which I have read refers back to the Oral Proceedings in 1962, in which we referred extensively to authority. I am merely giving the Court the reference—it will be found in the Oral Proceedings of 1962 at page 46 **(VII)** and the following pages. Extensive reference is given to international authority, but inasmuch as the principles are in their essence the same as are applied by municipal courts in respect of implications in contracts or agreements, some reference is also made to pronouncements of municipal courts in that regard; and there are, because of their particular apposite nature as far as the issues in this case are concerned, three pronouncements in that regard to which I would wish to refer very briefly.

The first one is referred to at page 50 **(VII)** of the Oral Proceedings, at the bottom of the page. It is a reference to a statement of the relevant principles by a judge of appeal, later Chief Justice of South Africa, in a passage which we here cite from the Preliminary Objections **(I)** at pages 343-344, where the learned Justice Watermeyer said the following: that "there are two cardinal rules of logic which cannot be ignored" in reasoning by inference. The first is that—

> "The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn."

And secondly:

> "The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

That accords, in my submission, Mr. President, with formulations given all over the world in regard to this question of reasoning by inference—whether it is a question pertaining to implication of a term in a contract, or whether it is a question in general pertaining to a conclusion to be arrived at by having regard to circumstantial evidence.

Then, at page 51 **(VII)**, of the Oral Proceedings we cite this very well-known pronouncement by Justice Scrutton in the case of *Reigate* v. *Union Manufacturing Co.*, where the matter was put in a manner which is particularly apposite from a practical point of view to the type of questions which arise:

> "These principles [the learned Lord Justice said], however, have been clearly established: The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. . . . A term can only be implied if it [is] necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case', they would both have replied, 'Of course so and so will happen; we did not trouble

> to say that; it is too clear'. Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

And then, Mr. President, there is this further pronouncement at the same page of the Oral Proceedings from Lord Justice McKinnon in *Broome* v. *Pardess Co-op. Soc.*, a case decided in 1940 in the United Kingdom. He stated: "I will add only one observation to those passages"—this was after a reference to, *inter alia*, the passage I have just read, and similar passages in other decided cases. He said:

> "Where the parties have made an express provision as regards some matter with regard to the contract, it is, and must be, extremely difficult for either of them to say in regard to that subject matter, as to which there is an express provision, that there is also an implied provision or condition in the contract."

Those, then, are the basic principles in regard to implication of a term not expressed by the parties.

Then, Mr. President, we come to the principle of effectiveness referred to by my learned friend in his argument. We find his reference in the verbatim record at page 182, *supra*. There one sees that my learned friend cites from what we had stated on the subject in our Book II, and he cites the following:

> "This principle takes account of the objects and purposes of the instrument to be interpreted, and presumes that the parties intended for particular provisions the maximum effectiveness; consistent with the clear text, towards achievement of such objects and purposes."

At once, Mr. President, the words "clear text" stick out, if I may put it that way, and it strikes one as an expression which ought not to occur in such a formulation at all. And indeed, my learned friend immediately proceeds to comment on that expression, and he says:

> "Although Respondent's comments, just quoted, appear to the Applicants in general to be a correct formulation, note might be taken that the phrase 'clear text' in the second quoted passage may involve a latent ambiguity."

And so it goes on from the "latent ambiguity" to the effect that the question introduces another canon of interpretation of natural and ordinary meaning, and so on, and that the Court has said that that rule of interpretation is not an absolute one—that was the line of my learned friend's argument. Mr. President, the whole answer, the very simple answer, to all this is that the word "clear" does not appear in our formulation at all. It was something interpolated—I don't know by whom, but it came to be interpolated in this version which my learned friend read out to the Court; and where my learned friend therefore speaks, at page 182 of that record, of the "phrase 'clear text' as employed by the Respondent", it is a misnomer. If we refer to page 112 of Book II of the Counter-Memorial **(II)**, one will see that the formulation is there exactly as quoted, except for the omission of the word "clear", and of course that is the sound formulation of the principle: the Court, in accordance with what it regards as the intention of the parties, attempts to give to the provisions their maximum effectiveness consistent with

the text—maximum effectiveness towards achievement of the object and purposes of the particular agreement or instrument.

Now, Mr. President, the way in which this principle can arise here is not as an aid to interpretation, because, as I have said before, there is no question here of competing possible meanings in a text to be interpreted; there is a possible field for application of this principle; viz. in a case where a text is not clear, where there are competing possible meanings and where that principle can assist the Court in preferring one meaning to another, but that is not the sense in which it could arise here. The only sense in which it could arise would be as an aid to a court in applying a proposition, or in considering a proposition, whether a particular term is to be implied in a particular instrument. We deal at page 112 of our Counter-Memorial **(II)**, with that difference in the possible field of application of this principle, and I proceed immediately then to this second possible field, which is dealt with as from the bottom of page 112 and running on to page 113, paragraph 30 there:

> "In its operation relative to implied terms, the principle of effectiveness also has a relatively limited application. Basically it only means that, for the purpose of deciding whether a term is to be implied or not, regard is to be had to the probability that the parties would have intended a result which is in consonance with the general object or purpose which they had in mind. To put it in a different way, the fact that the parties had a certain object or purpose in mind may in certain circumstances give rise to grounds for inferring an implied term. In all cases the ordinary rules relating to implied terms would still apply. Thus it would not be sufficient to have regard merely to the purpose or object of the parties. The purpose or object would be only one of the circumstances to be considered, although in some cases it might be a very important one. It would, however, always be necessary to examine *all* the relevant facts and circumstances, giving due weight to each one. Furthermore, the ordinary rule applies that an implied term cannot override the express terms of the instrument, or operate to regulate some aspect for which express provision is made in the instrument. Thus a finding that the parties had a certain purpose or object in mind, would not justify a radical amendment of the instrument in order to give effect to such purpose or object. In this regard, particular reference may be made to the following passage from *The Law of Treaties*, by Lord McNair:
>
> > 'The rule of effectiveness must mean something more than the duty of a tribunal to give *effect* to a treaty; that is the obvious and constant duty of a tribunal; that is what it is there to do. The rule must surely mean, in the mind of the party invoking it: "If you (the tribunal) do not construe the treaty in the way that I submit to you to be correct, this treaty will fail in its object." But that is a *petitio principii*, because, as has been submitted in the previous chapter, it is the duty of a tribunal to ascertain and give effect to the *intention of the parties as expressed in the words used by them in the light of the surrounding circumstances.* Many treaties fail—and rightly fail—in their object by reason of the words used, and tribunals are properly reluctant to step in and modify or supplement the language of the treaty.'"

Again, Mr. President, in the footnote relative to the passages which I have read, there are references to our treatment of a number of authorities, international and from municipal courts and authorities, on this aspect of the matter. One finds that at pages 57 and the following of the Oral Proceedings **(VII)**. There again, there is only one very brief passage —a pronouncement of the late Judge Lauterpacht, to which I would refer, as being something in line with the passage from Lord McNair which I have just read. It is at page 62 of the Oral Proceedings **(VII)** of 1962:

> "... absence of agreement could not properly be supplemented by an inference aiming at securing for the instrument in question a higher degree of effectiveness than was warranted by the intentions of the parties".

That, Mr. President, brings us immediately to my learned friend's contention to the effect that in deciding whether one deals with an obligation related to a specific supervisory organ only, or, as he says, a more general one of international accountability, one is to have regard not only to what the parties actually contemplated at the time, but also to what they might be expected to have thought or to have decided if something of which they evidently did not think had been brought to their attention. That is how I understood him in the verbatim record at page 183, *supra*, and he proceeds also to page 184 on the same subject. At page 183 my learned friend says this:

> "Respondent's contention that the obligation of international supervision, imposed and assumed under the Covenant and Mandate, merely was intended to refer to a specific supervisory authority, to wit, the League Council, is based upon the argument, *inter alia*, that:
>
> 'Since in fact nobody in 1920 contemplated the possibility of the future dissolution of the League, it would be unrealistic to impute an intention to the authors of the Mandate to guard against the possible consequences of such dissolution.'"

That is the quotation from our Rejoinder. My learned friend proceeded:

> "This argument, with all respect, seems to the Applicant to involve a *non sequitur* and, moreover, misapplies principles of interpretation. It is, we think, a *non sequitur* because the undenied fact that nobody in 1920 foresaw the dissolution of the League of Nations has nothing to do with what they would have wished to guard against had the possibility been envisaged."

Mr. President, perhaps I should just conclude by referring also to the passage at page 184, *supra*, where my learned friend says:

> "Courts frequently determine, in the light of circumstances, the nature and other provisions of an agreement, what the parties could have intended had they foreseen certain possibilities."

Mr. President, as a proposition applying to the question whether an implication is to be read into a contract—whether something is said to be in fact and in law part of a contractual or treaty relationship between parties—this is the first time I have ever heard of such a proposition. It must inherently, on an examination, on first principles, be unsound. Courts are there to give effect to agreements in fact arrived at between parties. Courts are not there to make agreements for parties, to say what

parties ought reasonably to have done under certain circumstances, what they ought to have agreed upon had they thought of something, or what they probably would have agreed upon, had something been brought to their notice. By recognizing an implication in a contract, and saying that something was tacitly part of an agreement, although not expressed, the Court gives effect to something which it finds as a fact, something which it finds as having in fact been contemplated by the parties as being part of their agreement. The only reason why they did not express it must be the reason as we have heard it from the authorities I have quoted, that in the light of their discussions with one another they did not even trouble to express that point because it was too clear. It was something that must have therefore been present in their minds, although they did not trouble to express it. But as soon as we come in the sphere of something of which they admittedly did not think (and here we have it on record by our learned friend for the Applicants—that is the admitted fact—that nobody thought of the possibility of dissolution of the League), and as to what provision was to be made for the situation that might then arise, what ground can there be *in law and in logic for saying that* the parties in fact had any contemplated agreement about that matter?

The formulation is inherently unsound not only as compared with basic principles, but also on the authorities to which I have referred. It is basically unsound. I can give the Court one reference which pertinently deals with this point, viz. in the Oral Proceedings of 1962 **(VII)**, at page 52. It is a case of which the name is not given in the Oral Proceedings at that particular page. The name of the case was actually *Rapp and Maister versus Oranowsky*, 1943, W.L.D. 68, at pages 74-75. It was a case in which a South African judge, Judge Millin of the Witwatersrand Local Division, had to apply these principles of implication of tacit agreement. The learned judge referred to the same authorities to which I have referred here, the well-known pronouncement of Justice Scrutton and the others that go with it. And he said as follows:

> "The cases show that the Court has to be continually on its guard against being persuaded to introduce a term which, on analysis of the argument, appears to be no more than a term which would make the carrying out of the contract more convenient to one of the parties or to both of the parties and might have been included if the parties had thought of it and if they had both been reasonable. You are not to imply the term merely because if one of the parties or a bystander had suggested it, you think only an unreasonable person would have disagreed. You have to be satisfied that both parties did agree. It is quite a different proposition, if in the hypothetical case *Scrutton L.J.* puts in, you feel the parties might say: 'You have called our minds to something we have not thought of and what you say is not unreasonable, let us discuss it.' If that is all that the Court feels might have happened then the Court is not entitled to imply the term."

As I say, it follows from an application of the basic principles, principle that the Court is to give effect to an agreement actually arrived at and not to something speculative which it thinks the parties may, or would probably even have agreed upon, if it had been put to them. That is not the function of the Court.

The only type of case in this type of creative confusion, Mr. President

—the only type of case where that kind of approach to what the parties would probably have intended had their minds been directed to a point—where that kind of approach is to be followed—is not one in relation to finding what was a term or a provision of an agreement between the parties. It arises only in what I might call an *ex post facto* situation where the Court is confronted with a difficult question, say, of severability or inseverability of a contract, or of a statute. The position arises that the Court finds that a particular part of a contract is illegal, a particular part of a statute is *ultra vires*, or a particular part of a contract or a treaty or an agreement has become inoperative, and the like. Then a question arises: Can the rest of that instrument stand—will it be a statute, or a treaty, or a contract? And the test to be applied, as we know, on the principles, is again a test as to the intention of the creators—of the authors—of that instrument, be it a legislature or contracting parties. And then very often the Court comes before this artificial position, and it is a position which arises in this case too, on an issue on which we shall have to deal later. But if it is quite clear that the parties did not actually apply their minds to that particular point—the parties, or the legislature, or whoever it might be—the Court has to a certain extent to surmise from objective indications what the parties or the legislature would have intended had they thought specifically of that particular point. And that question, because of no other means of determining it, the Court may very often have to determine on a preponderance of probability, one way or the other. But that is because the Court is then forced to come to a conclusion one way or the other because of this *ex post facto* situation which has arisen. But that is no criterion, and it cannot ever be a criterion for determining, Mr. President, whether in fact the parties were agreed upon a proposition which is said to operate as a part of an agreement between them.

Then, Mr. President, my learned friend, Mr. Gross, referred to a passage in the dissenting opinion of Mr. Justice van Wyk in 1962 in this Court. We find that at page 185, *supra*, of the verbatim record. The passage reads as follows:

> "In the course of a consideration of principles of construction, in his 1962 dissenting opinion Judge van Wyk made the following comment, pertinent to the question under discussion:
>
> > 'One must also bear in mind that parties frequently deliberately use wide terms so as to provide for all possible situations, foreseen and unforeseen, and it follows that when a situation not foreseen by the parties arises which falls within the meaning of the words employed by them they are deemed to have had a common intention in regard thereto.' "

That certainly, Mr. President, with the greatest respect, is a very sound proposition, but totally inapplicable to the situation in which my learned friend seeks to apply it, that is, the type of situation where a specific formulation is used with the intent that its meaning is to cover anything that might fall within that meaning, whether that particular practical situation is then thought of or whether it is not thought of.

If a treaty is made applicable in all British territories when a certain situation obtains, then surely that treaty will apply at the time of its application in every territory that could be called a British territory. Whether it was such a territory at the time when the treaty was entered

into, whether there was any contemplation at that time whether that territory would later come into British domain or not, could not affect the position. That is the type of situation in which this formulation by the learned Mr. Justice van Wyk would apply.

Again, if parties agree that some agreement would operate between them in respect of *all* public holidays, and the next year a new public holiday were declared which they did not contemplate at the time, then certainly this would be included as being part of their bargain because that is what they intended. If, of course, there are other indications of intent—an indication which limits their intent only to things which they contemplated at the time—then, of course, effect would be given to that intent. But that is the type of thing that could arise.

The basic requirement is that there must first be an agreement—a formulation which is in terms applicable to a particular thing. Then the question of whether that thing was specifically contemplated in advance, or whether it was not contemplated in advance, can come into operation, and the question whether it was then intended to be included, or not to be included in the formulation would fall to be decided. But one has to have that foundation first—that premise—before anything of this kind can arise.

Now how does my learned friend seek to apply it? My learned friend says:

> "Article 22 of the Covenant of the League used very 'wide terms' indeed in formulating and innovating the legal principle—
>
> '. . . that the well-being and development of such peoples [that is, peoples not yet able to stand by themselves] form a sacred trust of civilization and that securities for the performance of this trust should be embodied in the Covenant.'. . .
>
> Read in the light of this overriding purpose, the conclusion is not merely permissible, but, with respect, it seems to be unavoidable, that the intention of all the parties to the Covenant and to the mandates system must be presumed to have been that, if the League were to dissolve, which was not foreseen and not predicted, some other way would have to be found by which the Mandate would be supervised." (P. 185, *supra*.)

Now, Mr. President, with the greatest respect, I see not the least possible connection between this submission—this contention—advanced to the Court, and the principle quoted from the judgment of Mr. Justice van Wyk.

The portion of Article 22 which my learned friend cited to the Court merely states the broad principle of a sacred trust of civilization and that securities for the performance of this trust should be embodied in the Covenant. It says nothing more. The sacred trust of civilization in itself may or may not include accountability, depending upon what people decide about it. Article 73 of the Charter of the United Nations speaks of a sacred trust of civilization in that regard and has no provision for accountability in respect thereof. We all know that the formulation "sacred trust" was used long before the mandates system came into being, in relation to various colonial situations without any form of accountability. The mere fact that there is such a sacred trust of civilization in itself imports no concept of international accountability whatsoever.

Next, Mr. President, there is the statement that "securities for the

performance of this trust should be embodied in the Covenant". That surely is a reference to particular provisions to be found in the Covenant providing for security, and if one is to see what securities were intended to be provided, one looks at the particular provisions of the Covenant to see in what way those securities were expressed—in what way the intention of the authors of the Covenant was expressed in relation to those securities. Then one finds the words and to what they apply. Then one finds the specific words that the "Mandatory shall make to the Council of the League of Nations an annual report" and to nobody else, in so far as is relevant to the particular point under consideration.

So, Mr. President, there is nothing in the Covenant and nothing in the mandate instruments emerging from the Covenant which could be said to involve an application of a principle stated by Judge van Wyk. If there is a wide formulation, anything falling within that formulation could be taken to be included, even though not actually contemplated. The wide formulation presupposed in a statement of that kind is non-existent relevant to the particular point which my learned friend wishes to make.

In any event, there is this strangeness about the concluding words of the quotation reading "some other way would have to be found by which the Mandate would be supervised". One may ask the question if there was such a contemplation, what would the contemplation have permitted so far as some other way was concerned? Would the parties have contemplated that a court of law could now decide whether some other international organization is to be regarded, for practical purposes, as a good and a sound substitute for the League supervisory organs and that the Parties would have to be bound by such a determination. This is, in effect, what my learned friend seems to suggest.

Surely, Mr. President, if there was a contemplation on the part of parties that "some other way would have to be found", the normal contemplation would be that there would have to be no agreement upon the point. The mandate instrument itself makes specific provision that if and when the circumstances may require it, there can be agreement between the Mandatory and the Council of the League so as to effect a modification of its terms and provisions.

[Public hearing of 1 April 1965]

Mr. President, at the conclusion yesterday I was dealing with certain principles of law and of interpretation and of implication of provisions of a contract, or an agreement, or a treaty—certain considerations that are basic to the consideration of the dispute between the Parties—with which I propose to deal further this morning.

There is one of these underlying principles on which I would still like to say something more, and that is my learned friend's reference to the possibility that if one has regard to implied intentions on the part of the contracting parties—a possible tacit agreement between them—one looks not only at what they actually contemplated but also at what they would have contemplated if something about which they had not thought at all was brought to their attention. I submitted on principle, and with reference to authority, that that was an untenable proposition.

My learned friend in the course of developing that argument referred the Court also to the decision in the *Barcelona Traction* case. We find that

reference in the verbatim record at pages 185-186, *supra*. After reading from the Judgment of the Court in the *Barcelona Traction* case, my learned friend said, at page 186:

> "The *Barcelona Traction* case, it is submitted, demonstrates that the Court will construe the intention of the parties to an agreement in the light of what their common intent would have been, if they had foreseen developments relevant to their common purpose."

Mr. President, with submission, I have read the *Barcelona Traction* case very carefully and I do not find a word of support anywhere in that Judgment for a proposition of this kind.

My learned friend went further. He said that the parties to the compromissory clause in the *Barcelona Traction* case did not foresee the demise of the Permanent Court, and yet the Court had no difficulty in reaching the conclusion that, in view of their purpose, the parties would have intended to submit their dispute to the new Court, had they anticipated the demise of the old one. Mr. President, I find no reasoning whatsoever on these lines in the Judgment in the *Barcelona Traction* case. What the Court did find, in my submission, was this: the Court found that the parties were, in fact, agreed upon an obligation to submit to judicial settlement of a dispute and that that obligation could stand, and was in terms of their agreement to stand, independently of the question of the particular forum, which was under discussion in relation to another term of that same agreement.

The Court found, in other words, that there was an actual agreement between the parties that that general agreement to submit to adjudication could stand even though the particular forum referred to in one of the clauses relating to that obligation was to fall away. The Court gave effect to that agreement which it found, in fact, existed between the parties. The effect of the agreement was that when the particular forum fell away, the agreement to be subject to adjudication remained—that obligation remained. The clause in question became dormant and it could not be operative again until a new forum was substituted by agreement. A new forum was substituted by agreement at the stage when both parties became signatories to the Statute of this Court. So, all the Court did in the *Barcelona Traction* case was to give effect to what it found to be the actual agreement between the parties. There was nothing which rested upon a basis of what the parties would have thought, or would have decided, if something they had not thought of, had been brought to their attention.

Now, Mr. President, on the basis of that background we proceed to deal with the first of the basic issues between the parties regarding Article 6—that is, what I termed yesterday, the issue of a specific supervisory authority versus the contention of a general obligation of international accountability, or to submit to international supervision. For the purposes of weighing that issue between the parties we also have to traverse the field of the history and the surrounding circumstances pertaining to the establishment of the League of Nations and of the mandates system.

We noted earlier, Mr. President, that the actual terms of Article 22 of the Covenant, and of Article 6 of the Mandate, providing for supervision by League organs, were entirely clear and explicit. We submitted that no implication of the kind which is contended for by the Applicants

could be derived from the actual terms and provisions of those instruments. We have also indicated that the question then arises whether it would be permissible at all to go beyond the wording and the context of the instruments and to attempt to establish the existence of an implied term from material contained in the documents themselves. We referred, in that regard, to the opinion of the honourable President of the Court in the case of the *Expenses of the United Nations*. We also referred in our Rejoinder to certain other authorities, which will be found in V, page 32 thereof. We indicated, Mr. President, that when one has a basic instrument of the nature of the Covenant of the League—the same question arose later in regard to the Charter of the United Nations—the question is whether it is permissible in such circumstances to look at what the contracting parties who brought that instrument into effect initially, might have thought amongst themselves without expressing it in words—without making it possible for successive generations to know what it was they had in their minds.

We submit that there is strong authority in favour of the proposition that one has to be very conservative—to put it at its lowest—in regard to instruments of this nature about any excursion into extrinsic material, in order to arrive at intentions of parties, which are either not clearly expressed, or clearly implicit, in what is set out in the instruments concerned.

But, Mr. President, we do not wish to rest our contention purely on that. It does not embarrass us at all to undertake an excursion into the history and the surrounding circumstances pertaining to the establishment of the League of Nations and the mandates system. On the contrary, such a review, in our submission, entirely confirms our contention and militates very strongly against that of the Applicants. It shows, in our submission conclusively, that there is no justification whatsoever for saying that as a matter of necessary inference the parties had in mind such a concept of international accountability, divorced from the actual League machinery, as is contended for by the Applicants. On the contrary, the indications of probability are very strong that there are at least certain of the interested parties who would not have been prepared to agree to a vague concept of that nature.

May I draw attention first to the nature of this implication which is sought to be drawn by the Applicants. They say that the obligation for which they contend is one to submit to international supervision—an obligation of international accountability. But when we analyse that and the manner in which they seek to apply it in this case, Mr. President, it will be quite obvious that they cannot contend that that was the sole content of the obligation at the time when the League was in existence and in operation. In the agreement it stood quite clearly on record that a report was to be made to the Council of the League, to its satisfaction. If we suppose now that some other political international organization had also come into being at the time, consisting of other States not members of the League—there was a time when a considerable number of the States of the world were not members of the League. Some had not joined. Some had joined and then resigned from the League again—if we suppose that some parallel organization came into existence while the League was still in existence, then surely it could not have been contended that the Respondent, having submitted to international supervision, as is contended by the Applicants, would have become obliged to report and

account also to this other organization, with which it might have no connection whatsoever. Surely that could not have been the contention.

Again, Mr. President, if we take the example of other international organizations that did exist at the time—let us take the International Labour Organisation, which existed side by side with the League. Supervision by an organization of that kind could also be classified as international supervision. If there were accountability to such an organization, it would also be international accountability and yet, surely, there could be no contention to the effect that there was any obligation on the part of the Respondent to submit to supervision of that nature because it could be classified as international supervision.

Now, Mr. President, if one analyses this contention, it really carries in it the germ, I may call it, of a succession idea, although it is no longer called that. It really carries with it this implication, that the parties contemplated that there would be a general obligation of international accountability, but that as long as the League was in existence that obligation of accountability would be discharged by reporting and accounting to the Council of the League; so that the importance of this general concept of international accountability would arise only if and when the League's existence should come to an end. That is the implication, and the important implication, in this contention of the Applicants; that is what they are in effect contending for, otherwise it makes no sense and does not advance their case in the least. In other words, they have to contend that one should read into the relevant instruments an implication of something of this nature: that there is to be a regular report—an annual report—to the Council of the League to its satisfaction, and that if the League should be dissolved, the mandatory would continue to be under an obligation of international accountability. That would be one way of putting it—I am just suggesting various ways in which it could be phrased. Another possibility would be that the obligation was intended to read somewhat as follows: the mandatory shall be obliged to submit to international supervision, which obligation shall, during the lifetime of the League, be discharged by rendering annual reports to the Council of the League to its satisfaction. That concept of something which will have to change on the dissolution of the League—something which will have to take on a new form after the dissolution of the League—is a common factor underlying any formulation of the kind which one will have to put forward in order to assist the Applicants' contention. In other words, there must be inherent in this contention a contemplation on the part of the authors of the mandates system to provide for something after the League has become dissolved; otherwise it brings them nowhere. And that renders so extremely important, Mr. President, the fact that it is common cause, as a matter of fact, that there was no contemplation on the part of the authors of the system that the League would come to an end, and that there was quite obviously no intent on their part to make contractual arrangements or agreements about that eventuality. They did provide in the mandates themselves for the possibility of modification of the terms of the mandate, if and when that should be necessary, and that is quite obviously, in our submission, where they left the matter. That is a result which is in complete accord with the admitted fact that there was no contemplation of what would happen after the dissolution of the League.

Our argument in regard to this point, Mr. President, will be found in

the pleadings in the Counter-Memorial, **II**, at page 123, and also in the Rejoinder, **V**, at page 34. The argument in the Rejoinder in this regard relates to the contention then advanced by the Applicants in their Reply regarding the "organized international community" theory. But, Mr. President, in view of the fact that, as I have just demonstrated, this contention regarding international accountability, or being accountable to international supervision, also brings the Applicants nowhere if there had not been any contemplation on the part of the authors of the system extending beyond the lifetime of the League, the same arguments apply, *mutatis mutandis*, to this contention.

And that makes it so important to have regard to the submissions I made yesterday afternoon, and emphasized again this morning, that there is no basis in law for finding a contractual obligation on the basis of what parties did not think—did not have in their minds—but would probably have had in their minds if somebody had raised the matter and had said to them "Let us discuss it".

Mr. President, we contended further in our pleadings that even if this factor were disregarded (the fact that nobody actually thought of what would happen after the dissolution of the League) it would still have to be borne in mind that certain of the mandatories were reluctant to accept the extension of the mandates system to particular territories occupied by them, and that they were influenced in their eventual acceptance of the mandates system, amongst others, by the nature of the supervisory machinery. We pointed out in our pleadings that the supervisory machinery was carefully checked and balanced so as to render unlikely any injurious, biased or unfair interference with mandatory government, and so as to contain a minimum of a political element and a maximum of an independent expert approach. We referred there to the unanimity rule applying in the case of the Council; we referred, Mr. President, to the constitution of the Permanent Mandates Commission as a body of experts and not as a political body, and one which expressly stated its task, and its view of its task, to be one of co-operation and collaboration rather than one of sitting in jugdment. The references one will find in the Counter-Memorial, **II**, pages 119-121 and 123-124, and also in the Rejoinder, **V**, at pages 34-35. We pointed out that some of the statements made in the deliberations that eventually led to the compromise agreement, made it perfectly clear that the composition of the supervisory organ was in fact, and as a practical consideration, a matter of importance to these parties who were reluctant to have the system extended to their particular cases at all, and they included the then Prime Minister of the Union of South Africa. Mr. President, we submitted that under those circumstances, having regard to the attitude which the particular parties took before the compromise agreement was arrived at—when they could only with reluctance be persuaded to accept this compromise agreement as far as it went—there could surely be no warrant for saying that if something more had been sought to be imposed upon them—something which was in fact not discussed—if it had been suggested to them not only that they should be willing to submit to supervision by the particular League supervisory organs of which they knew how they were going to be constituted, but also that they were to be subject to a vaguer concept of international accountability—surely there could be no justification for saying that they would have agreed to that—that they would have said "But that is understood; it is something we did not trouble to express;

it is too clear". Surely, Mr. President, the reaction of at least some of them would have been to say "But that is something we have not discussed at all—let us consider it". And the probabilities are that they would have said "No, we are not prepared to bind ourselves to a vague concept of that kind—we shall bind ourselves to what we know—to a definite proposition. Here we have a League which is intended to exist for an indefinite time. If its existence comes to an end, then, and in that event, we can talk about it again, and we can see whether we can make a new agreement". That is surely the reaction which one could have expected from the practical men who were to forge that agreement.

That was broadly the line of argument which we set out in our pleadings, and I am setting it out as a background now to this review of the facts at the time of the establishment of the system. I may just give a further reference. The historical background to this submission is set out in our Counter-Memorial, **II**, at pages 9-14, and again at pages 119-121.

And now the Applicants in their oral argument have sought to join issue with these contentions on our part, and they do so in two ways.

Firstly, Mr. President, they attempt to minimize the nature and the importance of the elements of compromise in the Mandate. They go so far as to say that the only significant element in the compromise was that the open-door provision was not to be extended to the case of "C" Mandates. That is how they try to whittle down the significance of the compromise aspect of the whole situation.

Secondly, they contend that the authors of the mandates system were primarily concerned with a general obligation of accountability, and that the agreement as to the organs responsible for supervision was only an incidental aspect—something which did not play any important role at all in the processes of coming to an agreement.

Those are the two important aspects which they emphasized, as we understood them, in the argument of my learned friend, Mr. Moore, and those are the two aspects on which we shall concentrate, in turn, in the further review which we now intend to undertake of the relevant historical events.

I deal first with the first one—the importance or otherwise of the compromise aspect of the arrangement. The Applicants in this regard argued as follows in the verbatim record at page 139, *supra*.

They said:

> ". . . there was a 'compromise' on the issue of annexation, but it is also apparent, even obvious, that the solution finally accepted was a 'compromise' only in so far as there was no provision for the 'open door' in the 'C' Mandate provisions eventually adopted as Article 22, paragraph 6, of the Covenant".

Now, Mr. President, as far as we are concerned, it is of course not disputed that all interested parties finally agreed that there would be no annexation of the German colonies conquered or occupied by them, but the Applicants now attempt to minimize the significance of the compromise by virtually suggesting that that was the only important aspect of the agreement that was reached.

The Applicants do not in their review of the events give any consideration at all to what we submit to be of the utmost importance, and that is, that the debates which led to the eventual agreement contain this

continual element of discussion and difference of opinion on the very nature of the relationship between the League and the Mandatory. It amounted to this, that the adherers to the principle of non-annexation—the adherers to the principle that the mandates system was to be extended to all the colonies and possessions in question—initially had in their minds a very absolute form of League control over the possessions in question—an extreme form of League control—so that the Mandatory was to play a completely subordinate part—the Mandatory was to be there as a mere agency, which could even be chopped and changed at the discretion and on the basis of decisions taken from time to time by this controlling power, the League. That was the type of conception which President Wilson and those who agreed with him had before this agreement was eventually reached.

And in terms of that conception, Mr. President, as we shall point out, there was initially not even provision for reporting, the idea having been that the League itself would be in such absolute control that that would not be necessary. That might then well have become a mere incidental matter, to be arranged administratively arising out of that very relationship.

It also went so far, then, that expenses of mandatory administration would have to be borne by the Members of the League, and not by the Mandatories themselves—that was one of the natural corollaries. It was when representatives of other States said: "No, but we have to be more practical about this situation. We cannot put ideals of that nature into practice and expect them to work", that the whole concept began to change, and that it became necessary eventually to define the position in terms whereof the Mandatories would be in primary control and the relationship between them and the League one of supervision, not of control, on the League's part. There was to be no idea of chopping and changing of Mandatories. In other words the Mandatories were to have security of tenure, if one might call it that. *Then* the arrangement was necessary to define how this supervision was going to work, and for the purposes of that it was necessary to define the content of an obligation of report and accountability. That is how, eventually, this whole agreement came about.

As is well known, Mr. President, we admit that President Wilson strongly advocated a policy of "no-annexations" (we refer to that in the Counter-Memorial, **II,** p. 11, para. 5), and that he sought to apply the mandates system to all conquered German colonies and possessions. In this aim he eventually succeeded, but at the same time, in order to succeed in this aim, he had to compromise on some of the very vital aspects of the whole scheme, in that he had to abandon quite a number of his earlier ideas.

On the point that President Wilson initially had in mind that the League would be vested with complete authority and control, reference may be made to the following, Mr. President. Firstly, there was President Wilson's *Third Draft*, also referred to as the *Second Paris Draft*, dated 20 January 1919. I refer to Article II of the *Supplementary Agreements* annexed to the draft Covenant; and that read, *inter alia*:

> "Any authority, control, or administration which may be necessary in respect of these peoples or territories other than their own self-determined and self-organized autonomy shall be the exclusive function of and shall be vested in the League of Nations and exercised

or undertaken by or on behalf of it." (*Vide* D. H. Miller, *The Drafting of the Covenant*, Vol. II, pp. 103-104.)

Now in the same document we find in Article III the following:

"The degree of authority, control, or administration to be exercised by the Mandatory State or agency shall in each case be explictly defined by the Executive Council in a special Act or Charter *which shall reserve to the League complete power of supervision . . .*" (*Ibid.*, p. 104.)

The factor to which I wish to refer and which I omitted earlier was that the Mandatory under this scheme of things did not need to be a State at all. There could have been a specialized agency who could have performed this function of being a Mandatory. I refer in regard to this quotation also to Miller, at page 104.

Now, Mr. President, Mr. Lloyd George, in writing of the events of 30 January 1919, when there was this eventual clash between President Wilson and the representatives of Australia and New Zealand, of which we speak in the pleadings, on the very question of mandates, Lloyd George writes in that regard as follows:

"Feeling was at moments intense. President Wilson had his own idea of Mandates. It was hardly a plan, for he had clearly not worked it out and he had therefore not submitted to the Congress any detailed project. But he vaguely indicated that what he had in mind was an Administration of the German Colonies by Mandatories *under the direct orders of the League.*" (David Lloyd George, *The Truth about the Peace Treaties*, p. 541.)

This concept of complete control, Mr. President, naturally entailed also that the League should have been responsible for administrative expenses in mandated territories, and in this regard Lloyd George says in the passage which follows immediately upon the previous one which I have read:

"When asked who was to defray the cost of carrying out these orders, he (i.e., President Wilson) replied that *the League would bear the financial burden.* He could not explain how the money was to be raised. That essential detail had somehow escaped his consideration. Nevertheless he stuck to his original notion, and as my proposal contemplated placing the financial responsibility on the mandatory, he regarded my plan as an incomplete concession to his ideas." (*Ibid.*, pp. 541-542.)

Mr. President, we could refer in this regard also to President Wilson's *Third Draft*, called the *Second Paris Draft*, of 20 January 1919. Article III of the *Supplementary Agreements* annexed to that draft says, *inter alia*, the following:

"Any expense the Mandatory State or agency may be put to in the exercise of its functions under the Mandate, so far as they cannot be borne by the resources of the people or territory under its charge upon a fair basis of assessment and charge, shall be borne by the several signatory Powers, their several contributions being assessed and determined by the Executive Council in proportion to their several national budgets, unless the Mandatory State or agency is willing itself to bear the excess costs; and in all cases the expenditures of the Mandatory Power or agency in the exercise of

the Mandate shall be subject to the audit and authorization of the League." (D. H. Miller, *The Drafting of the Covenant*, Vol. II, p. 104.)

Mr. President, it will be noted that this provision was omitted from President Wilson's *Fourth Draft*, also called the *Third Paris Draft*, of 2 February 1919. I refer to Miller, Volume II, pages 152-153. In the course of coming to the compromise agreement, this idea had to be dropped.

The other important aspect of President Wilson's original concept of all control being vested in the League was that it was not a matter of any great moment whether any particular country would be appointed as a Mandatory. His idea was that the Mandatory could be something in the nature of an "organized agency". As I have pointed out (the expression used in this quotation is from his *Third Draft*, or *Second Paris Draft*, of 20 January 1919), it could be an organized agency. It need not necessarily be a State. This idea he also eventually dropped. It no longer appeared in the *Fourth Draft* of 2 February 1919 (that is also referred to by Miller in his Volume II, pp. 145-154). The *Fourth Draft* provided that the tutelage of those peoples who could not yet stand by themselves "should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position, can best undertake this responsibility". That was the eventual notion. We find that also in Miller, Volume II, page 152.

Another incident of President Wilson's original concept, Mr. President, of an all-powerful League, was that Mandatories could freely, at the discretion of the League, be removed or substituted. The references are paragraphs I, II and III of his *Second Draft*, or *First Paris Draft*. We find it in Miller, Volume II, pages 87-89, and again, in paragraphs I, II and III of this *Third Draft*, or *Second Paris Draft* (Miller, Vol. II, pp. 103-104). This question of cancellation of mandates by the League was expressly discussed in January 1919. It appears from "The Intimate Papers of Colonel House" (*Seymour*, Vol. IV, p. 306) that on 27 January, Lord Robert Cecil of Great Britain indicated to Colonel House that Australia and South Africa would consent to being Mandatories of South West Africa and the Pacific Islands "providing there was no question of cancelling the Mandate"—again, Mr. President, indicating how important that element became. Colonel House, putting the American viewpoint, is reported to have argued "that the League of Nations must reserve the right to cancel the Mandate in cases of gross mismanagement", but that the President—that is President Wilson—"would agree that the peoples concerned should be able at any time to vote themselves part of Australia and South Africa, thereby cancelling the Mandate".

But, Mr. President, this concept of making express provision for cancellation of a Mandate on the grounds of mismanagement, was, of course, not maintained, nor was the idea that the League could "at any time release" from guardianship a people or a territory which it thought capable of taking charge of its own affairs. That initial idea is set forth in paragraph III, being part of the *Supplementary Agreements* annexed to the President's draft of 20 January 1919.

Now, Mr. President, it remains to refer to certain aspects of the acceptance by all concerned of the proposal which eventually divided the mandated territories into "A", "B" and "C" Mandates.

On 24 January 1919, Mr. Lloyd George made it clear that South Africa, Australia, and New Zealand laid claim to the German territories

which had been conquered by them. (That we find in the *Foreign Relations of the United States*, Vol. III, pp. 718-720.) And although he stated that Great Britain "saw no objection to the mandatory system" (that is at p. 719), he summed up his remarks by saying the following (that is, Mr. Lloyd George):

> ". . . he would like the Conference to treat the territories enumerated as part of the Dominions which had captured them rather than as areas to be administered under the control of an organisation established in Europe which might find it difficult to contribute even the smallest financial assistance to their administration."

That is at page 720 of the work to which I have referred.

Then we find, Mr. President, that the Dominion Ministers personally came and stated their claims to the territories and the reasons why they wished to annex them. (*Foreign Relations of the United States*, Vol. III, Mr. Hughes, Australia, pp. 720-722; General Smuts, South Africa, pp. 722-723; Mr. Massey, New Zealand, pp. 724-727.) These claims were repeated on subsequent days. (*Ibid.*, South Africa, pp. 743-745, 27 January; Australia, pp. 745-747, 27 January; and New Zealand, p. 751, 28 January.) Discussions then reached a stage of near breaking-point, as can be seen in the same work at page 763, where President Wilson said ". . . it looked as if their roads diverged".

That, Mr. President, was the basis upon which further discussion took place—in which the eventual compromise agreement was arrived at—but I emphasize that, at that stage, it was only a *provisional* agreement —provisional in various senses which I shall explain, and which emerge very clearly from the record.

First, it is clear from this background, and from the relevant provisions of the Covenant as finally determined, that the Applicants grossly over-simplify the position when they argue that the solution finally accepted was a compromise only in so far as there was no provision for the open door in the C Mandate provisions.

The important question is not simply one of these being a compromise on the narrow issue of annexation. It was a compromise on the relationship between the Mandatories and the League, and in this regard, we submit, the history shows, as we have sketched it, that as time went on President Wilson changed ideas he had previously held in regard to the powers to be assigned to the League vis-à-vis mandate States and Mandatories.

There is ample historical proof therefore, Mr. President, that our summing up of this position, in regard to the compromise, in our Counter-Memorial is perfectly correct:

> ". . . President Wilson had to abandon certain of the extreme aspects of his proposals concerning League supremacy and control and the consequent payment of expenses of Mandate administration by League Members. All Mandatories were to be States, not 'organized agencies'. The Mandates were to be allocated by the Principal Allied and Associated Powers (not the League), and at any rate in the case of C Mandates the allocation *'would have to be'* to the adjacent claimant States." (Counter-Memorial, **II**, pp. 13-14.)

The Court will recall that that is the expression which occurred in Mr. Lloyd George's statement of 30 January 1919, when he laid before

the Conference this compromise formula on which he said the Dominions were prepared to agree.

The relationship between the League and the Mandatories was, in each case, regulated by a mandate instrument, the terms of which were assented to by the Mandatory and would normally require its consent for alteration. All this was very far removed from the envisaged free League discretion to appoint and change Mandatories. In the case of "C" Mandates, the Mandatories were to have powers to administer the territories as integral portions of their own, and there would be no objection to eventual amalgamation which could naturally result from such administration, if agreed to by the inhabitants. Those were the important elements of this compromise, showing this middle-point, if I might call it that, where the extreme ideas eventually met.

I turn now, Mr. President, to the other reason why we undertake this historical survey, and that is in regard to the Applicants' contention:

> "... it is apparent that the primary concern of the founders of the mandates system was the obligation of international accountability, and not the details which would spell out the manner in which the obligations would be carried out". (P. 144, *supra.*)

In developing this point, the Applicants first referred to the pre-Conference evaluation of the mandates system which, in their view, gave paramount importance to the idea of international supervision, and for this purpose quoted extracts from various sources containing phrases such as "in trust for civilization" and "as trustees for all mankind". (Pp. 142-143, *supra.*)

These phrases were quoted, Mr. President, as if they were applicable to the concept of a mandates system.

Mr. President, we do not deny that in the initial discussions before the Conference, perhaps even in the first stages of the Conference, concerning this whole idea of a mandates system and the idea of international control or supervision, there would have been very little discussion on questions of detail as to the manner in which supervision or control, and so forth, was to be exercised. That is the way in which any discussion originates. There is an idea, and the principles of the idea are discussed first; then one proceeds from the principles to a question of detail with a view to putting those ideas and those principles into effect.

We must point out, Mr. President, that most of the sources quoted by the Applicants do not bear out their contention that in the pre-Conference era there was unanimous agreement on the desirability and necessity of international supervision of mandated areas, with the accent on "mandated areas". So, for instance, they create, unfortunately, a misleading impression when they refer to P. H. Kerr, of the *Round Table*, stating "that the Mandatory Power 'ought to govern the dependency as trustees for all mankind'". (P. 143, *supra.*)

Mr. President, even a superficial perusal of this source cited by the Applicants, *Introduction to the Study of International Relations* (1916), page 179, shows that Mr. Kerr did not have in mind a mandates system which would create some form of trust relationship between a mandatory and an international organization. Mr. Kerr was, in fact, dealing in general with the problems which arise out of the contact between advanced and backward peoples. The first of three general principles advocated by him was that so long as there are people seriously below

the level of most civilized nations, commercial intercourse was bound to lead to evils which can only be ended by a more civilized people assuming charge of the government of the more backward race. When this has been done ". . . the ruling people ought to govern the dependency as trustees for all mankind . . .".

It should be noted that the author used the words "the ruling people", and not "the Mandatory Power", as suggested by the Applicants.

It is clear, therefore, that Mr. Kerr had in mind a general moral obligation resting on all colonial powers, and not a legal obligation owed by mandatories to an international organ. He was speaking in general of the concept which should govern relationships between a colonial power and a dependency governed by it. This could include a mandatory under the new system which was already under discussion, but it was not something which related specifically to mandatory powers in the mandates system as is represented by the Applicants.

The same applies to the passage from the *New Statesman* quoted at page 142, *supra*. Here again there was a concept of territories "held in trust for civilization", and as quoted, it was suggested that it related to a mandates system. In fact, Mr. President, if one looks at the extract from the *New Statesman* and considers the context in which this expression applied, it becomes quite clear that what was referred to was again the general relationship of colonial powers to territories administered by them. There was a suggestion by the learned author that a distinction was to be drawn between countries in which white men could settle, and countries in which they could not. He suggested as a general principle that while temperate colonies which white men were living in and developing might properly be governed in the interests of the white inhabitants, tropical colonies ought to be governed primarily in the interests of their black inhabitants, and not in the interests of the European trader.

The *New Statesman* continues: "The ideal solution of the whole problem, we suggest, would be the deliberate abolition of all international fences in the tropics. All Central Africa from the boundaries of Morocco and Egypt in the north, to those of Rhodesia in the south, should be neutralized and administered by an international commission for the benefit primarily of the races which alone can live there and secondarily of the traders from all countries on equal terms. But ideal solutions are not always practicable." The author went on to describe what would be useful beginnings in this regard. That is the context in which this expression occurred which the Applicants quoted, namely—

> "If the Allies determine at the end of the war to retain control of the German colonies they might and ought to give a solemn undertaking to hold those territories in trust for civilization, to treat the interests of the natives therein as paramount . . ." (P. 142, *supra*.)

It was again, Mr. President, a general discussion on the principles which ought to govern the relationship between colonial and dependent peoples.

Now, Mr. President, as we have said, it may well be that in the pre-conference era writers and statesmen devoted more attention to the abstract idea of international supervision than to the actual manner in which such supervision would be carried out. It is really inconceivable that it could have been otherwise. The framework of an idea in point

of time always precedes the details of the framework, in much the same way as the idea conceived by a painter precedes the complete painting. But that does not mean that, when the details are eventually filled in, they are unimportant. On the contrary, if this idea can only take effect by way of agreement between interested parties with conflicts of interest to a certain extent—conflicts of ideas, conflicts of objectives—then the exact machinery and details eventually agreed upon in order to put the ideas into practice to the extent agreed upon—surely become of the utmost importance.

What we do dispute, therefore, is the Applicants' generalization that the idea of international supervision remains superior to the details of the mandate system regarding the organs of the League of Nations to which mandatories would be accountable. And our contention in this regard is, in our submission, Mr. President, borne out entirely by reference to the discussions at the Peace Conference.

The Applicants allege:

> "Perhaps the most succinct statement of the nature of the obligation of international accountability was made by President Wilson himself. To use his words, 'the administration will be so much in the view of the world that unfair processes could not be successfully attempted'." (P. 142, *supra.*)

As we have already pointed out, Mr. President, it should be observed that President Wilson came to the Peace Conference without having developed a practical outline of the mandate system and that this very fact gave rise to much misunderstanding and heated discussion.

I quote again from Mr. Lloyd George—from another passage from *The Truth about the Peace Treaties*, 1938, Volume I, page 271. He stated there:

> "He (President Wilson) was definite and clear as to the objectives he desired to reach . . . but . . . he had never developed for himself the practical outlines of any of the ideas which inspired his speeches. He had not, for instance, taken any serious trouble with the formulation of his detailed and workable scheme for a League of Nations."

Now at the Peace Conference, Mr. President, after President Wilson had outlined his ideas concerning the League of Nations—these broad, general ideas of a League of Nations and of a mandates system—M. Simon of France said that France favoured annexation of the German Colonies, and then Mr. Balfour of England, at a meeting of the Council of Ten on 28 January 1919, expressed misgivings about the whole idea—misgivings which were shared by most of the delegates. I quote here from *Foreign Relations of the United States*, Volume III, pages 763-764:

> "Mr. Balfour enquired whether it was not true that whilst a good deal of thought had been given to the League of Nations, very little thought had been given to the position of a Mandatory Power . . . He . . . was strongly in favour of the principle. But he was conscious that it had not been worked out. He knew of no paper or speech in which the practical difficulties which they had to face had been worked out in detail . . .
>
> No conclusion had been reached and no authoritative statement had been made regarding another point, namely should the tenure

of the mandatory be made temporarily or not? If the tenure were merely temporary difficulties would arise and there would be perpetual intrigues and agitation."

At the same meeting, Mr. President, M. Clemenceau, Prime Minister of France, also pointed to the lack of practical detail and here I quote from the same source at page 768:

"But it appeared that they had now gone beyond that limit when they proposed to create a League of Nations with governmental functions to interfere in internal affairs, with trustees in various places sending reports to . . . he did not know whom. Throughout the world, even in Europe, . . . a control would be set up. President Wilson himself had said so, and, as a result, appeals would be heard from all parts of the world. Who would deal with those appeals? It had been said that an International Legislature and some sort of executive power . . . would have to be created. The idea of an unknown mandatory acting through an undetermined tribunal gave him some anxiety."

Mr. President, that was the context in which people spoke of this whole concept of relationship between a mandatory and the League. Was the League to be in control or was the position of the League, in relationship to the mandatory, to be one of mere supervision only—the main responsibility resting with the mandatory. And the other important point is that the practical men were asking for details. They said: "Now we want to know what is this system through which we are going to be controlled." The idea of an unknown mandatory, acting through an undetermined tribunal, gave them some anxiety.

So, Mr. President, we come to 30 January 1919, the important date on which Mr. Lloyd George outlined the proposals contained in the document—the so-called Hankey-Latham draft—which had been drafted by officials of Great Britain and the Dominions. This document was entitled *Draft Resolutions in reference to Mandatories* and one finds it at pages 785-786 of Volume III of the *Foreign Relations of the United States*. It is important because, with very few changes, it contains the eventual Article 22 of the Covenant. Mr. Lloyd George is reported to have said the following. (We quote briefly from it, Mr. President—certain excerpts—in our pleadings. It may, perhaps, be worth while to give the full statement in its context.)

"That document did not represent the real views of the Colonies; but it had been accepted by them as an attempt at a compromise. Great Britain had deliberately decided to accept the principle of a mandatory; but that decision had not been wholly accepted by the Dominions. The Dominions, however, were prepared to accept the conclusions reached in the document as a compromise, because they fully realized that there could be no greater catastrophe than for the delegates to separate without having come to a definite decision. It had been decided to accept the doctrine of a mandatory for all conquests in the late Turkish Empire and in the German Colonies. But three classes of mandates would have to be recognized, namely:

Firstly: Mandates applicable to countries where the population was civilized but not yet organized—where a century might elapse before the people could be properly organized. For example, Arabia.

In such cases it would be impossible to give full self-government and at the same time prevent the various tribes or units from fighting each other. It was obvious that the system to be applied to these territories must be different from that which would have to be applied to cannibal colonies, where people were eating each other.

Secondly: Mandates applicable to tropical Colonies situated a long way from the country of the possible mandatory. In other words, territories which did not form an integral part of any particular mandatory country. For example, New Guinea. In these Colonies the full principle of a mandatory would be applied, including the 'open door'.

Thirdly: Mandates applicable to countries which formed almost a part of the organization of an adjoining power, who would have to be appointed the mandatory."

The third one, the third class, was the cause of particular difficulty before this compromise agreement could be arrived at, and it of course included the case of South West Africa. It included also the case of the conquests of Australia and New Zealand, and that is why it becomes very pertinent to refer now to the attitude taken up immediately afterwards by Mr. Hughes on behalf of Australia.

After Mr. Hughes had pointed out that his Government had asked for full details concerning the mandatory principle, and that he was therefore compelled to withhold his assent to the proposals until his Government had communicated its decision, President Wilson also showed an awareness of the importance of the practical details necessary to give concrete content to the mandatory ideal. I quote, Mr. President, from the same source (*Foreign Relations of the United States*, Vol. III, pp. 788-789), President Wilson speaking:

"To return to the immediate subject, could they take a clean sheet and say that Australia, for example, would accept a mandate about New Guinea? How would that mandate be exercised? What would it involve? No one could give an answer to Australia... He surmised that the character of the mandate would be left in the hands of an executive of the League of Nations, consisting of the Great Powers with a minority representation of the Smaller Powers. He imagined, also, that no action could be taken by that Council in the face of three negative votes. Should that system be adopted it would be impossible for any harmful conditions to be imposed upon the mandatory State."

Already, Mr. President, the significance of this aspect of the situation was stressed in these very deliberations in pursuance of the point raised by Mr. Hughes. I quote further from President Wilson:

"But that arrangement had not yet been adopted; no agreement had as yet been reached. He had been accused of being a hopeless Idealist, but as a matter of fact he never accepted an ideal until he could see its practical application. The practical application was always the more difficult. Mandatories might work unsatisfactorily under one programme whilst they might work well under another. Therefore no one should accept the scheme unless it was shown how it was going to work... Further, it would be necessary to define the methods of self-expression of the ward or people under tutelage.

> There must be a responsible body which would be in a position to hear that self-expression and not be carried away by its sympathies."

Here, Mr. President, the emphasis is on the fact that this could not be a definite, a final, arrangement, until people knew how the whole scheme was going to work. Mr. Hughes, later in the meeting, expressed a similar sentiment. I quote from the same source at page 793:

> "It was proposed really to govern the fate of people by declaring that a certain principle should apply, but to what extent that principle should apply, or by whom that principle should be applied, or when it should be applied, no one knew. For that reason President Wilson had pointed out that the acceptance of Mr. Lloyd George's resolutions would not settle anything until the League of Nations had been created and clothed with authority and with certain powers, duties and functions . . . Now he would have to tell the people of Australia how the whole matter was to be settled, and they would ask, how? His reply would be that the mandatory principle was to apply but he did not know how except that the arrangements would be such that the scheme would fit like a glove to the hand. Having lived all his life in Australia and knowing the Australian temperament, he thought it would be impossible to expect them to accept a principle the nature of which was not known. A definite decision could only be expressed when they knew what it all meant."

It seems, therefore, Mr. President, in our submission, perfectly clear, firstly, that there was a general recognition of the fact that no power could be asked to accept undefined mandatory obligations towards an undefined international organ. At the same time, there was already a contemplation, and that appears to have been generally assumed, that the supervision would be exercised by an executive of the proposed League of Nations, which would consist mostly of the great powers. I mention that point because in reading the Hankey-Latham draft, one will find that the clause relating to a report speaks of a report to the League. It does not yet say specifically a report to the Council.

But it is significant, Mr. President, in that regard, that not only President Wilson referred in the passage from which I have read to the idea that the controlling or supervising authority should be the executive, on which three negative votes, as he put it, would be sufficient to make it impossible for a resolution to be adopted, and that that executive would consist of the great powers with some minority representation of smaller powers, but that the matter was also referred to in the speech by the South African Prime Minister, General Botha. This is of particular importance in this regard. I will come to that a little later. First I wish to refer to a statement by President Wilson on 28 January 1919, in answer to a question by Sir Robert Borden. The question was: "whether the nomination of a mandatory need be postponed until the League of Nations was constituted. Under the scheme for the creation of a League of Nations, he understood that the five Great Powers would form a Council controlling the work of the League. Therefore the difference between making the decision now or leaving it to the Council of the League of Nations was not great. He would, therefore, ask whether President Wilson would take that suggestion into consideration." (*Foreign Relations of the United States*, Vol. III, pp. 766-767.)

President Wilson replied to this question in the affirmative. He said

that he would take that suggestion into consideration—that the difference between making a decision now and leaving it to the Council of the League was not great.

At the council meeting of 30 January, Mr. Hughes is reported to have enquired whether they should await the acceptance of the League of Nations by the conference and by the world. Was not the *de facto* League of Nations already in existence in that room? He suggested that they, as a League of Nations, should act as the executive of the future League of Nations and settle the various problems which awaited settlement.

Then, Mr. President, President Wilson's remarks at that very same meeting (which I quoted earlier), will be recalled, and in that same context came the speech of the South African Prime Minister, General Botha, which we recorded.

Mr. President, at the adjournment I was dealing with this factor that, although at the stage of the compromise agreement, or arrangement, of 30 January 1919—at the Paris Peace Conference, no specific details were worked out in regard to supervision of the respective mandatory administrations, there was, quite obviously, general acceptance of the idea that the responsible organ in the League would be an executive and that executive would consist largely of the Great Powers, with a certain minority representation from the smaller powers. I have just read to the Court certain statements—speeches made by various delegates —which all show that contemplation. I was referring to that fact at the adjournment, that in an extract from a speech of the same date by the South African Prime Minister, General Louis Botha, which extract we cite in our Counter-Memorial, **II,** page 119, he also expressed his understanding that, if the idea fructified, the League of Nations would consist mostly of the same people present there that day, who understood the position and who would not make it impossible for any mandatory to govern the country.

The people there that day were, of course, representatives on the Council of Ten—really representative of the five Great Powers, together with the representatives of the Dominions, were some of the prospective mandatories.

The other factor that I want to stress about the situation as it had emerged on 30 January 1919 in this: that there was, at that stage, no final agreement. Everybody had regard particularly to the comments made by Mr. Hughes of Australia and by President Wilson to the effect that it was important for all to know what the details of this scheme were—how was it going to work. Therefore, nobody could be expected to agree finally before knowing those important details. The details related particularly to the exact manner in which the League would be constituted—how its organs would function—because those things had, as yet, not been settled.

That this was the understanding emerges very clearly from various passages in the record. Mr. Lloyd George first of all expressed the hope—

> "... that his colleagues would provisionally adopt the resolutions he had submitted, subject to such reconsideration as might be required when the complete scheme of the League of Nations was formulated". (Miller, *The Drafting of the Covenant*, Vol. II, p. 199.)

Those were the exact words of Mr. Lloyd George in introducing this compromise formula and laying it before the meeting of the Council.

After him, the one delegate after the other expressed his understanding that the agreement reached was provisional.

President Wilson said that he was—

> "... willing to accept Mr. Lloyd George's proposals, subject to reconsideration when the full scheme of the League of Nations was drawn up". *(Ibid.)*

Baron Makino of Japan "expressed his satisfaction that a provisional agreement had been reached on the question of Mandatories". (*Ibid.*, p. 201.)

Sir Robert Borden of Canada "expressed his pleasure at the fact that an agreement, if only provisional, had been reached". (*Ibid.*, p. 202.)

That was the situation as it emerged in general, at that particular stage.

It was not a question of the parties having agreed to a general concept of international accountability, without being interested in what the details of the scheme were or how they were going to work.

I wish to turn, Mr. President, more specifically to the Respondent's part in this whole arrangement—how it affected the Respondent's position—what the Respondent's position was before and after this agreement. The Respondent's position was generally considered, by everybody concerned—to be something special—something extraordinary—something unique—that is, so far as the South West Africa question was concerned at that particular stage. I do not think it is an exaggeration to say that there was general agreement beforehand that the South West Africa case was so special that, although the mandates system might extend to all the other colonies, it would not extend to South West Africa. One knows, of course, that the initial proposal by General Smuts, for instance, was that all the German African possessions, should be excluded—and also those in the Pacific Islands. Other ideas prevailed eventually.

I wish to refer to some of the views expressed, particularly in so far as South West Africa was concerned, where even the case of South West Africa was distinguished from all the others.

At page 138, *supra*, of the verbatim record, the Applicants quote a passage from Mr. Lloyd George's *The Truth About the Peace Treaties*, Volume I (1938), page 6, in order to show that prior to the Peace Conference the Imperial War Cabinet accepted the principle that, as part of the general mandates scheme applying to enemy colonies, there would be a right of appeal from the mandatory power to the League of Nations on the part of anyone who considered himself ill-treated or claimed that the conditions set down by the League of Nations were not being fulfilled. That is the purpose of the Applicants' reference to that particular passage in the book of Mr. Lloyd George.

Mr. President, the author makes it perfectly clear that the ideas expressed at that meeting were not intended to apply to South West Africa, or to certain islands in the Pacific. I quote from page 123:

> "The outstanding feature of the conversations that took place was the complete unanimity with which the Imperial War Cabinet accepted the doctrine of the Mandate in respect of enemy possession, except in South West Africa and the islands conquered by Australia and New Zealand." (George, *The Truth About the Peace Treaties*, Vol. I (1938), p. 123.)

That was the exception made at that particular time.

So in concepts then expressed as to what the mandatory system was to be—the same applies to General Smuts' book—where they were thinking in terms of certain types of territories, or possessions, or peoples, that would come under the mandates system. Then surely the ideas which they had in mind for a system of that kind, which was to be of limited application to those peoples, could not literally just be transplanted to a more expanded mandates system which came about later and in which there were included territories, possessions and peoples who, according to those initial ideas, would have been excluded.

The Applicants refer also to the December 1918 issue of the *Round Table* in which it was proposed that supervision and ultimate control of mandated areas be placed in the hands of the League—that is in the verbatim record at page 143, *supra*. But, Mr. President, at page 28 of the same article of the *Round Table* it was made clear that the general principles proposed in the article were not intended to apply to South West Africa.

> "In the light of these principles let us now consider in detail the disposal of the derelict territories. They do not of course apply to Alsace-Lorraine . . . Nor do they apply to German South West Africa. There Germany established a peace by creating a solitude. The climate of this vacant territory admits of white colonisation. From its situation it must form an integral part of the South African Union . . ."

That was the article in the *Round Table*, December 1918, referred to by my learned friend.

Prior to the Peace Conference Mr. G. L. Beer, the chief of the colonial division of the American Delegation to the Conference, prepared a well-known paper in which he detailed proposals relating to enemy colonies and territories. He advocated the application of the mandates system to such colonies, but in respect of South West Africa he concluded as follows: "For various valid reasons, the mandatory principle is inadvisable and really inapplicable in this case." I refer to his work *African Questions at the Paris Peace Conference* (1923), at page 443. The Court will recall the earlier position—the attitude taken by General Smuts in his publication dealt with in the pleading, where he also thought that all these territories in Central and Southern Africa and in the Pacific were to be excluded.

Mr. President, President Wilson himself was prepared to accept that South West Africa was in a unique position, and that the mandatory principles advocated by him should not apply to the Territory—I am talking now about his attitude before the Conference. When the President met Mr. Lloyd George in England shortly before the Peace Conference, Mr. Lloyd George put forward the claims of South Africa, Australia and New Zealand to annexation of the German colonies conquered by them. President Wilson was then willing to accede to South Africa's claim, but he was of the opinion that the German islands in the South Pacific were on a different footing. This appears from Mr. Lloyd George's *The Truth About the Peace Treaties* (1938), Volume I, page 191:

> "In the other category he [that is, Mr. Lloyd George] had put German South-West Africa as the strongest case, pointing out that it would be quite impossible to separate from the South African Union

> what was essentially part of the same country. The President did not seem prepared to contest that contention, but of his own accord retorted that the position of Australia with regard to the Pacific colonies was not quite the same."

That was the attitude indicated before the Peace Conference by the President.

At the Peace Conference the three dominions, as we know, outlined their cases for annexations of the colonies concerned, and none of the delegates except President Wilson voiced any opposition to this idea. Mr. Lloyd George expresses the position as follows in the same work at page 515:

> "As the time approached for deciding whether the Mandate principle should be incorporated in the Treaty, and if so in what form, the opposition to the whole idea assumed formidable dimensions . . . I think it is fair to state that President Wilson and I were alone in supporting the principle of vesting the German Colonies in the League of Nations as a trustee, with Mandatories nominated by the League to undertake the duties of administration."

And even Mr. Lloyd George, as we know, was of the opinion at that stage that the mandate principle should not apply to the colonies in possession of the three dominions.

It is, Mr. President, fair to conclude, in our submission (it is of course a measure of speculation now, *ex post facto*), that if the claim of the other two dominions had not been made at the same time, and if, as a result, certain other questions had not then been voiced by other States, it seems quite likely that the arrangement in regard to South West Africa, as proposed before, could have gone through without objection. I am just speculating on that possibility for what it is worth, but we emphasize the particular position in which South Africa found itself at that time, prior to agreeing to this compromise. When the question was raised at the Conference, after the three dominions had stated their case, we find that M. Simon of France also spoke in favour of the principle of annexation in respect of certain possessions then occupied by France. We find that in *Foreign Relations*, Volume III, pages 758-763.

And it was in those circumstances, Mr. President, that a complete breakdown threatened, when the one after the other of those of the representatives present at that particular meeting of the Council of Ten—when one after the other spoke in favour of annexation—that was when the position reached the point of near breakdown, or near explosion. There then came this violent reaction from the side of the President, and it was with a view to preventing a complete breakdown that there were further discussions, quite obviously behind the scenes, which led to this compromise formula eventually introduced by Mr. Lloyd George as the Hankey-Latham draft.

I am emphasizing that from Respondent's point of view there was probably less reason than from the point of view of anybody else to agree to this compromise—to agree to the inclusion of South West Africa in the mandates system, because of its special position. If South Africa, in other words, had wanted to hold out on this particular question, emphasizing the distinction between its case and the other cases, then it could possibly have won the day. But, Mr. President, there were of course reasons which operated in the other direction, why South Africa

was prepared to be co-operative, but on its terms, in reaching an agreement and in not threatening a complete breakdown of the whole Conference. The terms were of great importance to South Africa—the whole formula of being able to administer this Territory as an integral portion of South Africa's own territory; and in regard to the question of accountability, the factor that the accountability would be to the executive of the League, consisting largely of the great Powers with minority representation of the smaller powers—that in itself also played a very important part.

Another factor that played a very important part was the gradual change which this whole mandate idea had undergone in course of time, from the extreme ideas of League control, where the League could do everything and the mandatory's position was just that of a kind of a tool in this whole situation. The mandatory could be chosen or abandoned by the League at will, as it were. That whole idea had been changed now to one in which very much more responsibility was being placed on the mandatory powers themselves and the League's role would be one of a more indirect supervisory nature.

The fact that that is so, Mr. President, is emphasized by a point which I did not mention before but to which I could give the Court references now, and that is that in President Wilson's draft of 20 January, to which I referred before, there was no provision for reporting to the League on the part of a mandatory. The reason for that was—if one reads that draft as a whole—the whole idea of the draft was—that the league itself would be in complete control. The text of the mandates, as proposed at that stage in the draft, is to be found in Miller's *Drafting of the Covenant*, Volume II, at pages 103-104.

The first place in which we find, in the President's drafts, any reference to reporting, is in the draft of 2 February 1919. That we find in Miller, Volume II, page 152, in paragraph 3, and that was at the time when it had already been decided that the League would not be vested with complete control. The whole idea had changed and the League's function would now be a more indirect one of supervision. Now it became important to formulate exactly what form that supervision would take and through which medium—through what machinery, it would be exercised.

A major factor in this transformation was the question of the whole approach to the function of the League vis-à-vis the mandatory. In Book II of the Counter-Memorial, **II,** at page 119, we quote a statement by Mr. Lloyd George, made on 28 January 1919. (This was in the course of these discussions as to what exactly this relationship was going to be.)

> "MR. LLOYD GEORGE said that he agreed with M. Clemenceau that if the League of Nations were made an executive for purposes of governing, and charged with functions which it would be unable to perform, it would be destroyed from the beginning. But he had not so interpreted the mandatory principle when he had accepted it.
>
> PRESIDENT WILSON said he too had not so interpreted it.
>
> MR. LLOYD GEORGE, continuing, said that he regarded the system merely as a general trusteeship upon defined conditions. Only when those conditions were scandalously abused would the League of Nations have the right to interfere and to call on the mandatory for an explanation. For instance, should a mandatory allow foul liquor to swamp the territories entrusted to it, the League of Nations would have the right to insist on a remedy of the abuse."

All that is part of the background—part of this gradually changing picture—until we come to the 30th, when this provisional agreement was entered into. And it is, Mr. President, against this background that we have to view the speech made by General Louis Botha on the 30th, from which I read a part to the Court before. Perhaps I should again refer to the extract in full, in its context. We get that also in the Counter-Memorial, **II**, at page 119:

> "Personally he felt very strongly about the question of German South-West Africa. He thought that it differed entirely from any question that they had to decide in this conference, but he would be prepared to say that he was a supporter of the document handed in that morning, *because he knew that, if the idea fructified, the League of Nations would consist mostly of the same people who were present there that day, who understood the position and who would not make it impossible for any mandatory to govern the country. That was why he said he would accept it.*"

Now, Mr. President, in that context, and against this background, how can the Applicants possibly say that the question of the exact nature of the supervisory machinery—its composition, its manner of functioning—was a matter of mere incident, was not a matter of importance in coming to the agreement at all?

Here, from the mouth of one of the most vitally interested parties, the Prime Minister of the Respondent in this case, we have the evidence of what a tremendously important—what a crucial—role he played in bringing about agreement in so far as this compromise was concerned.

Mr. President, the Applicants are not consistent either in their line of reasoning. They argue, on the one hand, that inasmuch as in the beginning of these negotiations which eventually led to the agreements (the pre-conference era and the earlier stages of the conference) there was discussion of a general principle of accountability or international supervision or control—for that reason the agreements eventually arrived at in regard to machinery are not, from a practical point of view, to be regarded as being of importance. They put it in this way in the verbatim record at page 144, *supra*:

> "... the primary concern of the founders of the mandates system was the obligation of international accountability, and not the details which would spell out the manner in which the obligations would be carried out".

Mr. President, I say they are not consistent because, on the other hand, when they deal with the historical background of Article 2, paragraph 2, of C Mandates, they stress very strongly the fact that the final text of the C Mandate Agreements goes considerably beyond the terms proposed in Lord Milner's original draft, since the insertion of the phrases "promote to the utmost" and "social progress" involved expansion of the said paragraphs. That argument we find in the verbatim record at page 147, *supra*.

The Applicants regard it there as perfectly natural, and we do not dispute their contention, that our obligation in regard to the inhabitants of the Territory is to be read in the light of what was ultimately agreed upon—of the obligation as ultimately formulated. That is perfectly correct. But when it comes to the general obligation of accounting and reporting then they say that is not to be read in the light of the agreement

as it was ultimately reached and as it was ultimately recorded in the relative instrument but, that it is to be read in the light of what people said in the early stages of the discussions while they were still discussing general ideas and while they had not come down to details yet. I submit, Mr. President, it is a completely illogical and unfounded manner of argument.

The fact that these details—the actual machinery and the actual composition of the organ—were important appears not only from what I have already laid before the Court. If it were necessary to add anything at all, there is some indirect evidence in regard to the formation of the United Nations which again shows how important machinery, and how important a manner of exercising a function of supervision, can be to the parties affected by it. I refer, Mr. President, to the provisional discussions at the San Francisco Conference on the question of the trusteeship provisions of the United Nations Charter. We have a discussion on the subject in a work by Russel, Ruth B., and Muther, Jeannette E.—*A History of the United Nations Charter (1958)*, at pages 838-840. One will see from that discussion, from which I will read a portion—certain extracts—that there were various ideas. There was a general idea, of course, of trusteeship—a general idea of accountability in respect of that trusteeship—but there were a multitude of ideas as to the manner in which provision should be made for carrying that idea into practice and the parties took very strong attitudes about it—the various interested States —and eventually they had to compromise between ideas in order to come to a solution at all. I quote from the work at the pages I have mentioned:

> "In the Five Power Consultative Group there were considerable differences over supervising machinery for the trusteeship system. Great Britain and Australia wanted an expert commission, similar to the Permanent Mandates Commission of the League, to inform the Assembly, through the Economic and Social Council, on the observance of trusteeship terms. They argued that the Commission would be primarily concerned with economic, social and humanitarian matters and should therefore be directly responsible to the organ co-ordinating such United Nations activity. The United States, however, maintained that the trusteeship organ would have to deal with governments administering the trusts, and should therefore have a higher status as well as political representation. In that event, it should logically report directly to the Assembly. The other members of the Consultative Group supported this type of organ and the United States title for it—The Trusteeship Council."

I skip a paragraph and the quotation proceeds:

> "The Powers to be given that organ were also subject to controversy, despite general agreement that the administering States should report to it annually in accordance with the prescribed form, and that it should act in some way on those reports. The United States, however, would not agree to any reporting on the strategic trusts, rejecting even a Chinese suggestion that such reports might be made to the Security Council on the basis of a questionnaire drawn up by it. As for nonstrategic territories, the United States was anxious to give the Trusteeship Council the right to receive petitions and to institute investigations. The Soviet Union wanted it

authorized also to 'control the fulfilment of the instructions and recommendations given by sending [its]' representatives and inspectors to the trust territories. The Soviet Union also proposed that the five major powers formulate the questionnaire for the administering authority. On the other hand, both Great Britain and France objected to giving the Trusteeship Council a free hand to investigate as it might undermine the local authority of the administering State. The United States and China maintained that petition and investigation were essential means of safeguarding the rights of dependent peoples."

Mr. President, no doubt the abstract idea of trust territories was accepted by all the delegates before discussion took place as to the precise machinery which would serve to give concrete effect to that idea. Nevertheless, it appears that that machinery was regarded as being so important that prolonged discussion was necessary in order to arrive at a compromise agreement.

The founders of the trusteeship system would certainly be surprised to hear the suggestion that they considered the practical machinery as of relatively minor importance in relation to the abstract idea of trusteeships, but not more surprised, we submit, than the eventual founders of the mandates system would be in respect of the Applicants' suggestion at present under consideration. I submit that those founders would be extremely surprised to hear that in their minds this question of the exact formation—the exact composition, the exact manner of functioning and the exact relationship between the supervisory organ and the mandatory —was a matter which they regarded as of relatively minor importance; and that that portion of their agreement was not to be regarded as being at least of equal importance to any other portion.

They would be surprised to hear that where they took time and trouble to agree on a system of careful balances and checks that it is now to be brushed aside as being of no importance and that their agreement is simply to be viewed as being one relating in general to a vague concept of international accountability, which is to be applied to some other body in respect of which they never intended to give any consent whatsoever.

Mr. President, then, to conclude this historical survey regarding the establishment of the League and of the mandates system, in our submission the survey entirely confirms the contentions which we have advanced on our pleadings, regarding the indications of probability in this regard. It confirms in particular that, in the first place, the compromise operated, amongst other things, as between ideas of extreme powers of League control, on the one hand, and, on the other hand, those of keeping some territories out of the system altogether. Those were the extreme ideas which somehow had to meet.

The transformation of the envisaged relationship between the League and mandatory—from one of extreme control to one of restricted and co-operative supervision—was one of the important features which made the system acceptable to those who were initially against it—initially against it either in the sense of being opposed to the principle, or being opposed to its extension to particular territories. It was one of the practical factors which rendered it more acceptable to those persons.

The transformation and the ultimate compromise included the element that in the case of certain "C" mandates particular States would have to be the mandatories.

In the second place, Mr. President, the survey confirms that the question of composition of the supervisory authority and its manner of functioning was an element of great importance. Amongst others, to the Respondent itself it was expressed to be so. That was clearly understood by everybody before final agreement was reached. Therefore this evidence tends very strongly against and not in favour of the implication contended for by the Applicants. The task resting on the shoulder of the Applicants is to show that, with reference to this extrinsic evidence, the actual provisions of the instruments concerned and everything that can have a relevant bearing on the question—as a matter of necessary inference it must be concluded that everybody was agreed upon this vaguer and wider concept of international supervision—international accountability —in contrast to the precise terms of the instruments, as they are set out, relative only to specific supervisory machinery.

And far from satisfying the Court, Mr. President, that there can be a necessary inference to that effect—that it can necessarily be said that those parties were agreed about the matter—that they did not trouble to express it because it was too clear—that if someone had asked them they would immediately have said that that is what they understood about it—far from satisfying the Court to that effect, Mr. President, the Applicants have introduced the subject which, when viewed in its whole, as we submit it is to be, and with reference to the further facts which I have now brought before the Court, makes it absolutely clear that the probabilities were dead against certain of the interested parties agreeing to such a vague concept.

I wish to refer the Court on this regard, with submission, to a passage in the dissenting opinion of Judge van Wyk in the 1962 Preliminary Objections—a passage with which I respectfully, and with submission, wish to associate myself:

> "When an agreement is the result of a compromise and an issue arises whether any given term should be implied or not, common sense dictates that one should have due regard to the attitude of the parties prior to the concession, or concessions, which made the agreement possible. It should not be inferred that a party intended to concede more than the words of the agreement conveyed and more than was necessary to effect the compromise. It was with great difficulty that certain States were persuaded to accept the supervision of the organs of the League; on what basis can it be assumed that they would have agreed to the supervision of the organs of another undefined organization? The words of a compromise should never be whittled down by way of interpretation, so as to arrive at a result not contemplated by the parties. The Court clearly cannot infer a common intention to contract on the basis of a term not conveyed by the words employed by the parties where the surrounding circumstances reveal that some of the parties at least would not have agreed thereto had it been raised." (*I.C.J. Reports 1962*, p. 609.)

I submit, Mr. President, with respect, that that expresses the matter as aptly as can be in the circumstances, and that further support is derived for that approach from the very facts to which I referred this morning, and which make it perfectly clear that there is no justification for an implication of the nature suggested by my learned friends for the Applicants.

Mr. President, it remains for me, before concluding my argument on this aspect of the case, that is, on the conflict between our submissions in regard to the interpretation and effect to be given to the initial instruments—on the question of specific supervisory organ as against a general obligation of international accountability—to deal with certain isolated contentions of the Applicants on this aspect.

First, I wish to refer to my learned friend, Mr. Gross's contention, which we find in the record at page 205, *supra*. There my learned friend refers to our starting point, namely that Respondent's original undertaking was limited to an obligation to report and account to a specific organ of a specific organization of certain of the nations of the world, and he submits that this leads to demonstrably false conclusions. Now what are those "demonstrably false conclusions", Mr. President, which he submits?

He proceeds to state that—

> "... neither the composition of the League of Nations, nor the Council of the League, was fixed or static. Respondent, nonetheless [so it is contended], never asserted during the life-time of the League that when the League's original membership was altered by the addition of new members, or the departure of original members, that Respondent's obligations lapsed by virtue of such changes in membership.
>
> Respondent's contention that it contracted for a supervisory organ composed of only 'certain nations of the world' hence is a *reductio ad absurdum* of its emphasis on the contractual nature of the Mandate, to the exclusion of its essence as an international institution regulated by international rules."

Mr. President, this line of argument in itself amounts to a *reductio ad absurdum* with reference to something which was not part of my line of argument at all. It refers only to the expression used in our contention, an expression referring to an organization consisting of "certain of the nations of the world". That was a part of our contention emphasizing that we were dealing with a particular organization and with an organ of that particular organization. We never contended, or suggested, that we were liable only to a certain group of nations statically defined as at the date when that organization came into existence. Surely we could never contend that and we never suggested that. The provisions of the constitution of that organization made it possible for new members to join—made it possible for some members to terminate their membership of the organization. We knew all that when we accepted a Mandate on behalf of the League, and that is the very point we make. The point is that we knew what the constitution of that organization was, and we knew what it was we were binding ourselves to. Obviously we could have had no right to object to a change in membership through the ordinary processes provided for in the constitution—of new members joining or old members departing. That was something we knew beforehand. It was part of our bargain. We could never object to that.

What we could object to, and that we point out in the Counter-Memorial, II, pages 121-122, was an amendment of the provisions of the Covenant which would detrimentally affect our situation as a mandatory in relationship to the supervisory organs. We point out in that passage in the Counter-Memorial that there is provision for an amendment of the provisions of the Covenant, but that there is specific provision to the

effect that such an amendment would not bind any Member of the League that had not agreed to such an amendment.

Therefore, Mr. President, if there had been a change in this regard—a change in regard to which organ of the League was to conduct the supervision—say the Assembly of the League and not the Council—or if there was to be a change in the sense that the Council could in relation to mandate matters come to a conclusion by a majority vote or by a two-thirds vote instead of by a unanimous decision—those would be matters which would prejudice the mandatory's position in relation to the original agreement and therefore the mandatory would have the right to object to them. If a change in the constitution came about to which the mandatory did not agree, the mandatory would not be bound by it although the mandatory would then lose his membership of the League. That was the effect of the League constitution on this particular point, but there was never any suggestion on our part, and there never could have been, that we could object to a mere change in membership of the League itself.

If that is the basis upon which my learned friend suggests that he could demonstrate that we reduce our argument to an absurdity, then I submit that the attempt has failed entirely.

The question arises, why does my learned friend not rather concentrate on the elements that do count—the element of it being a specific organization, where the Covenant itself says "a mandatory on behalf of the League"—and that where the Covenant speaks in the clearest terms of the specific organ of that organization to which accounts are to be made, to its satisfaction? I have not heard any argument directed at the object of saying that that argument led to any absurd conclusion.

Mr. President, then in the same passage, one of the other demonstrably false conclusions, suggested by my learned friend, appears to be the one which he mentions at page 206, *supra*, of the verbatim record.

He submits there that:

> "Respondent's premise of an original undertaking limited to a 'specific organization', composed of 'certain nations', leads to the equally untenable conclusion that at the moment of the dissolution of that Organization, Respondent's right of annexation would have been perfected, in the absence of a new undertaking, *in expressis verbis*, to an amendment of the language of Article 22 of the Covenant, and of Article 6, and of paragraph 1 of Article 7, of the Mandate."

In other words, my learned friend suggests that that would have involved a contemplation—that our contention ascribes to the authors of the Covenant a contemplation that at a certain point of time the Respondent might have a complete right of annexation. Mr. President, what kind of contemplation is that, which is now ascribed to the authors of the Covenant? Does it not again carry in it the same germ of false reasoning that the authors of the Covenant, although they did not in fact, as is admitted, contemplate the termination of the League's existence, nevertheless must be deemed to have thought of what would happen, should the League come to an end? It is again part of that reasoning. The mere expression that "Respondent's right of annexation would have been perfected"—how does my learned friend arrive at that? Surely the matter has to be viewed in the light of what the consequences would be if the League came to an end—if the obligation of accountability then came to an end. Would that mean the right of annexation on the part of Respon-

dent? Would that have been so contemplated by the authors of the Covenant? My learned friend seems to me to go directly in conflict with submissions he himself is making to the Court. My learned friend is contending that the Court was right in finding that the Mandate continued in existence, after the dissolution of the League—that it still carried, as part of it, this same trust conception as before, and that this Court would have supervisory jurisdiction—he called it "right of judicial supervision in respect thereof". Would that amount, Mr. President, to a "right of annexation"? I do not understand that. Surely there is a complete confusion of ideas here. One has first to make out, whether the termination of supervision would also mean a termination of the Mandate—that is our contention. If my learned friend accepts that contention he apparently then arrives at the right of annexation. He has not explained to us how. He seems to have challenged us on the papers to say, if the Mandate no longer is in existence, what title we could have to the Territory at all. And here apparently he talks of a "right of annexation", which would have been contemplated by the authors of the mandates system.

Surely the crucial question to be made out there is whether there was a contemplation that, if supervision no longer existed, the Mandate could no longer exist. If there was no contemplation on this point, then surely no question could arise of a contemplation of a "right of annexation" on our part.

If the contemplation was that there was severability between the provisions for supervision and the substantive provisions providing for the sacred trust, as regards the administration of the Territory, then this question of a "right of annexation" as a result of falling away of supervision, could never arise. My learned friend has not demonstrated that there was any actual contemplation on the part of the authors of the mandates system on this particular question, nor any contemplation on their part as to what would happen if, and when, the League should come to an end and there could no longer be any supervision by the League organs.

I submit therefore, Mr. President, that this conclusion, in the sense of something that could be attributed to the contemplation of the authors of the mandates system, is again one which is completely unfounded.

Indeed, Mr. President, this contention on the part of the Applicants is at variance with another contention which they are advancing to the Court and that is that, if there should have been no new agreement in the years 1945-1946 on a substitution of a supervisory organ, then our original obligation would not have lapsed relative to supervision. It would simply have become inoperative or dormant. They advance that argument on the basis of the decision of this Court in the *Barcelona Traction* case. I indicated to the Court before that I would deal with the merits of that attitude taken by the Applicants—the attempt made, on their part, to put the circumstances of this case, with reference to administrative supervision, on a par with the reasoning of the Court in the *Barcelona Traction* case, and I think this may be a convenient stage at which to deal with that factor.

The reference to the case is in the *I.C.J. Reports 1964* and the particular passages we find at pages 38-39. Perhaps for background it may be necessary to refer to the whole treatment of what was there the second objection to jurisdiction—the second Preliminary Objection. The commencement of the treatment of that subject one finds at page 26 of the record, second

Preliminary Objection, and it proceeds, I think, as far as page 40. The treaty in that particular case was a treaty between two States—Spain and Belgium. It concerned, amongst others, the subject of adjudication in the event of dispute between the parties regarding matters dealt with in the treaty. Those provisions regarding adjudication, we find, were not concisely stated in one provision only. They were spread out over a number of provisions and they contained different elements. We find that right at the beginning of the Court's exposition on this part of the case (it is stated at the top of p. 27), with reference to the Treaty of 19 July 1927:

> "This Treaty, which will henceforth be called the 1927 Treaty, provided by its Article 2 for a reference to adjudication of all disputes between the parties, involving a disagreement about their legal rights. For this purpose, and if the methods of conciliation also provided for by the Treaty failed, or were not utilized, the parties were in each case to draw up a *compromis*. If, however, agreement could not be reached upon the terms of a *compromis* within a certain period, then the fourth paragraph of Article 17 of the Treaty, now invoked by the Applicant Government, provided that:
>
> *[Translation]*
> '. . . either Party may, on the expiry of one month's notice, bring the question direct before the Permanent Court of International Justice by means of an application'."

So, Mr. President, there is not one provision providing for adjudication by a particular tribunal, but a series of provisions providing, first, for an obligation of adjudication of the dispute and then for certain machinery to be used, leading eventually to this concluding part, that failing the earlier parts of the machinery, then this particular step may be taken by the party involved. That was the type of treaty which had to be interpreted in that particular case by the Court.

May I also point out at once that the subject-matter with which the Court was dealing there was different from the concept with which we are dealing here, and which is submitted to the Court for consideration by the Applicants' contention. The Court was dealing there with the concept of an obligation to submit to adjudication. Here the parallel concept suggested for consideration by the Applicants is a concept of submission to international administrative supervision. Mr. President, immediately it will strike one that there is, in so far as a possibility of legal obligation is concerned, a wide distinction between those two concepts. When one speaks of a concept of being obliged to submit to adjudication, that is a concept with a content which has become established, by understanding, and by practice, in course of time. One knows that adjudication in respect of a dispute is a concept with a defined content. One can go into details as to how it is to be worked out in a particular case, but one knows that adjudication is adjudication, whether it is to be an arbitration tribunal, whether it is to be by an international court, whether it is to be by a different judicial tribunal—always the basis of adjudication is judicial. It is something which is to be accomplished by the process of applying the law to the facts—ascertaining what the law is and applying the law to the facts of the particular case. That is an established concept—one knows what it is—and it is quite possible to reason, as the Court did—I say "quite possible" with respect—that par-

ties could notionally be agreed on a concept of that kind and that that concept could be sufficiently precise to create an obligation on a party's part in regard to a concept of that nature.

It becomes another matter, Mr. President, when we speak of a vaguer concept of being obliged to submit to international supervision. What is established about that concept—what was established about it, particularly in the years 1919-1920, when the agreements with which we are concerned now were entered into? Nothing, Mr. President. There was no established concept of international accountability or international supervision. The whole concept carries in itself the possibility of large gradations of what could be contemplated and what could be comprised in it. Immediately it is clear that, if there is supervision, there is no definite criterion of the kind which one has in the concept of adjudication. A supervisory body of an administrative kind does not look merely at legal obligations—does not only look at application of the law to the facts—it looks at very much more. It looks at policy applied. It looks at action taken. It looks at the manner in which a discretion is exercised. It looks at the question whether good use is made of the powers—in the expression of one of the reports made to the League on the subject.

In other words, it is something which could very vitally affect the actual day-to-day exercise of a power—the exercise of a discretion—the manner in which one acts in pursuance of a power, and it would depend upon the exact manner in which one prescribes the concept of supervision, to what extent that interference would be possible. If there is no specific prescription as to what the function of supervision is to involve—how far it may go, and how far it may not go—then this question of how far it could go would very largely rest with the supervisory authority. It would then become very important to know who that supervisory authority is, how it would be constituted and composed, and what its approach would be to its task. All those things would have to be known before there could be any definite content ascribed to a concept of international supervision or international accountability, before it could become, in my submission, anything precise enough to form the subject-matter of an obligation.

In the absence of something more precise than this vague concept, the whole idea of an obligation to submit to international supervision would, in my submission, be void for vagueness, because it would not relate to anything which could be said to be a subject of common understanding or agreement between the Parties.

Therefore, a certain measure of definition, exactness and preciseness, to indicate what is meant by that concept when it is to be translated into practice, would be necessary in the case of administrative international supervision, as opposed to a concept of being liable to adjudication.

Now, Mr. President, when we look at the actual reasoning of the Court in the *Barcelona Traction* case, we find that it proceeds very strongly on the basis that, in view of the particular provisions of that Treaty, it was possible to separate an obligation of submitting to adjudication from the particular tribunal which was concerned in the later clause—Article 17, paragraph 4, of the Treaty.

The Court in the first place came to the conclusion that, even if the Article providing for adjudication would have lapsed in the normal course due to the cessation of existence of the Permanent Court—even in that event, Article 37 of the Statute of this Court would still have resulted

in a position that that would not have mattered. As soon as both Parties eventually became signatories to the Statute of this Court, the effect of Article 37 would be that the adjudication clause would still apply with a substitution of the present Court for the Permanent Court.

This reasoning, the Court stated, on the basis of the exact provisions of the Treaty, was additional to the conclusion at which it had already arrived on the basis of Article 37 of the Statute of the Court alone. The Court made that clear on page 37 of its Judgment:

> "The Court has thought it desirable to base itself up to this point wholly on considerations relating to Article 37 of the Statute which, in its opinion, would (in the absence of any relevant special factor) be applicable to the case of all the jurisdictional clauses in the treaties and conventions to which Article 37 applies. In the case of treaties having the character of the Hispano-Belgian Treaty of 1927, however, there are special features which afford additional support for the conclusions arrived at on the basis of Article 37 alone." (*I.C.J. Reports 1964*, p. 37.)

It was on the basis of these special features that the Court proceeded with its reasoning, of which a portion was extracted by my learned friend for the purposes of placing his case within the principle there enunciated. The Court proceeded:

> "Article 17 (4) of the Treaty was discussed between the Parties in the course of the written and oral proceedings, largely in relation to the question of its 'severability' from the rest of the Treaty. Into this question, which has implications reaching far beyond the scope of the present case, the Court does not consider it necessary to go. What must be true, on any view of the matter, is that Article 17 (4) is an integral part of the Treaty as a whole; and its judicial fate cannot be considered in isolation.
>
> It is at this point necessary to note that Article 17 (4), the relevant terms of which are cited above, had as its primary object in the scheme of the 1927 Treaty, what was more a matter of mechanics . . ." *(Ibid.)*

I emphasize, Mr. President, that was the primary object in the scheme of the 1927 Treaty. The primary object of Article 17 (4) was "more a matter of mechanics". The Judgment continues:

> ". . . namely to indicate in what circumstances, and at what precise point in the attempt to dispose of the dispute, either party would have the right to take the matter to the Court. This right was to be exercisable if the (optional) conciliation procedure provided for by the Treaty had not been made use of, or had failed; and if agreement had not been reached within a certain period on the terms of a *compromis* for the submission of the dispute by mutual consent to the Court or to arbitration; and if, thereupon, a month's notice was given of the intention to take the matter to the Court unilaterally.
>
> The basic obligation to submit to compulsory adjudication, however, was and is carried by two other provisions of the Treaty . . ." *(Ibid.)*

And that I cannot emphasize heavily enough. That basic obligation was not found by the Court in this particular clause of Article 17 (4).

"The basic obligation to submit to compulsory adjudication, however, was and is carried by two other provisions of the Treaty, namely Article 2, and the first paragraph of Article 17. The relevant paragraph of Article 2 reads as follows:

'All disputes of every kind between the High Contracting Parties with regard to which the Parties are in conflict as to their respective rights, and which it may not have been possible to settle amicably by the normal methods of diplomacy, shall be submitted for decision to an arbitral tribunal or to the Permanent Court of International Justice.'

The Treaty then goes on to provide for the conciliation procedure, and continues in Article 17 (1) to reaffirm the essence of Article 2 as follows:

'In the event of no amicable agreement being reached before the Permanent Conciliation Commission, the dispute shall be submitted either to an Arbitral Tribunal or to the Permanent Court of International Justice, as provided in Article 2 of the present Treaty.' "

And it was only after that, Mr. President, that this particular clause, Article 17 (4), followed which indicated that "either party may on the expiry of one month's notice bring the question direct before the Permanent Court of International Justice by means of an application". That is the basis on which the Court separates the general obligation to submit to adjudication, and this particular part of the machinery finally related solely to this Court.

[Public hearing of 2 April 1965]

Mr. President, at the conclusion yesterday I was dealing with some of the remaining contentions of the Applicants regarding the first major issue between the Parties regarding Article 6 of the Mandate—the issue whether the obligation related to specific supervisory machinery only, or whether it was of a wider nature contended for by the Applicants. And I was dealing with the reliance which the Applicants placed in that regard on the decision in the *Barcelona Traction* case in support of their contention—the attempt of the Applicants to argue by analogy from the reasoning of the Court in that case regarding a compulsory adjudication clause to the contention which they now advance about international supervision. And I submitted to the Court, Mr. President, that there was a distinction between the concepts of compulsory adjudication and international supervision for the purposes of this suggested analogy. I submitted that it was conceivable that the concept of compulsory adjudication could be regarded as established to such an extent—to have a sufficiently definite meaning in order to be the subject-matter of a legal obligation—so that it could not be said that if parties stipulate for an obligation to submit to compulsory adjudication, such a stipulation should be regarded as void for vagueness. One can see that questions could arise in that regard, depending on a particular instrument and particular circumstances. The minority judges, including Judge Morelli, in the *Barcelona Traction* case apparently had difficulty with that idea in itself. But there is, Mr. President, a strong case to be made out for the

proposition that one could have an obligation relating to compulsory adjudication without more—without having to stipulate a specific forum for the adjudication.

That is the one side of it. The other side of the picture is this: when it comes to the concept of international supervision, I submit, even as it is today, it is a matter of such uncertain and such variable content that that can certainly not be the subject-matter of an obligation. But if there were to be a stipulation that a party was to be obliged to submit to international supervision, without more, that stipulation would surely have to be regarded as void for vagueness.

The reasons for that distinction I indicated to the Court yesterday, and I need not repeat them now. The Court, in my submission, in the *Barcelona Traction* case found that on the basis of the particular provisions in the instrument before it—the Hispano-Belgian Treaty of 1927 there was an agreement between the parties whereby there would be an obligation to submit to compulsory adjudication, and that that obligation could stand independently of a particular clause which referred to adjudication by the Permanent Court. I pointed out, Mr. President, that the question in the *Barcelona Traction* case concerned the disappearance of the Permanent Court and the effect which it had on the particular adjudication provision. The circumstances, as the Court will recall, were that Spain first became a signatory to the Statute of this Court some years after the Permanent Court had disappeared, and the question then arose whether under those circumstances Article 37 of the Statute of the Court could still provide for a substitution of Courts, or a change-over of Courts; in other words, whether the adjudication provisions had not already lapsed completely and beyond redemption. The Court, as I pointed out, gave as its main answer that Article 37 in itself, on a true construction of the Article, avoided that result, and that despite the fact—despite the possibility, that the particular provisions might have lapsed had it not been for Article 37, Article 37 prevented such lapse. But in addition, as I pointed out, the Court said at page 37 of the Judgment that there were special features in the Hispano-Belgian Treaty of 1927 which afforded additional support for the conclusions arrived at on the basis of Article 37 alone. Now what were those special features, Mr. President? They were, in the first place, the fact that there was a series of provisions on the question of adjudication—not only one provision, which was inevitably linked and necessarily linked with a particular tribunal. The provision which was in issue there—Article 17, paragraph 4, of the Treaty—the one which gave a party the right to institute proceedings unilaterally in the Permanent Court and which mentioned, in that regard, the Permanent Court as the only tribunal—that provision, Mr. President, was an ultimate one which was only to apply after a number of other provisions which provided for international adjudication—for compulsory adjudication—had failed. Those other provisions, Mr. President, preceding Article 17, paragraph 4, of the Treaty, provided in the first place for conciliation procedure. They provided also that agreement could be reached to bring the dispute to adjudication by joint action, either before the Permanent Court or before an arbitration tribunal. So that there were all those possibilities which could lead to actual adjudication, and which demonstrated the intent of the parties to be bound to an obligation to submit to compulsory adjudication, before this particular provision could come into operation after a month's notice—after all the others had broken down,—the provision

by which one party could then unilaterally take the matter to the Permanent Court.

In those circumstances the Court held, and I refer to page 37, that this last provision (Article 17, paragraph 4)—

> "... had as its primary object in the scheme of the 1927 Treaty, what was more a matter of mechanics—namely to indicate in what circumstances, and at what precise point in the attempt to dispose of the dispute, either party would have the right to take the matter to the Court".

Mr. President, that was more or less as far as I came yesterday in dealing with this Judgment of the Court. I wish to refer further to what the Court said at page 38. The Court said:

> "In the light of these provisions, it would be difficult either to deny the seriousness of the intention to create an obligation to have recourse to compulsory adjudication—all other means of settlement failing—or to assert that this obligation was exclusively dependent on the existence of a particular forum, in such a way that it would become totally abrogated and extinguished by the disappearance of that forum. The error of such an assertion would lie in a confusion of ends with means—the end being obligatory judicial settlement, the means an indicated forum, but not necessarily the only possible one.
>
> This double aspect appears particularly clearly on the basis of the several jurisdictional clauses of the 1927 Treaty, taken as a whole; and these considerations furnish the answer to the contention that the obligation of compulsory adjudication in the Treaty was so indissolubly bound up with the indication of the Permanent Court as the forum, as to be inseparable from it, and incapable of continued existence in the absence of that Court. On the very language of Articles 2 and 17 (1), this is not the case. An obligation of recourse to judicial settlement will, it is true, normally find its expression in terms of recourse to a particular forum. But it does not follow that this is the essence of the obligation."

That was the basis, then, upon which the Court found that it was possible to speak of this double aspect of the adjudication provisions of the 1927 Treaty, and that there was, independently of this particular clause that was in issue in that case—Article 17, paragraph 4—an obligation to submit to adjudication which could stand independently of the disappearance of the forum—of the Permanent Court—which would in that particular respect be dormant—but only in that particular respect—because it could still apply in so far as the parties could come to an agreement to submit a dispute to arbitration. In that particular respect, however, it would then become dormant, but upon the new agreement between the parties—as soon as both of them became signatories to the Statute, and as soon as both became parties therefore to Article 37 of the Statute—that obligation would, in regard to its application in practice, be revived in full.

Another significant aspect of the language of the Court in this regard is, still at page 38, the following:

> "If the obligation exists independently of the particular forum (a fact implicitly recognized in the course of the proceedings, inasmuch as the alleged extinction was related to Article 17 (4) rather than to Articles 2 or 17 (1)), then ..."

certain consequences follow, which I need not read. My emphasis is on the fact that the Court says it was "implicitly recognized in the course of the proceedings" that the obligation existed independently of the particular forum "inasmuch as the alleged extinction was related to Article 17 (4) rather than to Articles 2 or 17 (1)". That, Mr. President, I submit, makes it perfectly clear on what special features the Court based that particular finding in the *Barcelona Traction* case.

I have, Mr. President, with respect and with submission, heard no contention on the part of the Applicants pointing to similar special features in the present case upon which the Court should come to the conclusion that the provisions of the Covenant of the League and of the mandate instruments, in so far as they relate to international supervision should be construed as relating to a vague obligation of submitting to international supervision and are not inseverably linked to the particular organs mentioned in them, as we contend. There is no contention, as I say, on behalf of the Applicants, which refers to such suggested special features. There can be none, Mr. President. There is no double aspect to the provisions in this instance as there was in the case of the adjudication provisions in the Hispano-Belgian Treaty in the *Barcelona Traction* case. In the case of the instruments now under consideration by the Court, we have only two provisions specifically referring to the question of international supervision. They are: Article 22, paragraph 7, of the Covenant of the League, and Article 6 of the mandate instrument for South West Africa. Both of them, Mr. President, define the obligation to submit to supervision only with reference to a particular forum—a particular supervisory organ—and the second one of them—Article 6 of the Mandate itself—it says that the reporting is to be to the satisfaction of that organ. In other words, there is nothing in the language of the instruments concerned on which to base a contention analogous to the finding of the Court in the *Barcelona Traction* case, and as I have pointed out, the language in that case—the language of the particular treaty there—was something very strongly relied upon by the Court.

Apart from language, we have dealt at length with surrounding circumstances and history, and we have submitted that on a full review there is nothing in that extrinsic material on which the Applicants could rely as justifying a finding of special features of a dual aspect of the nature for which they contend. Again, the indications both of the language—which is clear and unambiguous—and of the surrounding circumstances —which point to very strong probabilities in favour of our contention and which militate against that of the Applicants—exclude any possibility of a finding that the obligation was intended to be a vague one relating to international supervision, and not one which was dependent entirely upon the existence of the particular forum.

I submit that, Mr. President, in addition to the contention which I mentioned to the Court yesterday, viz., that surely in 1919 and 1920, there could have been no suggestion that an idea of submitting to international supervision could in itself have been an established concept —something on which there could, without more, have been a concurrence of mind—a *consensus ad idem*—on the part of contracting parties. Without further stipulation, without indicating what forum, without indicating its composition, its manner of functioning, it would have been impossible, I submit for the parties to know what it was that they were required to submit to by way of legal obligation. And all the probabilities,

and all the indications of language, are against the contention that that was intended to be the agreement of the Parties.

I proceed now to another of the contentions of my learned friend on this basic issue of the interpretation to be given to the original agreement between the Parties, the issue of specific organ versus international accountability. This is the contention which we find, Mr. President, stated in the verbatim record at page 125, *supra*. My learned friend, Mr. Gross, stated it as follows:

> "It appears to be common cause between the Parties that supervision, or the right of recourse to supervision, is normal and essential in any situation in which control and benefit are separated, that is to say, in which one person, or entity, exercises a power over property or other interests, while another is entitled to the benefits thereof. This, of course, is the essential underlying concept of trust, or *tutelle*, in all legal systems, of which the Applicants are aware."

Mr. President, I do not know where this idea of common cause originates from, because if there is anything which is not common cause in these proceedings, then it is that proposition. Now, I should have thought, with respect, that that should have been perfectly clear from the way in which we deal with the subject in our Rejoinder, V, pages 41-42. I shall revert in a moment to what we say in that regard in the Rejoinder. First, may I point out that the Applicants develop the contention which I have just referred to, in the verbatim record, at pages 188-189, *supra*. I am not going to read all of it to the Court. I shall indicate broadly what the main essentials of the line of argument there were. My learned friend started off by saying:

> "Mr. President, I had reached the point of stating that in their Reply the Applicants have demonstrated that the basic principles of the Mandate structure, being a combination of the concept of trust or *tutelle* and of *mandatum*, require that the Mandatory, the trustee, or the *tuteur*, be subject to accountability. This is discussed in our Reply (IV) at pages 525-540."

And my learned friend goes on to refer, in fact, to the answer which we gave in our Rejoinder. He refers twice—both at page 188, *supra*, of the verbatim record thereof to page 43 (V) of our Rejoinder; and he refers to the answer we gave, although I must say, with regret, he takes our answer somewhat out of perspective. And what is it he says? At page 188 of this record his submission is, firstly, that our rebuttal "consists of a mere assertion". He says further that that rebuttal is "coupled with doubtfully relevant propositions concerning principals and agents, masters and servants, and certain types of brokers", and then he adds the contention in regard to the trust in England. That is still at page 188. And then still at page 188 he ascribes to us a contention, which we never advanced, namely that is that we have a duty to report and account to the inhabitants of the Territory. These would seem to be the main elements in the answer which he gave to our exposition, and I should therefore like to set the perspective straight and to refer to what our exposition was, in the main, and to show to what extent these comments are or are not justified.

The Court will recall that these contentions on behalf of the Applicants were advanced also in the Reply, where they sought to apply an analogy from municipal law institutions of trust and *tutelle* to the case of the mandates system. Our answer broadly was that their generalization in

regard to municipal law was wrong, and, therefore, that the application of their generalization to the mandates system was also wrong. In giving that answer we distinguished, Mr. President, very clearly between our contentions regarding municipal law and our contentions regarding the mandates system. In fact, we dealt with those three subjects separately under separate headings. At page 42 of our Rejoinder (V) we dealt with the first one, under the heading "Fiduciary Institutions in Municipal Law"—in the series of paragraphs commencing with paragraph 31. Then, at page 45, we proceeded to deal with the other subject under this heading, "The Analogy between the International Mandate and Municipal Fiduciary Institutions", in the group of paragraphs starting with number 34.

Mr. President, in regard to the situation in municipal law we made certain points. I will just mention the main ones, I am not going to read it all to the Court now. We made the point that there are many categories and a very large number of fiduciary institutions in municipal law in which control and benefit are split or severed from one another—when the man having control is obliged to exercise that control for the benefit of another, which is essential in the trust idea. We made the point that that concept applies not only to a trust properly so called—not only to cases of guardianship or *tutelle*—but in a variety of other cases having different names but containing a similar fiduciary element. We referred in that regard at page 42 (V), of our Rejoinder, to an extract from Quincy Wright in which he refers to a large number of such situations which bear some analogy to the situation in the mandates system. He refers there to agents, to executors, to administrators, to attorneys, to directors of corporations, to guardians "and others who are not strict trustees but whose functions are like those of the trustee in that they act for others and are entrusted with power over, and title to or possession of, things to be used for the advantage of another". We pointed out, at the next page, that there could even be additions to that list, and we mentioned as a few examples certain types of servants and employees. We had in mind, for instance, persons in a managerial capacity in a company, and so forth, or in a partnership or ordinary firm, or members of club committees; one could think of members of Church councils, and so forth.

Then, Mr. President, we proceed to submit at page 42 (V) that:

> "When regard is had to the wide class of fiduciary relationships referred to above, all of which involve a division between control and benefit, it immediately becomes obvious that Applicants are wrong in saying that one of the consequences of such division is that 'there must be supervision by a public authority', or that reporting to, and supervision by, such authority are 'necessary corollaries of the fiduciary character' of such relationships. Such supervision is not as a matter of logic inherent in the division between control and benefit, and, indeed, there must be few, if any, municipal systems which provide for public supervision in respect of *all* such relationships, or even *most* of them."

Mr. President, it seems, with respect, that our contention was stated very explicitly and clearly, and I still do not understand where the concept of common cause comes from.

We proceeded to point out, Mr. President, that the true position is that the only obligation with respect to accountability which is normally

regarded as incidental, in principle, to a fiduciary relationship, is the duty to render account to the beneficiaries, and that was the distinction we drew, purely in regard to municipal law. We made it clear that one could not say that it was necessarily incidental to a fiduciary relationship of a type where control is separated from benefit, that there must be accounting to a public supervisory authority. What is incidental, is that there must always be accounting to the beneficiaries themselves, but that accounting is of a different kind. The accounting is of the essence of the obligation itself. Accounting means, on the one hand, that there is to be given to the beneficiaries what is due to them under the particular legal arrangement. There is to be accorded to them what they are entitled to, and, in order to accord to them what they are entitled to, the trustee, or quasi-trustee, or whatever his title might be in the particular situation, is obliged to indicate what he has done with his trust—what are the results of his trust. The results are paid over—made available—to the beneficiaries.

But, Mr. President, supervision by a public authority is a different concept. It is true that it is very often regarded as very desirable to have regular accounting by a trustee, or quasi-trustee, to such a supervisory authority, but that does not flow from the institution of a fiduciary relationship as a necessary corollary, or as something inseverably connected with it. It is something which is, in specific instances, provided for by a special arrangement, and in municipal law mostly by legislation.

We say then, Mr. President, in our Rejoinder:

> "In addition to the duty to account to the *beneficiary*, some form of accounting to and/or supervision by a *public authority* has been introduced in many systems, in respect of the performance of fiduciary obligations falling in specified categories. Such introduction, which commonly occurs by way of legislation, has in no case of which Respondent is aware, resulted in a uniform duty falling upon all fiduciaries to account to, or submit to the supervision of, some public authority. Much the reverse is the position—in all probability the majority of fiduciary institutions in the civilized world are not subject to such supervision at all, and where it does exist, it does so by virtue of a special provision made *ad hoc* with respect to a particular category of fiduciary institution." (**V**, p. 43.)

It is that proposition which we proceeded to illustrate with reference to various systems and known fiduciary relationships.

I submit, Mr. President, that that position is indisputable (it appears from the very authorities which the Applicants themselves have put before the Court) and I pointed out the significance of it but have had no reply from my learned friend, that in the United Kingdom, which is the home of the Anglo-Saxon trust, there is no provision for regular supervision by an administrative supervisory authority, or for accounting to such an authority. We refer in that regard to the authority in footnote 4, page 46, of the Rejoinder (**V**).

We also refer to the authorities relied upon by the Applicants themselves in regard to the situation in the United States of America, where they point out that in *some* states, but not in *all*, there is provision for accounting to authority by trustees, or at least trustees acting under a will—in other words, not *all* trustees, and not in *all* states—trustees acting under a will in *some* states, but not in *all*, leaving out of account

all other fiduciary relationships, even trustees acting under a deed *inter vivos*.

We further pointed out, Mr. President, in the Rejoinder, V, paragraph 33, pages 44-45, that there is a need for special provision in municipal law to have supervision of this nature—accounting to a supervisory public authority—and that in municipal law such provision is normally to be found in legislation.

Then, Mr. President, one comes to questions as to the nature and scope of the supervisory power, and of the obligation to submit to it, which is the particular question with which we are concerned here, namely whether the obligation was inseverably linked with a *particular* supervisory authority, or whether it could continue to exist independently of that authority, if that authority should cease to exist.

Those are questions of interpretation of the relevant legislation in every case. In each instance it is a matter of ascertaining the intention of the legislature. The normal situation is that the legislature provides for the obligation and for the supervisory authority as two things linked with one another. If the supervisory authority should fall away for any reason, the legislature is always there to make a new provision, if necessary.

That is generalizing. The main point is that, as a matter of principle, it is a question of interpretation in every case—of ascertaining the relevant intent of the legislature—to see whether it is intended that a particular obligation to submit to supervision should survive when the particular supervisory body, mentioned in that legislation, falls away.

That, Mr. President, brought us to the Applicants' suggested analogy regarding the mandates system, their application of the principles of municipal law to the case of the mandates system. Obviously, we stress, therefore, that in so far as one does find in the mandates system an obligation relating to accountability, that obligation did not originate because of any necessary, or inseverable, connection between such an obligation and an institution of trust, or *tutelle*. It arose for one reason only, and that is that the authors of the mandates system considered it desirable to make such provision, just as the legislatures in municipal systems consider it desirable to make such provision in *particular* cases, but not in *all* cases.

Therefore, it was again the question of a need to have law-making, as in municipal systems, and the law-making here consisted of the treaties and conventions in question—the Covenant of the League and the mandate instruments made in pursuance of them. And, therefore, if one is to ascertain the question whether that particular supervision was intended to survive the particular supervisory organization, it again becomes a matter of ascertaining the intent of those responsible for this law-making—in other words, the authors of the Covenant and the parties that gave their consent to the mandates instrument. That, and that only, is the basis upon which one can determine a question of this kind.

We dealt with that question, Mr. President, in the Rejoinder, page 45 (V), particularly paragraph 35.

So that sets out our attitude. We, of course, did not dispute that the authors of the mandates system found it desirable to make provision for supervision by a supervising body, but the question of the nature and the content of that provision, and particularly its effect on this issue between the Parties as to the continued existence of the obligation in the absence

of the supervisory authorities, is a matter which can only be determined on the basis of ordinary interpretation and implication, relative to joint intent—in other words, by applying the ordinary principles to ascertain the joint intent of the authors of the instrument.

To suggest, Mr. President, that we are suggested to have said that we are now, under the mandates system, liable to report to the inhabitants of the Territory is to ascribe to us something which we never said. We do, of course, accept that we are responsible for the inhabitants of the mandated Territory. We accept that we have a trust obligation in regard to them. We accept that we have to administer the Territory for their benefit, and we are doing that; we assist them in building up their own political institutions as a means of responsible deliberation and consultation between them and the Mandatory Government, and also as a means of self-expression in case they may have any cause for just complaint. In any case, Mr. President, the Respondent Government acts openly and before the eyes of the world, whether it is liable to supervision, or not. It has not treated the Odendaal Commission report or the Government's reaction thereto, in the White Paper and the Parliamentary debate—as official secrets or as matters of underhand scheming. These things proceed openly before the eyes of the world, and they are done by way of fulfilling a sacred trust towards the inhabitants of the Territory. But to suggest that we say that we have to make reports to the inhabitants of the Territory is ascribing to us something which we never said.

In dealing with this aspect of the matter in the Rejoinder, Mr. President, we said:

> "In order to determine the nature and content of the duty of accountability, it accordingly becomes necessary, as in municipal law, to examine and interpret the relevant law-making instrument. The content of the duty of accountability to be thus determined, must provide the answer to the question whether provision was made for a substitution of supervisory organs. This answer can consequently be obtained only by ascertaining the intentions of the authors of the Mandate System as expressed or implied in the Mandate documents." (V, pp. 45-46.)

We proceed to discuss that question with relevant reference to the facts, as I have done in the course of this oral argument, and I do not wish to reiterate, except to state these conclusions as they are set out in the Rejoinder:

> "*They [the Applicants] do not show . . . [that] the authors of the* System, in the circumstances then prevailing, [induced] to make provision for the future succession of an undetermined body, in unknown circumstances, to counter the effects of a situation (the dissolution of the League) which they did not expect to arise and which could be dealt with if and when it did arise." (V, p. 46.)

And we conclude, Mr. President, with this:

> "All this becomes the more evident from the fact that the Applicants do not show why, if there had been an intention to provide for succession as regards supervisory organs, it was not expressed in the documents themselves, or in any preparatory debate or negotiation or why it was not referred to in the later discussions on that subject."

And that, I submit, may be a suitable note on which to conclude this review of the first major issue between the Parties.

I proceed, Mr. President, to deal with the next stage in the development, namely with the events of the years 1945 and 1946 when the United Nations was formed and when the League of Nations was dissolved. In the light of the issue between the Parties, i.e., the rival contention about the interpretation of the original obligation—the obligation as originally stipulated in the Covenant of the League and the mandate instrument—we have to determine the significance of the events of the years 1945 to 1946.

If the Respondent is correct in its submission that its obligations of accountability under the Mandate related only to the specific supervisory organs referred to in the relevant instruments, the consequence would be that, on dissolution of the organs in question, no duty of accountability would have remained, unless specific provision was made for a substitution of organs. In other words, there would have had to be what the Applicants term in that regard a wholly new agreement. The Applicants have conceded that that would have been necessary and I do not have to refer to the passages again.

I have also shown, Mr. President, that the Applicants apparently do not attempt to show that if such a wholly new agreement was necessary for the purpose of providing, or keeping alive, the duty of accountability, it was in fact entered into. Their submission is, as we have shown, that the Respondent was obliged initially to submit to international accountability, and not to supervision by specific supervisory organs. But we have also indicated, Mr. President, that they admit that that leaves them with the problem that when the specific authority—the only supervisory authority—initially mentioned fell away, that obligation, on their premise, would have become dormant unless there was agreement for the substitution of a new supervisory organ. So, on their premise as well as on ours, it becomes necessary to show that there was in this regard a new agreement in the years 1945 and 1946—a new consent—a new arrangement—involving consent on the mandatory's part.

The Applicants contend that that consent was given *ab initio* in the original arrangements of 1919 and 1920. They admit that they have to establish some consent in the years 1945 and 1946.

And, Mr. President, whether one approaches the matter from the Applicants' point of view—from their premise—or from the Respondent's premise, it becomes clear that the same principles of law must apply to this inquiry. It is common cause between the Parties that there was no express agreement on this question in the years 1945 or 1946—no express agreement whereby the United Nations, or any organ of the United Nations, was accepted by the Respondent as the new supervisory authority in substitution for those provided for in the initial agreements. Therefore, the only basis upon which consent could be established would be by way of the showing that it was tacit. It would be by way of a process of inference from fact—by way of showing a proposition by circumstantial evidence. The ordinary principles would apply in that regard, it being necessary as the Applicants put it themselves, to establish that proposition by proof which is so unequivocally clear as to leave no room for any reasonable alternative.

In other words, Mr. President, we submit that irrespective of which of the Parties is correct in its interpretation of the extent of the duty of

supervision, as originally created, this Court has to determine whether an implied or tacit agreement was concluded during the transitional years whereby Respondent consented to submit to the supervision of the General Assembly of the United Nations. And, as a matter of law, no such agreement can be implied unless the inference is consistent with all the proved facts, and unless no other reasonable inference may be drawn from the relevant facts and circumstances. That, as I have said, would apply on either basis.

The only difference between the Applicants' approach and our approach would seem to relate to a question of assessment of the facts. The only conceivable difference could be this, that if the Applicants' approach is correct there was still an obligation, although a potentially dormant one, of a wide nature, to submit to international supervision. Then, perhaps, some utterance or some event, or the totality of utterances and events during the years 1945 and 1946, may, as a matter of fact, have to be given some different weight from what the position would have been if it had been necessary to establish a wholly new agreement. That, of course, is purely a question of appraisal of fact in particular circumstances. It does not affect the legal principle which I have mentioned which makes it necessary for the Applicants to establish their proposition as a necessary inference from all the relevant facts.

As far as we are concerned, Mr. President, it does not matter to us, in this particular review which I am going to undertake now, which of those approaches is followed. In our submission, the result is the same, in any event.

May I first put to the Court the way in which the Applicants have stated their approach? They said in the verbatim record at page 132; *supra*:

> "... whatever conclusions might be reached in respect of the degree or quality of truth necessary to demonstrate a new amendment under the false premise from which Respondent proceeds, a different set of considerations, we submit, is applicable if one proceeds from the premise that the obligation of international accountability is an essential and integral element of the Mandate and that it must survive so long as the Mandate itself endures. It would follow from this premise, upon which the Applicants rest, that the only remaining question—although an important one indeed—would be whether the function of supervision passed to the nearest equivalent of the League, to wit, the United Nations. If not, these Articles would not have lapsed, but would have become inoperative for lack of a supervisory organ with capacity to replace the League Council."

In our submission, Mr. President, as I have said, there can be no different set of circumstances as far as the legal principles are concerned. The only basis upon which the Applicants could establish, in their own words, that "the function of supervision passed to the nearest equivalent of the League, to wit, the United Nations", would indeed be consent on the part of all the interested parties, and in particular, on the part of the Respondent. And that is, therefore, the purpose of this review.

As I have said, Mr. President, it does not matter to us whether this review follows the Applicants' approach or ours. In our submission, the events of the years 1945 and 1946 are so clear that they not only show that there can be no necessary inference of a general agreement on this

point, but that they also show definitely that there was no such general agreement, and we say that that is so whether one has to establish a wholly new agreement, or a lesser proposition of consent to a substituted organ.

Now, Mr. President, before reviewing the events themselves, it may be necessary to draw a distinction with respect to something which arises in the manner in which the Applicants have presented their review of the facts of this period, and that is a distinction between the question whether the Mandate survived the dissolution of the League and the question whether provision was made during the transitional period for a substitution of supervisory organs.

The Applicants, Mr. President, approach the matter as if the two questions were inseparably linked with one another—as if a positive answer to the one would necessarily imply a positive answer to the other. They seem to approach the matter more or less in this way: firstly, that the Court must find that accountability was an essential element of the Mandate, or that it was the very essence of the Mandate, as they have put it, with the result that if the Mandate can be said to exist it must necessarily follow that accountability under the Mandate also exists. That seems to be their first proposition, viz., that the Court must come to that conclusion.

Then, Mr. President, arguing from that premise, they seem to suggest that it must follow that all States which dealt with this problem in the earlier stages must, at all times, have held a similar view about the situation with the result that if any State indicated that it thought that the Mandate would still exist after a certain event, say, after the dissolution of the League, then that must necessarily also carry the implication that that State considered that accountability would still exist after the dissolution of the League.

Mr. President, that, in my submission, is of course a complete fallacy. The two questions are entirely distinct: i.e., what the Court finds now as a matter of law and *ex post facto*, and what various States thought at various stages whilst this question was emerging and while it was being discussed and dealt with in the various organs. If the Court should now find that on the basis of interpreting the intentions of the authors of the mandates system the element of accountability is indeed an essential part of the Mandate, then the Court would be making something which I yesterday described as being in the nature of an *ex post facto* finding.

We proceed from a factual basis which is common cause, viz. that the authors of the mandates system did not contemplate the dissolution of the League. Therefore, Mr. President, it seems quite evident that it cannot be said that they specifically contemplated what would happen in the event of the League, as supervisory body, falling away, i.e., whether the mandates could or could not still remain in existence after that event. That is a matter which is not specifically dealt with in any of the instruments which have to be interpreted. It is a matter on which there was no expression of opinion at the time of the creation of the mandates system, and, Mr. President, it is a matter in regard to which the probabilities show that it was never in fact contemplated by the authors of the system at all. They did not think about it. They did not intend to make any provision in that regard.

Now the Court may be faced with the question, namely that if it finds

that supervision has lapsed whether the rest of the mandate instrument can stand without supervision. Then the Court has to relate that question to the probable intent of the authors of the mandates system. That can only be done, as in so many of the cases that arise in practice, on a somewhat artificial, and almost speculative, basis, particularly in view of the facts which I have mentioned, namely that as far as we know, and in all probability, the authors of the system gave no thought to this question at all, or that, if they did, they did not express their thoughts anywhere so as to serve as a guide for us—neither in writing at the time or in speech. We accordingly have no guidance directly and specifically on that question from the authors of the mandates system.

In the circumstances it becomes a somewhat artificial task now for the Court to determine—but one on which the Court must necessarily embark—whether, in the light of general indications of what the intent of the authors of the system would have been on this particular question, they would have intended the rest of the Mandate to survive in this truncated form. As I indicated before, that is the type of question which a court may well, in particular circumstances, have to decide on a preponderance of probability, because there would be no other basis upon *which it could decide it. But that does not follow,* because it is a situation which is to be entirely distinguished from the question which arises when the Court is to determine from circumstances whether an inference of an agreement to operate between the parties was, in fact, entered into in any particular respect. In that instance the principle is that there must be an inference, which is the only reasonable inference in the circumstances. It must be a necessary inference. That is the process by which the Court can then come to its conclusion that parties actually bound themselves to an obligation.

But where it deals with the converse question which we have here, i.e., whether on the lapse of part of an instrument the rest of the instrument may still stand, it may well be, and it very often happens, that the Court has to decide on what I have just described as a somewhat artificial basis.

It therefore follows immediately from that situation, Mr. President, that the mere fact that the Court may now, *ex post facto,* find that those two elements were to be regarded as inseverably connected with one another, so that if one takes away the supervision then the whole structure must collapse, can surely not by itself afford any indication as to what the various interested parties and States must have thought at various stages of the historical development of this matter, especially in the years 1945-1946, and especially if we accept the premise that no positive thought was given to that question in 1919 and 1920 when the original instruments were forged.

That is one factor, Mr. President, which immediately distinguishes those two situations.

Another factor which lends emphasis to the distinction is this, that in the Opinion of 1950 on the South West Africa question, given by this Court and its Members, it seems to have been fairly generally accepted that accountability under the Mandate—the duty of a report under Article 6—could be regarded as severable from the rest of the mandate institution. That that was the contemplation of the two judges who gave minority opinions, Sir Arnold McNair and Mr. Justice Read, is quite apparent from the very result—from the very conclusions—at which they arrive. They concluded that the Mandate was still in existence, but

that there was no obligation of reporting and accountability as from the time of the dissolution of the League.

As far as the majority opinion on that point is concerned, there is no statement whatsoever to the effect that those two elements were regarded by the majority as having been inseverably linked with one another—no indication really that the majority embarked upon that inquiry at all. On the contrary, the reasoning and the manner in which it was set out in the Opinion, seemed to imply that the majority regarded the two questions as severable because the majority dealt first, Mr. President, with the question whether the Mandate could be said to be still in existence after the dissolution of the League. The Opinion dealt with the whole of that question without bringing into relationship with it the problems arising under Article 6 as to the question of a supervisory organ which has fallen away.

It came to its conclusion that the Mandate as an institution was still in existence, without adverting to the problems regarding Article 6 at all. It was only in a separate part of the Opinion that it proceeded to discuss the problems relating to Article 6. The indications are, Mr. President, that the Court, to all intents and purposes, regarded those two questions as severable, because if it had approached the matter from the opposite premise—if it had considered that the question whether the Mandate was still in existence, was inseverably linked with the question whether Article 6 was still in existence—then surely it could not have come to its conclusion that the Mandate survived without having discussed the problems regarding Article 6 at all.

That lends emphasis to the fact, Mr. President, that whatever the conclusion of this Court may now be on the question of severability or inseverability between Article 6 and the rest of the institution, that that was not necessarily the contemplation of parties dealing with this question over the years that have passed, and particularly during the years of transition and when this dispute took shape.

The Applicants' own attitude, as now presented to this Court, shows that this assimilation of the probable views of parties, all along the line with what the Court is now asked to find upon the question of inseverability, is an artificial one, that is, in so far as they now place themselves on the basis of the reasoning in the *Barcelona Traction* case—of the distinction drawn there—and in so far as their suggestion is that the Mandatory (and this is their contention) is now obliged to report and account to the General Assembly of the United Nations. They cannot now come and contend that, if the Mandatory indicated, or if any State indicated, a contemplation that the Mandate would still be in existence, that that necessarily implied an obligation on the part of the Mandatory to report and account to the General Assembly of the United Nations because they themselves say that, if there was no agreement about a substitution of supervisory organs, it could not have resulted in a lapse of the obligation of accountability. The obligation of accountability would survive, although dormant. Therefore, Mr. President, no question of lapse of the Mandate could arise on that premise. The obligation of accountability, even if an inseverable part of the Mandate, would still survive and, therefore, the Mandate as a whole would still survive—only one of the obligations would have become a dormant one and no question of the lapse of the old institution could then, on this premise of the Applicants, have arisen.

Surely it then follows that, if somebody under those circumstances spoke of the Mandate as surviving, and adopted the Applicants' premise and approach to this whole matter, but yet did not in any way imply that the Mandatory was liable to report and account to an organ of the United Nations, it would indicate, Mr. President, that the Applicants' approach to the events of the period, in so far as they identify the two questions of lapse of the Mandate, or continued existence of the Mandate and continued existence of accountability to an organ of the United Nations, is fallacious.

It is further shown to be fallacious by the very facts of the period 1945-1946 and the first years ensuing after those, because the facts show, as we shall indicate, that there were a number of States which indicated a view to the effect that the Mandate was still in existence and, at the same time, indicated that they did not think that there was any obligation of accountability to organs of the United Nations.

In other words, the manifested attitude of various States during that period was that they regarded those two questions as severable. They accepted the possibility that the Mandate might still be regarded as being in existence, without any accountability to any supervisory organ.

I thought it was necessary to make that distinction clear because, if one does not do that, then one falls into the confusion to which the Applicants' analysis of the events of 1945-1946 must necessarily lead one.

On that basis, Mr. President, and for those purposes I now proceed to consider the first phase of this history, namely the events concerning the foundation of the United Nations and the first period of its existence up to, and until, the dissolution of the League. After that I shall consider the events at the dissolution of the League and turn to a consideration of further developments in the United Nations in the period thereafter. I shall deal with the matter with reference to those three phases, the first one being the foundation of the United Nations.

Now, Mr. President, these events are dealt with in our pleadings, fairly extensively, as well as the significance which we place upon them. I do not intend to review them all in full. I shall give the Court the references to the places where we deal with them and shall indicate very briefly, for the convenience of the Court, what significance we attach thereto.

Firstly, we point out in the pleadings that the establishment of the United Nations Organization flowed largely from inter-allied co-operation during the Second World War. The preliminary negotiations and conferences leading up to the drafting and coming into effect of the Charter all took place while the League of Nations still remained in existence. In fact, the Charter came into effect on 24 October 1945 whereas the League of Nations was dissolved only in April 1946. We deal with that in the Counter-Memorial, **II**, page 32-33. There, Mr. President, we also point out that there was a substantial difference in the membership of the two organizations and we give details in that regard, which I need not repeat, at page 33.

Next, Mr. President, we point out that already at the drafting of the Charter at San Francisco in the period between 20 April and 26 June 1945, the question of the future of the Mandate for South West Africa was raised. On 11 May 1945 the South African representative made a statement in which he gave reasons why the South African delegation claimed "that the Mandate [for South West Africa] should be terminated and that the Territory should be incorporated as part of the Union of South

Africa". Those were his words and we quote that statement in full in our Counter-Memorial, **II**, pages 33-34. The statement indicated, Mr. President, that the matter would not be pursued further at the San Francisco conference, but would be raised at a future contemplated Peace Conference where territorial questions would be handled. What exactly was contemplated in that regard I do not know, but that was the tenor of this statement. The statement as far as I have repeated it now, Mr. President, indicates implicitly that the Union of South Africa was not intending to place this Territory under trusteeship and that it did not want its participation in the proceedings leading to the drafting of the Charter to be misunderstood as involving any commitment on its part relative to this new trusteeship system and its possible application to South West Africa. That, as I said, was implicit from that statement itself.

It becomes more emphatically so, however, if one looks at the addition which we cite in the footnote at page 34 (as the Court will recall, the verbatim official records do not contain that, but it is contained in our record and the person who made the statement, Dr. Smit, confirmed to the Respondent that he had made it). The words were:

> "As stated in the memorandum, this is not a matter that can be decided here, but I am directed to mention it for the information of the conference so that South Africa may not afterwards be held to have acquiesced in the continuance of the Mandate or the inclusion of the territory in any form of trusteeship under the new International Organization."

Mr. President, at the adjournment I had quoted from a statement by a South African representative at the San Francisco Conference. I may just add that in the Counter-Memorial, **II**, page 35, there is a quotation from a statement by General Smuts in the next year, on 4 November 1946, in which he explained what the significance and the purpose of this previous declaration had been. He explained that it was necessary to ensure—I am quoting from the statement as we have it at page 35—

> "... that, when the proper time arrived for consideration of any change in the status of the Territory, such consideration should not be prejudiced by any prior commitment on the part of the Union Government by virtue of its membership of any organization which might replace the League of Nations;".

The statement went on to explain that when eventually, in Article 77 of the Charter, the word "may" was substituted for "shall", that made the application of the trusteeship system "a matter of voluntary agreement", and then the real necessity of this statement, as it had been seen earlier, to that extent fell away. But nevertheless, Mr. President, it is significant that the emphasis falls on the need to have no—

> "prior commitment on the part of the Union Government by virtue of its membership of any organization which might replace the League of Nations".

Now, Mr. President, the next element in this review is that the United Nations Charter itself made no provision in the future for a mandate. As stated in the 1950 Opinion—

> "... the Charter has contemplated and regulated only a single system,

> the International Trusteeship System. It did not contemplate or regulate a co-existing Mandates System."

The quotation is given in the Counter-Memorial, **II**, at page 127 and also the reference. And so, Mr. President, we find that in the provisions of the Charter not only was there no provision for power on the part of the United Nations, or any of its organs, to exercise supervisory jurisdiction in respect of mandates as mandates, but there was no provision for any machinery in that regard either.

It is also, Mr. President, common cause in this case that there was no obligation on the mandatory powers to submit or conclude trusteeship agreements—that was a voluntary matter. The reference to my learned friend's statement on that point is in the verbatim record at page 209, *supra*.

We now come to the next important step, Mr. President. Towards the conclusion of the San Francisco Conference, on 25 June 1945, a Preparatory Commission of the United Nations was established, *inter alia*, to "formulate recommendations regarding the possible transfer of certain functions, activities and assets of the League of Nations which it might be considered desirable for the new Organization to take over"—that was the phraseology used in this regard. The details of the Commission's activities and the resolutions finally adopted by the General Assembly in that regard are set out in the Counter-Memorial **(II)**, at pages 35-38.

Although, Mr. President, there is now no contention on the part of the Applicants that there was a transfer of powers from the League to the United Nations—no contention any more of a general succession in respect of powers in that regard—these events—these special arrangements here—remain of particular significance, because of the light which they throw on the intent of everybody concerned, and particularly on the way in which the whole question of mandate was differentiated from the other matters with which the Conference was dealing. I shall explain in what particularly significant way that indicated the intentions in regard to mandate.

The following aspects we see to be important in regard to this aspect of the matter—the work of the Preparatory Commission in this regard.

Firstly, there were by sub-committees—the Executive, and so on—proposals that provision should be made for the transfer—I emphazise the word "transfer"—of functions and activities of the League. That, after debate, was altered—the phraseology was altered, because the word "transfer" was—I quote from the debate—one which could "imply a legal continuity which would not in fact exist"; so careful were the States concerned to make it clear that there was no legal continuity between the League of Nations and the United Nations. Consequently, Mr. President, the terminology was altered, and the new terminology was "the assumption of responsibility for certain functions and powers" by the United Nations—we give that at page 38 of the Counter-Memorial. Nevertheless, Mr. President, although this terminology was altered, there was a very carefully devised resolution to provide for such an assumption of functions and powers—I shall give some of the other significant aspects of it in a moment—but the most significant aspect of it was that there was an exception in regard to mandates. Nothing was provided for in regard to mandates, and in the circumstances, which I shall deal with, the only inference is that the omission was a deliberate one.

The next step is, Mr. President, specifically as regards mandates.

It will be recalled from what we set forth in our pleadings (Counter-Memorial, **II**, p. 40) that the Executive Committee of the Preparatory Commission recommended that the General Assembly should create a temporary trusteeship committee which would have the function, amongst others, to—

> "advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the Mandates System".

I emphasize those words, Mr. President—"the transfer to the United Nations" of the functions and responsibilities concerned. And in the proposed provisional agenda of this temporary trusteeship committee, the following item was included: "Problems arising from the transfer of functions in respect of existing mandates from the League of Nations to the United Nations" *(ibid.)*—again the same concept, that there was a necessity for a transfer of functions. The recommendations regarding the temporary trusteeship committee were, however, as the Court is aware, not accepted by the Preparatory Commission, but the Commission replaced them by a recommendation that the General Assembly should adopt a resolution calling on States administering mandated territories to submit trusteeships at an early date—that we find in the Counter-Memorial, **II**, pages 40-41—and nothing, Mr. President, was substituted in that resolution or in any other resolution for these previous suggestions of making some arrangement in regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the mandates system.

The next step is that during the discussions preceding this recommendation of the Preparatory Commission—in a debate on the same subject in the Preparatory Commission and also afterwards in the General Assembly—Respondent's representative repeatedly emphasized that Respondent was not undertaking to enter into a trusteeship agreement, but that in its view the interests of the Territory could best be served by incorporation with South Africa, and that the matter would subsequently be raised at an appropriate time and on an appropriate occasion. That we find dealt with in the Counter-Memorial, **II**, pages 40-42.

Another important factor is that other mandatories also indicated in debates and in statements that they would not, or might not, submit or conclude trusteeship agreements in respect of certain mandated territories. We give the references in Book II of the Counter-Memorial **(II)**, pages 42 and 131. The Court will recall that the reference is amongst others, to the United Kingdom—its intentions in regard to Palestine. Those intentions were at that stage not entirely clearly formulated as regards the future, and the United Kingdom found it necessary to reserve its position entirely in regard to Palestine. In regard to Trans-Jordan it indicated that there was an intention to give independence to that territory—again, in other words, a clear intimation that that territory would not come under the trusteeship system.

The position with regard to the Pacific Islands, previously under Japanese mandate, was entirely uncertain, and the United Kingdom and France in any case indicated in their statements that, in so far as they proposed to negotiate in regard to trusteeship agreements, their intention was subject to the obtaining of satisfactory terms in that regard.

Next, Mr. President, the resolution regarding the conclusion of trustee-

ship agreements which was eventually adopted by the General Assembly, indicated that its members—the members of the General Assembly—were well aware that trusteeship agreements would not be submitted in respect of all mandated territories. We find that in Book II of the Counter-Memorial **(II)**, at pages 43, 131 and 132. At page 43 we give the text of this relevant portion of the resolution, and we refer there in one of the paragraphs to these words—

> ". . . the General Assembly:
>
> *Welcomes* the declarations, made by certain States administering territories now held under mandate, of an intention to negotiate trusteeship agreements in respect of some of those territories . . ."

In the result, Mr. President, and by reason of the failure to provide any specific provision for the transfer of functions under the mandates, it follows that such functions could have been transferred only by applying the general provisions agreed upon by the founders of the United Nations, that is, under the resolution to which I have referred, before regarding the assumption of responsibilities for certain functions and powers.

The Court will recall that there were two resolutions. No. XI was the one referring to the speedy entering into of trusteeship agreements, and the other one, regarding the assumption of functions and powers, was No. XIV.

Inasmuch as the trusteeship resolution XI made no provision in regard to mandates as mandates, or the taking over of any functions—the transfer of any functions or powers in regard to mandates as mandates—the only way in which that function could then have been dealt with, if at all, would have been under this other resolution XIV, providing in general for the taking over or the assumption of responsibility for functions and powers. But in this regard, Mr. President, it is significant that the General Assembly in that resolution distinguished between League functions contained in treaties having a non-political character, and League functions contained in treaties having a political character.

In regard to non-political matters generally, including those falling under treaties, there was a statement in the resolution XIV of general willingness on the part of the United Nations to assume those functions. We find that in the Counter-Memorial, **II**, pages 38-39 and again at page 130. The text is at page 39, and I read this one portion of the resolution—paragraph 3 of Part I:

> "3. *The General Assembly* declares that the United Nations is willing in principle, and subject to the provisions of this resolution and of the Charter of the United Nations, to assume the exercise of certain functions and powers previously entrusted to the League of Nations, and adopts the following decisions, set forth in A, B, and C below."

This resolution of being willing in principle was qualified in some minor respects which are not relevant to our theme, but subject to those it was a general willingness and it related to these various matters of a non-political character. The portion A following dealt with functions pertaining to a Secretariat. The portion B following dealt with functions and powers of a technical and non-political character, and there the expression of general willingness was confirmed. The full wording is set out in the Counter-Memorial, I need not even read it to the Court.

These functions of a non-political character would obviously not include the function of supervision in regard to mandates, and so the only portion of the resolution XIV under which that function could possibly fall would be Part I, 3, C, which read as follows:

> "C. *Functions and Powers under Treaties, International Conventions, Agreements and Other Instruments Having a Political Character*
>
> *The General Assembly* will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character. . ." (**II**, pp. 39 and 130.)

In other words, Mr. President, for the purpose of an assumption of a supervisory function regarding mandates, if the matter was to be dealt with in terms of this resolution there would have to be, firstly, a request from the parties to, or legally interested in, the respective mandates and, secondly, there would have to be a decision acceding to that request by the General Assembly or the other United Nations organ considered to be the appropriate one. That was the procedure envisaged for the assumption of functions having a political character.

Mr. President, if one merely looks at the face of this resolution—of the provisions generally regarding these functions under instruments having a political character—it would then seem to be a resolution which could cover the case of mandates if somebody wished to bring it under that resolution. However, it becomes clear from the history of this resolution and coupled with resolution XI that that was not the scheme intended by the proposers of the resolution. They did not, in fact, foresee, or contemplate, that mandates would be dealt with under this resolution at all. That emerges very clearly from the history, as I say, from the history of this resolution read in conjunction with that of resolution XI. It will be recalled, Mr. President, that this resolution was based on a recommendation of the Preparatory Commission, and this Preparatory Commission had in turn considered a prior report from its Executive Committee—that we find in Counter-Memorial, **II**, pages 36-38—and the relevant portion of the Executive Committee's report stated, *inter alia*, the following:

> "Since the questions arising from the winding up of the Mandate system are dealt with in Part III, Chapter IV, no recommendation on this subject is included here." (**II**, p. 36.)

So, Mr. President, the proposals which led up eventually to resolution XIV were not intended to include any recommendation on the subject of mandates and the reason given was because the matter in regard to mandates was dealt with in other parts of the proposals—those other parts being part of the history which led up to resolution XI, the eventual resolution calling on powers to submit to trusteeship agreements. The reference to Part III, Chapter IV, may be somewhat misleading, but if one correlates it, it seems that the only portion to which it could refer was that portion which dealt with the establishment of the trusteeship system—the portion which contained the proposals regarding a temporary trusteeship committee, which I have already read—and the suggested function of that committee of advising the General Assembly on any

matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the mandates system.

As we have shown, Mr. President, those proposals were rejected by the Preparatory Commission without anything of a similar nature being substituted in their place.

In other words, therefore, also in regard to resolution XIV we find an exclusion of an intent to deal with anything in the nature of a transfer of functions in regard to mandates because it is intended to be dealt with in the proposals leading to resolution XI. In the development of those proposals leading to resolution XI we find the specific proposals in regard to the temporary trusteeship committee—those particular functions to be assigned to it to cope with this problem of providing machinery for a supervision of a mandate outside of trusteeship itself—providing for a necessary transfer of functions in that regard. If those proposals are not acceded to, they fall away; nothing is substituted in their place.

So, Mr. President, in those circumstances, we submit, it is very highly significant that there was no express provision anywhere in regard to future supervision of mandatory administration. Against the background that I have put to the Court, the fact that there was no such provision has not only a negative value but also has a positive value. It has the positive value, I submit, of showing by inference that that question was deliberately avoided—that the decision to have no agreement in that regard was a deliberate decision.

The States which drafted and signed the Charter and which were the foundation members of the United Nations were aware, firstly, that time would elapse before the coming into effect of the trusteeship system. Secondly, they were aware of the fact that there was no certainty that all mandated territories would end up as trust territories. Yet, Mr. President, no attempt was made to arrive at the general arrangement, either for interim supervision, after dissolution of the League, of mandated territories until they should become trust territories, or for any supervision at all in respect of mandated territories which might not become trust territories. They knew there were these contingencies—that time would elapse in regard to those that might become trusteeship territories. They knew there were contingencies that some might not end up as trusteeship territories at all and yet they refrained from making any provision for supervision to cover those instances—either during the interim period or at all, in respect of those that might not end up at all as trust territories.

The United Nations made elaborate provision for the assumption of certain League functions and powers and for transfer to it of League assets knowing, however, that its resolution XIV in this regard was not designed for the transfer of supervisory functions in respect of mandates. The specific proposal envisaging investigation and recommendation regarding possible transfer of functions under the mandates system was rejected and nothing was substituted for it. There was no provision whatsoever for machinery to exercise any supervision over mandates as mandates, in spite of the proposals that were made emphasizing the need for having such machinery if there was a contemplation of such a provision.

Mr. President, in those circumstances my submission is that the inference is inescapable that these omissions were deliberate omissions. The situation in toto amounts to a deliberate decision to take no decision in

regard to mandates—a deliberate decision to make no provision in regard to mandates—and when I say "no provision"—I mean no provision, expressed or implied.

It seems most unlikely, Mr. President, that it would have been possible to achieve a general arrangement applicable to all mandated territories in view of the widely varying circumstances pertaining to them and the different intentions of the mandatory powers in respect to their future. The result was that the matter had perforce to be left to a special arrangement, if any, to be arrived at in each particular case. There was no provision and everybody knew that there was no provision of a general nature dealing with all mandates so as to bring them under supervision outside of trusteeship.

Mr. President, as I understand the Applicants' contention in this regard, it seems to agree with ours to this extent, that the decision to have no express provision was a deliberate one. We come into conflict on the question of tacit consent. The Applicants contend that, despite the circumstances I have just dealt with, there existed a common intent among all the members of the United Nations, that the United Nations would be substituted for the League of Nations as supervisory organ in respect of mandates.

Now, Mr. President, if that were so, the first question that arises is, if there was that common intent and if there was all this specific express provision in regard to similar common intent relating to other matters, why was nothing expressly said in regard to mandates? All this elaborate machinery is created—all these elaborate provisions are made—but there is this common intent in regard to mandates that there is no express provision. We find in the verbatim record at page 213, *supra*, the answer suggested by the Applicants, namely:

> "The United Nations membership resisted and avoided explicit measures or steps, such as the establishment of a temporary trusteeship committee, for fear that any such measures or steps might encourage delay in the completion of trusteeship agreements."

I refer, Mr. President, to the first part of that sentence—"The United Nations membership resisted and avoided explicit measures or steps". That shows the agreement to which I have just referred—the effect that the decision to have no express provision was a deliberate one. The reason given is the fear that any such measures or steps might encourage delay in the completion of trusteeship agreements.

Now, Mr. President, in so far as this is advanced as a possible explanation—even a probable explanation—of the fact that no express provision was made, I have no quarrel with it at all—it is perfectly acceptable. It confirms, as I have said, that the decision to have no express provision was a deliberate one.

But, Mr. President, in so far as this explanation is offered as indicating, or even being consistent with, an intention—a general tacit intention—that there would nevertheless be such a provision—such a transfer of powers—such supervision to be exercised over mandates not converted into trusteeships—I submit that a moment's reflection will show that that argument is completely without foundation and that it really borders on the absurd.

What does it amount to? We know that a tacit, or an implied, agreement has exactly the same legal force as an express agreement. It brings

about the same consequence and it comes into existence on the basis that everybody is aware of it—everybody is so much aware of it and so much impressed with this common agreement that exists between everybody in that regard, that they do not trouble to express it because it is too clear. So both in legal effect, and in regard to the fact that everybody is aware of it, an implied agreement stands, for present purposes, in exactly the same position as an express agreement.

So, Mr. President, if the mandatories would be encouraged to delay in submitting trusteeship agreements by the express transfer to the United Nations of supervisory functions in respect of mandates, then they would surely be equally encouraged by a tacit agreement, clearly concluded and accepted by everybody concerned. The only difference between those two agreements would lie in their manner of proof in the event of a later disagreement about the matter—in the event of a later conflict or dispute. The express agreement would be an easier one to prove than the tacit, or implied, agreement.

Therefore, Mr. President, if the Applicants' argument were to have any validity at all, it would amount to this, that those members of the United Nations which were not keen to encourage delay in the submission of trusteeship agreements—which preferred to conclude an agreement which is difficult to prove rather than one which is easy to prove—would do that as a measure in order to discourage delay in the concluding of the trusteeship agreements.

But now, how would that suit their purpose, Mr. President? Apparently, if I understand the Applicants correctly, or if it is to assist their argument at all, if it should suit their (i.e., the United Nations Members') purpose later that there was an agreement, then they would say there was an agreement. If it would suit their purpose to say there was no agreement, then they would say there was no agreement—in other words, a suggestion of rank dishonesty of purpose. The suggestion is apparently that if it became clear that a large number or all of the mandatory powers concerned were taking steps, or were intending to place the territories under trusteeship, then the attitude taken in regard to the mandatory powers would be: "You are not under supervision at the moment. Therefore you ought to expedite the submission of trusteeship agreements." This would appear to be the implication of the suggestion made on behalf of the Applicants. On the other hand, in the case of a mandatory power which might, in regard to a specific territory, decide not to place it under trusteeship, then the powers that be would have to be in the position of saying to that power: "No, there was a tacit agreement, as we all know. It was generally agreed that although we do not make any express provision there would be a transfer of powers in respect of Mandatories, and you would have to fall under the supervision of the United Nations even though you do not submit a trusteeship agreement." These would appear to be the implications of this suggestion on behalf of the Applicants if it were to make any sense at all.

But, Mr. President, even on that basis it makes no sense, in my submission, because how could this scheming take place without the mandatory powers knowing about it, and how could there be this scheme which was intended to be used against the mandatory powers and at the same time, although the mandatory powers do not know about it, there is general agreement between all concerned so clear as not to need expression at all, to the effect that there would be a transfer of supervisory

powers and an obligation of the mandatories concerned to submit to it? Surely it does not make any sense. If there was in fact a tacit agreement, then everybody concerned would know that there was such a tacit agreement, and then that in itself would discourage the mandatories to an equal extent, or to no extent at all, depending on the circumstances, just as would be the case with an express agreement. Whether the agreement was express or tacit, therefore, would make no difference whatsoever in regard to this factor mentioned by the Applicants, namely the fear that measures or steps might encourage delay in the completion of trusteeship agreements. We cannot admit, with respect, that there would have been any such intention of rank dishonesty on the part of United Nations Members as seems to be implicit in this suggestion. We cannot accept, on the other hand, that it would have assisted them at all. If there was a tacit agreement, everyone must have known about it, and this could have brought them nowhere.

The only suggestion, therefore, made by the Applicants, Mr. President —the only reason why they say that the omission to have provision was deliberate only in respect of express provision, but that it nevertheless provided scope for an implied agreement—the only reason advanced by the Applicants is completely without foundation. I submit the only conclusion that one can come to is that the deliberateness of the decision to have no provision extended both to express provision and to tacit or implied provision.

That is indeed, Mr. President, the logical conclusion to be drawn from the very practical premise which the Applicants here suggest—the premise that there was a desire not to encourage delay in the submission of trusteeship agreements. Accepting that there was such a desire, the logical conclusion would be that the Members of the United Nations were induced to conclude no agreement at all regarding transfer of powers in regard to mandates, or exercise of supervision on mandates outside of trusteeship. That would be the logical conclusion of a decision not to encourage delay in the submission of trusteeship agreements. It would then enable the United Nations Members to say that the supervisory functions of the League had fallen away and they would then have an added argument for urging the speedy submission on the part of everybody concerned of trusteeship agreements.

That, Mr. President, was the view adopted in the 1962 joint opinion by the honourable President and Sir Gerald Fitzmaurice. I would like to quote from page 539 of the report, leading on to page 540, a passage with which I very respectfully wish to associate myself and the contentions on behalf of the Respondent:

> "Our concern here is simply to show that the two Assemblies [the General Assembly of the United Nations and the League Assembly at its final session] were (except for Article 73 of the Charter) unwilling to provide in *any* specific way for the consequences of the termination of the League and its membership, or for a possible eventual failure to bring a mandated territory into trusteeship. In this lies the key to the whole matter.
>
> It is the key to the whole matter because it is strikingly evident that the two Assemblies (and the Applicant States were Members of both) relied, and *preferred to rely*, on the hope or expectation that the mandated territories would eventually be brought into trusteeship. Whether this was a reasonable assumption in the case of

South West Africa, considering the declarations that were made on behalf of the Union Government, is another matter. The fact remains that it *was* relied upon, in the full knowledge of facts from which it was manifest that the expectation might not be realized, and of the fact that the Mandatory was under no legal obligation in the matter.

It seems to us fairly clear as a matter of reasonable inference that an important part of the reason for this attitude was the desire to avoid even the suggestion that any mandated territory might not be brought into trusteeship; or, by providing for the situation that might arise if that was not done (and if the League had in the meantime been dissolved) to appear to be countenancing such a situation by providing for it, or to be giving grounds on the basis of which any Mandatory could contend that, express provision having been made for continuing the Mandates *as* Mandates, no further action was required.

In short, given the view that they took of the whole matter, those concerned thought it unnecessary to provide for this situation and better policy not to. This course having been chosen, and the possible consequences it entailed accepted, there is no legal principle which would enable a Court of law to put the clock back and, by judicial action, make provision for a case which those concerned elected not to deal with, for reasons which appeared to them good and sufficient at the time."

That, with respect, Mr. President, we submit to be the only logical inference one can draw from the events which I have tried to depict to the Court this morning—the events relative to the formation of the United Nations and these initial decisions taken in regard to the assumption of functions in various respects, and the creation of the trusteeship system.

There is one aspect of the Applicants' argument in this regard to which I must still make brief reference; that is, in the verbatim record at pages 152-153, *supra*. I read from it a statement of my learned friend, Mr. Moore:

"I emphasize, Mr. President, that no argument was presented by any delegate to the Preparatory Commission that the proposal for a temporary trusteeship committee was not acceptable on the grounds that the United Nations had no supervisory authority over mandated territories. Rather, it seems to have been assumed by the Preparatory Commission that the United Nations did have such supervisory authority, but that the most expedient method, not the only method, for giving effect to such authority was the rapid conclusion of trusteeship agreements and the formation of the Trusteeship Council."

Mr. President, my learned friend did not indicate in any way the source from which he seeks to derive this interpretation of the view of the deliberating States and delegates concerned. On the contrary, the indications are that they considered that there was no provision in law for any such supervisory powers on the part of United Nations organs—no provision for any machinery in that regard—and that if there was a desire to exercise such supervision, special provision had to be made for it. That indication is apparent from a number of circumstances, including

the very wording of these proposals that were made in regard to a possible temporary trusteeship committee. The words which I have emphasized, the words "with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the Mandates System" (Counter-Memorial, **II**, p. 40) emphasized, Mr. President, the apparent acknowledgment of a need to have such transfer if it were wished to exercise such functions on the United Nations side. Again, in the provisional agenda item appears the wording "Problems arising from *the Transfer* of Functions in respect of Existing Mandates from the League of Nations to the United Nations" *(ibid.)*. Those words in themselves emphasize the contemplation of a need to make special arrangement in that regard. The contemplation in that regard is further emphasized exactly by the fact that all these other elaborate resolutions and provisions were arrived at in order to make provision for transfer of assets from the one Organization to the other and also for the transfer of functions in other respects, non-political, and some political respects, the word "transfer" later being altered to one of assumption of the functions and powers concerned.

The mere fact that there was all this concern and special trouble taken to come to these specific arrangements in regard to all these matters, emphasizes what is, in any event, inherent as a probability in the old situation, namely that everybody concerned knew there was no express provision for any supervision of mandates in the Charter, and if there was any intent to have supervision of that nature, then special provision would have to be made for it.

I have not found any argument submitted by the Applicants which points to any evidential factor on the record tending to show the opposite.

I conclude this survey, therefore, Mr. President, with the submission that there was very definitely no provision, either express or implied, for a transfer of supervisory functions in regard to mandates, or for the exercise of any supervision over mandates, as mandates, outside of trusteeship. I submit that this result was arrived at by deliberate decision, and that everybody concerned *knew* that that was the position. That is a very important factor to be borne in mind as a background to the next phase of the history relating to the final session of the League Assembly, and the dissolution of the League.

Before I come to that, Mr. President, there is one more aspect relating to the foundation of the United Nations and the possible bearing of the Charter and arrangements in regard to the United Nations on the question now before the Court. That is the question of the interpretation now put on Article 80, paragraph 1, by my learned friends—the interpretation put on it, or the significance attached to it.

I need not read the text of the Article to the Court again, the Court will recall that I have read it before, and will know the terms of it very well.

The Court will recall that, after apologizing "for the incompleteness of presentation of this question during the preliminary objections phase of these cases" (p. 223, *supra*) my learned friend expressed his agreement with a proposition, stated by the honourable President of the Court and Sir Gerald Fitzmaurice, in their joint dissenting opinion in 1962, in the following words:

> "The sole purpose of the Article was to prevent any provision of

> Chapter XII of the Charter being construed so as to alter existing rights prior to a certain event." (*I.C.J. Reports 1962*, p. 516, f. n. 1.) *(Ibid.)*

My learned friend indicated that they associate themselves with that interpretation, but they still contend, Mr. President, that the Article may be invoked to show the understanding of the authors of the Charter —the pre-supposition in regard to continued existence of rights under the mandates, even after the dissolution of the League.

In order to evaluate this argument properly, Mr. President, one must have some regard to the chronology of events during this relevant period. As we have pointed out, the Charter was drafted and signed during the San Francisco Conference, between 25 April 1945 and 26 June 1945—in other words, some 10 to 12 months prior to the dissolution of the League. We give that in the Counter-Memorial, **II**, at page 32.

The Charter came into force on 24 October 1945, as we stated in the Counter-Memorial, **II**, pages 32-33—in other words, some six months prior to the dissolution of the League.

It is, therefore, Mr. President, quite understandable that, at the signing of the Charter and its coming into force, the authors of the Charter would have contemplated the existence of rights and obligations under the Mandate. The League was still in existence. It had not become dissolved, and nobody was suggesting, and we have never contended, that prior to the dissolution of the League, rights or obligations under the Mandate came to be altered. There is nothing inconsistent with our contention in a contemplation on the part of the authors of the Charter, at the time when the United Nations was formed, and at the time when the Charter came into effect, that there were unaltered rights and obligations under mandates—unaltered, that is, by any of the provisions of Chapter XII of the Charter, because that was what Article 80 (1) was dealing with.

We must emphasize, Mr. President, that Article 80 (1) could clearly do no more than indicate which rights were, in the views of its authors, in existence as at the stage of its drafting and possibly the stage of its coming into effect. Nevertheless, we find that my learned friend for the Applicants said:

> ". . . the inclusion of Article 80, paragraph 1, in the Charter serves to confirm the understanding of the authors of the Charter that certain rights, including those under mandates, did continue to exist, notwithstanding the dissolution of the League". (P. 223, *supra*.)

Later, Mr. President, in the same record we find the following:

> ". . . the authors of the Charter assumed that mandate rights, both of States and of peoples, continued, notwithstanding the dissolution of the League, and that the authors of the Charter, in Article 80, paragraph 1, sought to make clear that Chapter XII was not to be construed in a manner which would alter, in any way whatsoever, such rights which continue to exist by force of other instruments or undertakings". (P. 226, *supra*.)

Now, Mr. President, taking these submissions, or contentions, as they stand literally, the only way in which they would appear to make sense, with respect, would be to assume that there must be some misapprehension on the part of my learned friend as to the proper sequence of events, because otherwise they do not seem to make sense.

It is not clear how there could have been a contemplation, at the time when the Charter came into existence or when it was being forged, of any pre-supposition regarding the position *after* the dissolution of the League. That, surely, is not something which could be derived from Article 80 (1) itself, particularly not in the light of the Applicants' admission that it is to be construed as any clause of that nature. It is a mere aid to interpretation and merely makes it clear that certain provisions of the particular instrument are not to be construed as altering an existing position. That existing position was as at that date, and the wording of the Article certainly, and nothing which has been advanced in regard to its background or surrounding circumstances, would suggest any contemplation that this Article of the Charter, or anything in the contemplation of its authors, would have any effect on what would become of mandates as from the dissolution of the League—an event which was not yet there, and was yet to come.

The only way in which one could make sense, with respect, of this submission, would be to suppose that it is intended to mean something more than it literally says. In other words, that it is intended to mean that Article 80 (1) in some way shows a contemplation on the part of the authors of the Charter, that rights under mandates would, in fact, remain unchanged until trusteeship agreements were entered into—that they contemplated that at the time of providing for Article 80 (1)—in other words, a sort of tacit agreement amongst themselves on that point.

Now, Mr. President, in the first place, it seems most inherently unlikely that the authors of the Charter would have intended to make a provision of that kind, in regard to matters which really concerned relationships of certain States with another organization—an organization of which all the authors of the Charter were not members, and also an organization which included members which were not Members of the United Nations or included amongst the authors of the Charter.

It would have been a most *unusual* provision, quite apart from an unlikely one, and if, Mr. President, it was the intention to have such an unusual provision, then one would surely have expected it to have been set forth with explicit clarity, in order to have no mistake about it in the future. But, Mr. President, apart from the fact that it would be a most unusual provision, that argument would completely ignore the wording and the purpose of Article 80 itself. The Article dealt only with rights existing at a particular time, that is, at the time of the drafting or the coming into force of the Charter. Consequently, the Article itself shows no contemplation other than that certain rights were in existence as at that stage.

As to the future of these rights, the Article was only concerned with making it clear that the provisions of Chapter XII would not affect them unless and until trusteeship agreements, in terms of the said Chapter, were concluded. That was the only indication which the Article gave of being concerned with the *future* of those rights and obligations at all.

That, clearly, does not show a contemplation that *nothing* would affect those rights until trusteeship agreements were concluded. Purely as a matter of language, Mr. President, and as a matter of logic, no contemplation to this effect can be derived from the Article, nor from the circumstances surrounding its creation. I would like in that regard to refer the Court to a passage in the joint dissenting opinion, to which I

referred before, of the honourable President and Judge Sir Gerald Fitzmaurice, in the footnote on page 516:

> "What Article 80 (1) does not say is as important as what it does say. It does not say that rights shall continue. It does not provide that these rights shall not thereafter, until trusteeship agreements have been concluded, be subject to the operation of law, or that they shall not terminate or be extinguished by effluxion of time, failure of purpose, impossibility of performance or for any other reason. It does not say these rights shall not be altered or be subject to alteration even by normal legal processes." (*I.C.J. Reports 1962*, p. 516, f. n. 1.)

Mr. President, the facts themselves belie any conclusion that there was a contemplation of such an unusual nature on the part of the authors of the Charter. It must have been clear to all concerned that, at least in some of the mandated territories, the mandatory regime would or might be altered or terminated, other than by placing the territories concerned under trusteeship.

Apart from South West Africa, in respect of which Respondent had already, at the San Francisco Conference, made clear its intentions in that regard—its desire of obtaining recognition of a termination of the Mandate by incorporating the Territory with the Union—there were also the cases of Palestine and Transjordan, to which I have referred, in respect of which the Mandates were intended to be terminated although no trusteeship agreement was contemplated, or was in fact subsequently concluded.

Suppose, Mr. President, with respect, that, prior to the dissolution of the League, all the interested parties within the League had come to the conclusion that the best way of dealing with the whole mandate system was to have an express cancellation of all the mandates, so that there could be a clean start—so that there was no carry-over—no remnant of the mandates system at all. That would put everything in a position of suspense again and from there new agreements would have to be made, if at all, under the system and under the Charter of the United Nations. What I suggest in that regard is not a completely fanciful possibility. One knows that it was a practical idea to which some consideration was given in certain quarters, at a particular stage. The idea in the end did not prevail, but suppose it *had* prevailed, and suppose it *had* been decided in the League quarters that that was the practical way of approaching the matter, and that there had been express agreements to cancel all the mandates, surely, Mr. President, Article 80, paragraph 1, or any contemplation lying behind it, could not have affected that matter. Surely, as a matter of fact, as a matter of probability, there could have been no intention at the time when Article 80, paragraph 1, was brought into existence, to try to forestall, or cope with, a possible situation of that kind—a possible decision on the part of the interested parties in the League to deal with the matter in that particular way.

Mr. President, the same misapprehension and lack of logic in regard to chronology apparently underlies the Applicants' repeated references to statements made by South African delegates at the first meeting of the General Assembly—the first part of the first meeting. We find a reference to that in the verbatim record at page 164, *supra*, and again at page 224, *supra*. It is in both cases a reference to the same statement, as far as I

recall. There is a quotation, on page 224 of the record, from a statement by Respondent's delegate to the United Nations General Assembly that—

> "... arrangements are now in train for ... consultations to take place and, until they have been concluded, the South African Government must reserve its position concerning the future of the mandate, together with its right of full liberty of action, as provided for in paragraph 1 of Article 80 of the Charter".

That, again, Mr. President, is a reference to a statement which was made before the dissolution of the League. The statement was, in fact, made in January 1946—we find the reference to that in the Counter-Memorial, **II**, at page 41—in other words, still some months prior to the dissolution of the League. At that stage the only question was whether the Charter had in any way affected rights under the Mandate. The effect of the dissolution of the League, which was at that stage still in the future, although contemplated, was, for that reason, not an actual issue. The League Members still had to decide for themselves in what exact manner they were going to deal with the mandates.

No doubt, Mr. President, if the matter had arisen, the opinion might well have been expressed that the effect on the mandates of the projected dissolution of the League would depend on the arrangements to be made, or to be omitted to be made, during the final session of the League.

In any event, Mr. President, if one looks at the provisions of Article 80, paragraph 1, merely the negative effect that certain provisions of the Charter were not to be construed as altering or effecting rights, leads at most to a contemplation that certain rights would, but for normal terminations, stay in existence. How could an article of that kind possibly cope with a problem of a substitution of supervisory organs in respect of an obligation such as that incurred by the mandatory under Article 6. On my learned friend's contention, as well as on our contention, a new agreement was necessary—a new consent was necessary—with a view to affecting such a substitution in order to keep such an obligation either alive or operative, as the case might be. Surely nothing in Article 80, and nothing indicated as a possible contemplation of its authors, could by any stretch of the imagination be said to have been intended to cope with a problem of that kind.

Our submission is, therefore, in conclusion, that no agreement, express or implied, was embodied in the Charter, or otherwise concluded by the founders or Members of the United Nations, at any stage prior to April 1946, whereby the United Nations assumed the supervisory functions of the League in respect of mandates, or whereby any mandatory was rendered obliged to report and account, outside of trusteeship.

We can proceed now to a consideration of the later events which succeeded these.

[Public hearing of 5 April 1965]

Mr. President, and honourable Members, at the adjournment on Friday I had just concluded a review of events during the establishment of the United Nations Organization and during the first few months of its existence, up to and including the time immediately prior to the last session of the League Assembly in April 1946. The purpose of the enquiry

was to ascertain whether there was any general agreement between interested parties, including the mandatories in general and the Respondent in particular, to the effect that the United Nations would exercise supervisory powers over mandatory administration outside of trusteeship. We concluded the review, Mr. President, with the submission that—

> "... no agreement, express or implied, was embodied in the Charter, or otherwise concluded by the founders or Members of the United Nations, at any stage prior to April 1946, whereby the United Nations assumed the supervisory functions of the League in respect of mandates, or whereby any mandatory was rendered obliged to report and account, outside of trusteeship". (P. 391, *supra.*)

Earlier, we had contended that that result was arrived at, not by accident, but by design. By deliberate design the Members of the United Nations preferred not to make any provision for supervision of mandatory administration outside of trusteeship, and we indicated the reasons why we made that submission to the Court on the basis of a review of the relevant facts.

We now come to the next phase of the facts in the historical development, namely those pertaining to the final session of the Assembly of the League of Nations in April 1946, and the purpose of the enquiry is the same as before.

Previously, Mr. President, the Applicants gave very little attention to this last session of the League Assembly. In the pleadings that have been filed, and in their oral argument in regard to the Preliminary Objections in 1962, they hardly dealt with these events at all and they, in fact, relied on arguments which reduced the significance of events at this particular session—arguments which were aimed at avoiding the significance of these events.

Now, the Applicants do make a serious attempt to meet our arguments based on the events at the last session of the League, and they do attempt to derive from those events support for their contention of consent, on the Respondent's part, to accept a substitution of supervisory organs—consent which they now acknowledge to be a necessary element for the purposes of their test. The Applicants now contend, Mr. President, that all the parties concerned manifested an intent to substitute the United Nations for the League as the supervisory organ in respect of mandates. Respondent's contention is, as it has always been, that the very opposite is the case, viz. that the States that attended the session showed a clear contemplation that no such substitution would take place.

We submit that it is not only a case of the Applicants being unable to justify a necessary inference of tacit agreement, as they are required to do in order to establish their contention. We submit that the facts show the opposite. They show an absence of such an agreement, and they show an overwhelming understanding that prior to new arrangements, which might be agreed upon between the mandatories and the United Nations, there would be no accountability under the mandates to the United Nations, and also that there would, in fact, be no accounting under the mandate by any mandatory. That is what the facts in our submission show.

Now, Mr. President, it must be recalled at the outset (as I pointed out on Friday) that at the time when this final meeting of the Assembly of the League took place, the United Nations had already been in operation for

some months. Although the membership of the two organizations differed in substantial respects, the same States formed the majority in both organizations—both in the United Nations and in the League of Nations.

It must further be borne in mind, Mr. President, that for resolutions of the League Assembly unanimity was required. These factors, taken together, form a very important background to the deliberations at the final session of the League Assembly.

We indicated, in our review of events at the formation of the United Nations and during the first months of its existence, that the Members of this new Organization deliberately abstained from making any provision for a transfer to the United Nations of supervisory functions in respect of mandates, and we submit, as I have said, that that result was arrived at deliberately.

In the circumstances, Mr. President, one could hardly expect that a few months later an Organization consisting, as far as the majority was concerned, of the same States, would, without more ado and without very special reason, have come to a diametrically opposite conclusion as to the ensuing position, they wanted, after the dissolution of the League. It was not impossible, of course, that there could have been a complete turnabout as far as those intentions were concerned, but if there had been such a remarkable turnabout in intention, one would at least have expected that there would have been a special reason for it—a special reason leading to specific discussion of the subject, and leading eventually to an explicit and unmistakable resolution on that subject, so that everybody could know where they stood.

But, in fact, Mr. President, in our submission, an examination of the events will show that the League Assembly, just as the founders of the United Nations, deliberately abstained from making any provision whatsoever for a transfer of supervisory functions. They knew very well that that was the result at which they had arrived deliberately, and we submit that the picture in that regard is, in the case of these final events at the last session of the League Assembly, if anything, even more clear than in the case of the United Nations during the first few months of its existence.

At this final session of the League Assembly, the first occasion on which the question of the future of mandates was raised, was the plenary meeting on the morning of 9 April, and the delegate who raised it was the representative of the United Kingdom. We give a relevant extract from his statement in the Counter-Memorial, **II**, at page 46.

Mr. President, it will be recalled that, at that time, Transjordan had already become independent, and the gist of the statement, as we gave it, at the page which I have mentioned, was to the effect that, pending fresh arrangements about Palestine, the position of which was still uncertain, and pending satisfactory terms of trusteeship for the other territories under British mandate at the time, "it is the intention of His Majesty's Government in the United Kingdom to continue to administer these territories in accordance with the general principles of the existing mandates".

I wish to invite attention at once to the words "it is the intention". I submit, Mr. President, that they do not bear out the suggestion that there was any contemplation of a binding obligation in law. I am merely pointing that out in passing, because it was an element which was necessary for the purposes of the Applicants' argument to show that what

was said by mandatories there, in the particular context, was intended to be an expression of a legal undertaking—a legal commitment—on the part of mandatories to the other members of the League. I submit that the wording in itself certainly does not bear out that construction.

However, Mr. President, the major dispute between the Parties hinges on the interpretation of the words "the general principles of the existing mandates", the intention being expressed to continue during this interim period to administer these territories in accordance with those general principles. This phrase was not explained or defined on that particular occasion, but the Applicants now suggest, Mr. President, that those words must have included the obligation of accountability, and they suggest that since the United Nations was then the only body capable of exercising international supervision, this statement, like the statements of the other mandatories, must be taken to involve a promise or consent to submit reports to the United Nations. That they make these contentions with reference to all the mandatories, and not only with reference to the Respondent, is abundantly clear from the way in which their submissions are phrased in this regard.

I wish to refer the Court first to the verbatim record at page 149, *supra*. This is a contention by my learned friend, Mr. Moore, following immediately upon extensive quotations from the declarations made by all the mandatories on that occasion. The contention reads as follows:

> "The declarations by each of the mandatory powers make it abundantly clear that the general intention and understanding was that all of the obligations of the mandate agreements remained in force pending the conclusion of trusteeship agreements."

Later on the same page of that record, in relating this general submission specifically to the case of the Respondent, my learned friend made it clear that when he spoke of all the obligations of the mandate agreements in this regard he included the obligations under Articles 6 and 7 thereof. This point is also made explicitly clear by my learned friend Mr. Gross in the verbatim record at page 212, *supra*:

> "The Mandatories, including Respondent, accepted the continuance of the existing regimes, including the substitution of the United Nations for the League as the supervisory organ, for what everyone concerned hoped would be a short, transitional period."

So that would include, Mr. President, the representative of the United Kingdom.

Mr. President, if that had been the intention of the representative of the United Kingdom, the question immediately arises, why did he not say so? Why did he use these vague, general words, viz. "in accordance with the general principles of the existing mandates"? And why did he relate them only to the question of the administration of the territories and not to anything falling outside the concept of administration, such as the concept of accountability or the rendering of reports?

Mr. President, in fact, in my submission, those words in no way support the Applicants' contention. If the intention was to comply in full with all the obligations prescribed in the various British mandates, including an obligation of accountability, then surely, Mr. President, the words "in accordance with the general principles of the . . . mandates" would have been inappropriate. They would not have been used. At

least, Mr. President, if there had been any contemplation in regard to reporting and accounting, one would have expected the speaker to advert to the problem which would arise by reason of the fact that the only supervisory body mentioned in the mandate instrument, namely the Council of the League, would cease to be in existence. He would at least have adverted to that problem, and he would have indicated in what manner there could still be compliance with that obligation of accountability, as defined with reference to that particular supervisory organ.

But we find nothing of the kind, Mr. President. We find that the wording was confined to the question of administering these territories, and the basis upon which that was to occur, was said to be "in accordance with the general principles of the existing mandates". The wording of that statement itself, Mr. President, is therefore, in my submission, destructive of the Applicants' contention.

But the matter goes very much further than the wording alone. There were surrounding and subsequent events which threw very clear light on the actual intent of the British delegate in using those words. In the very next year the United Nations appointed the United Nations Special Committee on Palestine and they, in their report, said, with reference to this particular passage, how it was in their view to be understood. One finds the passage in the report, in the Counter-Memorial, **II**, at page 137. It reads:

> "Following the Second World War, the establishment of the United Nations in 1945 and the dissolution of the League of Nations the following year opened a new phase in the history of the mandatory regime [this is now with reference to Palestine]. The mandatory Power, in the absence of the League and its Permanent Mandates Commission, had *no international authority to which it might submit reports and generally account* for the exercise of its responsibilities in accordance with the terms of the Mandate. Having this in mind, at the final session of the League Assembly, the *United Kingdom representative declared* that Palestine would be administered 'in accordance with the *general principles*' of the existing Mandate until 'fresh arrangements had been reached'." (Italics added.)

Mr. President, this was a report by an 11-nation committee. It was not a report by the United Kingdom itself, but in the first place it seems most unlikely that the committee would have given this interpretation of the words used by the British delegate, unless they had obtained that explanation at the very source of the statement, i.e., from the delegate himself, or from the British authorities. That seems inherently unlikely. Apart from that, Mr. President, even if we should assume that they did not get the information directly from British sources, one must bear in mind that there was in fact never any repudiation by the British authorities of this explanation given by the committee.

On the contrary, the conduct of the British authorities in this regard was entirely consistent with this explanation given by the committee, because one finds that, in fact, the United Kingdom withdrew from the administration of Palestine as late as 15 May 1948. That was nearly three years after the Charter came into force and more than two years after the dissolution of the League, and during the whole of that period no report under the mandate was in fact made to the United Nations by the United Kingdom. In other words, this conduct entirely confirms the

interpretation put upon that initial statement at the final session of the League Assembly by this Committee, the interpretation to the effect that there was an intimation that in the interim period there would be no reporting and accounting under the mandate.

At the very least, Mr. President, this interpretation put upon the statement by the Special Committee shows what was the natural interpretation of that statement in its context and historical setting. And it shows more than that. It shows the way in which other interested States actually understood the statement made on behalf of the mandatory power, in this case the United Kingdom.

The States which were members of this Committee are mentioned in the Counter-Memorial, **II**, at page 141. They were Australia, Canada, India, the Netherlands, Uruguay, Czechoslovakia, Guatemala, Iran, Peru, Sweden and Yugoslavia. We have checked, Mr. President, and we find that nine of these States were Members of the League at the time of its dissolution. They were therefore represented on the occasion when the statement was made, and this is the clearest evidence one can get of the manner in which the expressions of intent on the part of the mandatory powers were in fact understood by the other States present.

(Mr. President, I could give the Court a reference indicating where we got that figure of nine in regard to membership. We have not got it here, unfortunately, but I will give it to the Court on a later occasion.)

I submit, therefore, Mr. President, that this British statement alone, taken on the basis of what it meant in its setting—in its context—and having regard to these further events which throw a light on what was intended to be conveyed by that statement, and on how that statement was understood—then that statement is in itself totally destructive of the Applicants' contention. How can the Applicants under these circumstances say that the agreement—the general consensus for which they contend—is consistent with all the proved facts and inconsistent with any other reasonable inference from the facts?

The next delegate, Mr. President, to speak on the question of mandates was the South African representative. That was later on the morning of 9 April 1946.

I refer to the quotation of his statement at pages 46-47 of the Counter-Memorial **II**, and I submit, Mr. President, that from this statement itself clearly emerges exactly the same contemplation as we found in the case of the statement of the United Kingdom. The statement began by referring to the intimations that had already been given, viz., that, on a future occasion, there would be a presentation of a case on behalf of South Africa to the effect that the Mandate for South West Africa was to be terminated and that the Territory was to be incorporated within the Union. The statement intimated that the intention of the Union Government was to raise this case at the forthcoming session of the United Nations General Assembly in New York.

Then the statement proceeded to deal with what would happen in the meantime, and I proceed to read from that point:

> "In the meantime the Union will continue to administer the territory scrupulously in accordance with the obligations of the mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held." (**II**, p. 47.)

There we find, Mr. President, the statement of intent on the part of the Union Government. This is its main statement of intent. The further portion of the statement goes on to explain in more detail what is meant by this statement of intent. The statement of intent will be seen to be concerned again with the question of administration of the Territory, i.e., it will be "scrupulously in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants"—clearly confined to that alone. To make it doubly clear that this was not intended to refer to anything beyond that concept—to anything of the nature of reporting or accountability—the statement proceeds to add "as she has done during the past six years when meetings of the Mandates Commission could not be held". Nothing could be clearer than that, Mr. President.

The rest of the statement, as I have said, is clearly explanatory and has to be read in that context. It reads as follows:

> "The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the mandate." (**II**, p. 47.)

It is again, in the context of what has just gone before, a reference to an intent to continue to administer the Territory as had been done during the previous years when meetings of the Permanent Mandates Commission could not be held. This clearly indicates a contemplation that there would be no accounting or reporting under the Mandate in this interim period to which the statement of intent relates.

The statement proceeds:

> "The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory." *(Ibid.)*

The Applicants in this regard, Mr. President, place reliance on the words "the Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the mandate . . ." Mr. President, they contend that this expression is to be taken not only as relating to obligations regarding administration of the Territory for the benefit of the inhabitants, but also, Mr. President, as relating to obligations to account and report. But surely the first part of the statement, where the ambit of the statement of intent has been indicated so clearly, rules out any construction of that kind. It is quite clear that where the statement speaks of the obligations of the Mandate, it means obligations relating to the advancement and promotion of the interests of the inhabitants—relating, in other words, exclusively to the concept of administration of the Territory.

Let me put it this way to the Court, Mr. President. Let us leave the question of context out of consideration for the moment. Let us assume that the South African delegate made a bare statement to the last session of the League Assembly to this effect, that, after dissolution of the League and prior to entering into new arrangements with the United Nations the Union Government would continue to honour its obligations under the Mandate—would regard those obligations as still being in full

force and effect. Surely a statement of that kind, in the circumstances in which it was made, would have imported an enormous ambiguity on this very question of reporting and accountability. The statement was made in circumstances where everybody knew that the dissolution of the League was imminent and that the disappearance of those organs of the League, which were charged in the mandate instruments and in the Covenant of the League with the supervision of mandatory administration, was also imminent.

Now clearly, as I have said before, a problem in that regard arose of which everybody is aware—a problem to the effect that if there was now to be further reporting and accountability under the Mandate, to whom was that reporting to be made? Was it to be made to any organ of the United Nations Organization, when everybody also knew that there was no express provision anywhere in the Charter of the United Nations, or in the initial resolution passed at the first part of the first session of the United Nations to make provision and to create machinery for that type of supervision on the part of the United Nations? Surely it was a question that did not resolve itself. If there was to be any intent that there was to be continuation of an obligation to report and account, then it could only have happened in the event of a reference to the question of substitution of a supervisory organ and, therefore, in the absence of any reference to that particular point—any general statement to the effect that obligations under the Mandate would still be honoured must—in itself, be an ambiguous one.

Mr. President, if one takes into account the context of this whole statement, any ambiguity that might result from the use of that phrase itself, divorced from its context, is immediately resolved. As I have said, the statement commences by indicating the ambit of the intent in this regard, and the ambit corresponds exactly with that which had been indicated on behalf of the United Kingdom, that is, the statement of intent related purely to the question of administering the Territory in accordance with the obligations of the Mandate. And that it was in that context, and in that context alone, that the South African delegate made clear that his Government would not regard the obligations of the Mandate as having been diminished. It could hardly be clearer, Mr. President, following as it does immediately on the statement that disappearance of the particular organs of the League would preclude complete compliance with the letter of the Mandate.

If one goes back further and sees the pointed reference to "as she has done during the past six years when meetings of the Mandates Commission could not be held", any doubt that there could otherwise have been on the point must surely disappear.

Further support for this contention is derived from circumstances outside the statement itself—from extrinsic factors. Firstly, there is the factor of probabilities in the light of the surrounding circumstances and the surrounding events. Further, Mr. President, support is derived from the subsequent conduct of the parties themselves.

On the first point—the question of probabilities. Why should South Africa have wished to renew voluntarily an obligation of accountability which was about to lapse or which, at the very least, on the basis of the Applicants' contention, was to become dormant by reason of the falling away of the supervisory organ, despite the view which the South African representatives had indicated so clearly before "that the Mandate should

be terminated and that the Territory should be incorporated as part of the Union of South Africa". (**II**, p. 34.) This is a point with which I have dealt before.

Further, Mr. President, there is the statement which had been made previously by the South African representative—

> "... that South Africa may not afterwards be held to have acquiesced in the continuance of the Mandate or of the inclusion of the territory in any form of trusteeship under the new International Organization".

The Court will recall that that statement was made at the San Francisco Conference and that the subsequent explanation of that statement made clear beforehand that the real wish of the South African Government —the real intent—was that this Territory ought not to be included under the trusteeship system at all, and that it was destined to become incorporated within the Union of South Africa itself. These previous statements had been designed to make it clear that the Union was not to be regarded as having committed itself in any way to supervisory powers on the part of the United Nations in regard to this Territory. Surely, then, it becomes most highly improbable that the South African delegation, on this particular occasion, would have indicated an intent to regard itself as bound to report and account under the Mandate to this new organization—the United Nations.

What is equally important, Mr. President, if not more so, is this. Why should the South African delegation alone, of all the mandatory powers, have manifested an intention of that kind? I have indicated a clear intent to the contrary on the part of the British delegation, and I shall proceed to indicate a clear intent to the contrary on the part of the New Zealand, the French and the Australian delegations, the Belgian delegation's statement being neutral on this particular point. The question then arises, why should the South African delegation, when it did not intend to put the Territory under United Nations trusteeship, and when it had made clear that intention, alone have decided to put the Territory under interim supervision until new arrangements had been entered into?

Furthermore, Mr. President, the subsequent conduct of the South African Government itself, and the subsequent conduct of other States who were present on this occasion, again show, firstly, that nothing of that kind was intended and, secondly, that there was no understanding on the part of the other delegates concerned of such an intention on the part of the South African delegation. That is made perfectly clear by the subsequent history. I am not going to deal with it now—I shall come to it at the appropriate stage.

We come next, Mr. President, to the statements by the representatives of France, New Zealand and Belgium. They are all quoted at pages 47-48 of the Counter-Memorial (**II**). They all followed much the same pattern. All of them, it will be observed, were confined to expressions of intention. Secondly, Mr. President, not one of these statements indicated any intention whatsoever of reporting and accounting under the Mandate, or of regarding the United Nations General Assembly as having been substituted for the Council of the League for that purpose. The statements of France and Belgium were completely silent on those points—on the question of reporting and accounting, or of regarding the United Nations General Assembly as substituted as the supervisory organ. That again is

in itself remarkable, for the same reason as I stressed before in the case of the statements of the United Kingdom and South Africa. Everybody knew of the problem which would result from the disappearance of the supervisory organs of the League; everybody knew that if there was to be further reporting and accounting, some special arrangement would have to be made in view of the existence of that problem. So these statements being silent on that particular point is in itself significant, especially as that is a feature which runs right through every one of the statements of the Mandatories. May I just say in that regard, that if there had been, on the part of these Mandatories, which had obviously discussed the matter with one another, as appeared subsequently from the debate, and which had conferred with one another as to these expressions of intent of which they were to inform this meeting of the League Assembly—if there had been any intention on their part to regard the United Nations as having been substituted for the League of Nations as a supervisory authority, then one would surely have expected at least one of them to have said so in one of their statements, but not a single one of them did so. Every one of their statements is confined to the question of what they would do with relation to administration of the territories in the interests of the inhabitants.

And then we find, Mr. President, that the statement of New Zealand in fact goes further. It intimates positively, and I submit in an implicit sense, that there would be no reporting and accounting as far as New Zealand was concerned in this interim period. The relevant statement reads as follows:

> "New Zealand does not consider that the dissolution of the League of Nations and, as a consequence, of the Permanent Mandates Commission will have the effect of diminishing her obligations to the inhabitants of Western Samoa, or of increasing her rights in the Territory. Until the conclusion of our Trusteeship Agreement for Western Samoa, therefore, the territory will continue to be administered by New Zealand, in accordance with the terms of the Mandate, for the promotion of the well-being and advancement of the inhabitants."

Again, there is a clear intimation that the dissolution of the League and, as a consequence, the disappearance of the Permanent Mandates Commission, will have some effect; implicitly that is so—it will have some effect, but one effect, New Zealand says, it will not have, and that is, to diminish her obligations as far as administration for the benefit of the inhabitants of the territory is concerned.

Again, therefore, there is this common theme running through all these statements. And, Mr. President, on this same point, we come to the statement which is in that respect the most significant and the most explicit of all, and that is the Australian statement. That we find quoted at page 48 of the Counter-Memorial (II), and because it is so very explicit and so very significant in this respect, I would like to refer to it fairly fully. The third line of the statement reads as follows:

> "After the dissolution of the League of Nations and the consequent liquidation of the Permanent Mandates Commission, it will be impossible to continue the mandates system in its entirety."

That in itself, Mr. President, is very explicit. There is nothing ambiguous when it is said that "it will be impossible to continue the mandates

system in its entirety". Something would be lacking; something would not be present. And what could that be but the very function exercised by the Permanent Mandates Commission as an organ in the League—the function of supervision of mandatory administration? The Australian statement proceeds:

> "Notwithstanding this, the Government of Australia does not regard the dissolution of the League as lessening the obligations imposed upon it for the protection and advancement of the inhabitants of the mandated territories, which it regards as having still full force and effect."

There is the same common theme, here explicit, which we find implicit in the New Zealand statement and in the South African statement, namely that notwithstanding the disappearance of supervision, the obligations relating to the protection and advancement of the inhabitants would not be regarded as in any way lessened.

The statement proceeds:

> "Accordingly, until the coming into force of appropriate trusteeship agreements under Chapter XII of the Charter, the Government of Australia will continue to administer the present mandated territories, in accordance with the provision of the Mandates, for the protection and advancement of the inhabitants."

Again the statement of that same intent, in the same way as we find in the other statements to which I have referred.

The quotation continues—

> "In making plans for the dissolution of the League, the Assembly will very properly wish to be assured as to the future of the mandated territories, for the welfare of the peoples of which this League has been responsible. So far as the Australian territories are concerned, there is full assurance. In due course these territories will be brought under the trusteeship system of the United Nations; until then . . ."

I break here because this is of the highest importance: what is the intent of the Australian Government in regard to this interim period—what is its intent in regard to the future of mandated territories—the question on which the League would want to be assured? "Until then", the statement says—

> "the ground is covered not only by the pledge which the Government of Australia has given to this Assembly to-day but also by the explicit international obligations laid down in Chapter XI of the Charter, to which I have referred. There will be no gap, no interregnum, to be provided for."

So, Mr. President, for that interim period the ground is covered by two things. The one thing is the pledge which the Australian Government gave to the Assembly on that day: the pledge relating to the manner in which administration of the mandated territory would proceed for the benefit of the inhabitants of the territory. The other aspect was the explicit international obligations laid down in Chapter XI of the Charter, to which the Australian representative had referred before. And, as we indicate at page 48 of the Counter-Memorial, in the earlier part of his statement in which he had referred to Chapter XI of the Charter, the Australian representative had said the following:

"Amongst other things, each administering authority under that chapter undertakes to supply to the United Nations information concerning economic, social and educational conditions in its dependent territories."

Now, Mr. President, Australia therefore speaks in its statement not only of this factor to which all the other statements were confined, viz. the factor of what the actual administration of the mandated territory would be like, and on what principles—on what obligations—it would be founded. It speaks also of the other element on which the other statements are silent, except for the pertinent indications implicitly given. It speaks pertinently of the question of report and accountability. And what does the statement indicate? That there would be a continuation of report and accountability as under the League system? No, Mr. President, clearly the statement indicates in its earlier portions, which I stressed, that Australia contemplated there would be no such further report and accountability under the mandate: instead there was an explicit international obligation laid down in Chapter XI of the Charter. And now, Mr. President, if we come to analyse what that explicit international obligation is, as laid down in the Charter, we find that it is not an obligation of accountability under a mandate at all. It is not an obligation involving supervision on the part of supervisory organs. It is merely a very limited obligation of supplying information of a technical nature on economic, social and educational conditions in its dependent territories for the information of the United Nations. The fact, Mr. President, that that obligation under Article 73 was not intended to involve accountability as under a mandate—accountability in the sense of having to report on and account regarding compliance with substantive obligations laid upon the administering power—the fact that that is so appears firstly very clearly from the very wording of Article 73 of the Charter itself.

The Article which, together with Article 74, comprises Chapter XI of the Charter, is headed "Declaration regarding non-self-governing territories". As my learned friend stressed also in his address, this is a declaration. It does not take the form of an agreement, and history shows that this was a very deliberate choice of wording, because the parties concerned were particularly agitated about the question that their commitment was not to be put on a higher level than a declaration. It provides that:

"Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government, recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

. . . . . .

(e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are respectively respon-

sible other than those territories to which Chapters XII and XIII apply." (Art. 73.)

We find immediately that this information is to be transmitted for information purposes only. We find that it may be subject to such limitations as security and constitutional considerations may require, and we find that it is to relate to economic, social and educational conditions —no mention whatsoever of political conditions. When one compares this with the definition of the obligation of reporting and accountability as set out in the mandate instruments—and for the purpose I read specifically from Article 6 of the Mandate for South West Africa—the contrast is a glaring one:

> "The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5."

The fact is, therefore, Mr. President, that the obligation under Article 73 *(e)* is not an obligation of reporting and accountability regarding compliance with substantive obligations. It is very clearly a very much lesser obligation—a very minor obligation—as compared with the obligation of reporting and accountability under the Mandate. That appears from the wording itself, and my learned friends who represent the Applicants, admit that this distinction exists as a matter of law. As a matter of law this obligation cannot be equated with one of accounting and reporting under the Mandate. We find their admissions in that regard in the verbatim record at pages 227-230, *supra*. I do not have to read the passages to the Court. The Court will recall what the gist of it was.

But, Mr. President, we also refer in our Book II of the Counter-Memorial, at page 138 **(II)**, to the history of Article 73 which had occurred during the middle and later portions of the year 1945—in other words, only some months prior to this final meeting of the League Assembly—a history, therefore, which was very much in the minds and within the knowledge of the delegates who were present on that occasion in April 1946—at least those delegates who were also Members of the United Nations. We refer there to the debates which took place on this subject—debates which emphasized the very points which I have mentioned now, regarding the construction of the provisions of Article 73 *(e)*. And we refer to certain passages in Hall, and I should also like to amplify those, Mr. President, with a reference to certain passages which we do not give in our Counter-Memorial. We find them in *A History of the United Nations Charter*, by Russell and Muther. It is the edition in this Library, and I wish to refer the Court particularly to passages at pages 821 and 822. There was, according to the authors, considerable discussion on the question of the title "Declaration" on the question whether the operative portion was to speak of "undertake", or "agree", and on what language should be employed in that regard. And they state at page 822, at the particular stage when this topic was under consideration:

> ". . . Great Britain pointed out that the section was voluntary and that 'undertake' went too far for some States. A Chinese proposal also to drop 'agree' was accepted. Thus the opening paragraph only committed administering States to recognize the 'paramount interests' of the inhabitants of dependent territories, to accept . . .

> the obligation to promote to the utmost their well-being and, 'to this end', to ensure political advance, develop self-government, etc., as listed in the subparagraphs."

That shows what care was taken on that particular point. But even more specifically important for our purposes is the question whether there was a concept that there would be supervisory powers on the part of the United Nations or any organ of the United Nations pursuant to this declaration. And that was a point on which the colonial powers were specifically insistent, namely that there was to be no conception of any supervisory power on the part of the United Nations.

At page 821 of the work to which I have referred there is a reference to one of the occasions when there was a suggestion, made on behalf of the Soviet Union, that the word "political" should be inserted in subparagraph *(e)*—"political" in addition to "economic, social and educational conditions". But there was objection on the part of Great Britain and France particularly, on that occasion, and France is reported to have declared that "the imposition of specific commitments amounted to establishing international supervision of colonies under national sovereignty". That was the concept against which there was very strong opposition on the part of the colonial powers.

Duncan Hall deals with this same matter in *Mandates, Dependencies and Trusteeship*. I wish to refer the Court first to a passage at page 285. After referring to Article 73 *(e)*, the author states:

> "This, according to the Charter, is transmitted 'for information purposes'. The British Commentary on the Charter noted that 'the general declaration ... does not empower the United Nations Organization to intervene in the application of these principles by the Powers concerned."

That was a British commentary on the Charter to which reference is made by the author.

At page 286, the author states:

> "The limitations in the Charter, that the data should be of a 'technical nature'—not political—and should be transmitted to the Secretary General 'for information purposes', were the result of a compromise at San Francisco. The purpose of the limiting words was to prevent the information being used for political purposes, e.g., to prevent outside interference in the government of the territories."

The author proceeds, Mr. President, to point to subsequent events during the years 1946 and 1947 on the question of the procedures that would be adopted in regard to the submission of information under Article 73 *(e)*. He also points out that the General Assembly appointed an *ad hoc* committee, *inter alia*, for the purpose of going into the question of procedures, and the author's general comment is that in the Preparatory Commission of the United Nations, in the autumn of 1945, throughout the 1946 meetings of the General Assembly, as in the *ad hoc* committee in 1947 and the second General Assembly, there was strong pressure on the part of a number of delegations to go beyond the wording of the Charter, in order to prepare the ground for intervention by the United Nations organization in the application of the principles of Chapter XI.

The author points out, at page 287, that there was opposition against the very establishment of this *ad hoc* committee, and that the opposition

included the United Kingdom, the United States, France and other colonial powers. Nevertheless, the committee was appointed and it proceeded with its deliberations.

At page 288 the author records:

> "In the course of its meetings the Committee rejected several proposals by the Soviet and other delegations, including
>
> *(a)* visits by the United Nations to non-self-governing territories,
> *(b)* the right of the United Nations to receive and examine petitions from such territories,
> *(c)* instructions from the Secretary General to make use in his analysis of information drawn from unofficial sources in the territories.
>
> The *ad hoc* committee agreed by a majority that there was no obligation under Article 73 to submit information on 'political progress'; if, however, governments sent such information voluntarily there was no objection to the Secreatry General including it in his summary."

The author proceeds, at page 289, to point out that there were a number of resolutions in the Fourth Committee adopted eventually by narrow margins, which had been proposed by, what he terms, "the anti-colonial bloc", led by the Soviet Union and India in the Assembly's Fourth Committee. He says that they succeeded by a series of votes, carried by very narrow margins, to undermine the agreement reached in the *ad hoc* committee, and he gives examples of these decisions of the Fourth Committee, at page 289:

> "Under the Fourth Committee's new proposal, the sending by governments of information on political progress was to be *recommended* by the Assembly. The position of the minority was that as a result of an agreement at San Francisco, the Charter excluded political information from Article 73 *(e)*. Thus, governments were under no obligation, either legal or moral, to supply it. To attempt to make them to do so was an attempt to rewrite the Charter by Assembly resolution."

After a few lines he continues:

> "A further resolution greatly widened the powers of the Special Committee by enabling it to make such recommendations as it deemed appropriate. This was objected to by the United States respresentative as an attempt to change the Charter, since the United Nations does not have any power of supervision over the administration of non-self-governing territories. The resolution, he pointed out, blurred the fundamental difference between Chapters XI and XII to XIII of the Charter, and placed no limits on the powers of the Special Committee. The United Kingdom representative added that the special committee as now proposed would be a rival organ to the Trusteeship Council. These Fourth Committee resolutions were rejected by the General Assembly on 3 November 1947 by substantial majorities and the resolutions of the *ad hoc* committee were adopted in their place."

Mr. President, I have referred at some length to this question of the history of Article 73 *(e)*, and also to the very firm attitude adopted

consistently by the Powers concerned immediately afterwards when attempts were made to impose upon them a more onerous obligation under Article 73 than that to which they considered themselves committed. I have stressed that because that history must, in fact, have brought the fact very firmly to the notice of everybody concerned in the years 1945 and 1946, viz. that Article 73 was *not* intended to impose an obligation of reporting and accountability. Bearing that in mind, we can revert now to the statement of the Australian representative that he considered that, in that interim period, his Government would deal with mandated territories on the basis of Article 73, and would submit information of the limited nature and for the limited purpose referred to in Article 73. That, in itself, Mr. President, excluded any contemplation whatsoever on the part of the Australian delegation that there would be an obligation of full report and accountability under the Mandate. And that must have been present in the mind not only of the Australian delegation, but of everybody present who was aware of this history and of the content of Article 73 *(e)* of the Charter.

Mr. President, whether the Australian delegate was correct or not, as a matter of law, in considering that Article 73 *(e)* would apply in that interim period in relation to the mandated territory under Australian control, is immaterial, to my contention. What *is* important is that the Australian representative, in fact, thought that Article 73 was applicable, and that he indicated that that was the view of his Government—that his Government was going to deal with the situation on the basis of the applicability of Article 73 *(e)*—and, therefore, that excluded very clearly any contemplation on the part of his Government of a continuation of an obligation of report and accountability under the Mandate itself.

Mr. President, I promised to give the Court a reference to authority on the point that nine of the members of the Special Committee on Palestine were Members of the League, at the time of its dissolution. The reference is Walters' *History of the League of Nations*, Volume I, pages 64 to 65. The two countries that were not members at the time of the dissolution of the League were Guatemala and Peru.

Mr. President, I now summarize the conclusions to be drawn from the various statements by the mandatory powers. I submit it can fairly be said, firstly, that not one of those statements indicates, in express language, that reports under the mandate would, in future and until termination of the mandate status, be rendered to the United Nations. Secondly, not one indicates any contemplation of any substitution of supervisory organs, for the purposes of the obligation of report and accountability under the mandate. Thirdly, all of them indicate an intention of continuing with those obligations under the mandate which relate to the manner of administration of the territory. Fourthly, in four cases—those of the United Kingdom, South Africa, New Zealand and Australia—a clear indication is given that no reporting and accounting under the mandates would occur. We submit that it is perfectly plain that that is the manner in which the statements were also understood. That follows, not only from the arguments which I have already addressed to the Court, but also from consideration of the further events which led up to the eventual resolution of the League on that subject, and the very wording of that resolution itself. We give the wording in Book II of the Counter-Memorial (II), at pages 51 to 52, and just on this particular point, I refer to paragraph 4 of the resolution which—

"Takes note of the expressed intentions of the members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective mandates until other arrangements have been agreed between the United Nations and the respective mandatory powers."

The concept, which we find in all those statements of expressions of intention, is limited to the concept of administering the territories in a particular way, viz., in accordance with the obligations of the mandate for the welfare of the peoples concerned.

This, in itself, in our submission, Mr. President, dispels any suggestion that all States, at the final session of the League, had a common intent to effect a substitution of a supervisory organ. The mere fact that the mandatories themselves were so clear on that point makes it obvious that at least it cannot be said that the mandatories (and they were, after all, the crucial parties concerned—those upon whom it is sought to impose this obligation) agreed to this obligation. But the lack of consent, not only on the part of the mandatories but on the part of everybody, becomes more manifest when we have regard to the history of the resolution on mandates.

On the afternoon of 9 April (that was after the statements by the United Kingdom and South Africa which had been made on the morning of the 9th, but before the other statements by mandatories), the Chinese representative, Dr. Liang, proposed for discussion a draft resolution which is quoted at page 49 of the Counter-Memorial **(II)**. I am not going to read its terms now. I shall do so presently. The Chairman, on that occasion, ruled, in the Committee concerned, that the proposal was not relevant to the item then under consideration. (That is on the same page of the Counter-Memorial.)

Subsequently, Mr. President, three days later, on 12 April 1946, the same Chinese delegate, Dr. Liang, introduced a new draft, in the Committee concerned—that is Committee I if I remember correctly—and of this new draft, Sir Hartley Shawcross, the United Kingdom representative, said, when seconding the proposal, that it "had been settled in consultation and agreement by all countries interested in mandates, and he thought it could, therefore, be passed without discussion and with complete unanimity". **(II,** p. 50.)

This draft, as introduced on 12 April, was the basis of the eventual resolution concerning mandates, and the resolution is quoted, as I have said, at pages 51 to 52 of the Counter-Memorial **(II)**.

This may be a convenient time to refer to the wording of the two proposals.

The first one, the one of 9 April, read as follows:

"The Assembly,

Considering that the Trusteeship Council has not yet been constituted and that all mandated territories under the League have not been transferred into territories under trusteeship;

Considering that the League's function of supervising mandated territories should be *transferred* to the United Nations, *in order to avoid a period of interregnum in the supervision of the mandatory regime* in these territories; (Italics added.)

Recommends that the mandatory powers as well as those adminis-

tering ex-enemy mandated territories shall continue to submit annual reports to the United Nations and to submit to inspection by the same until the Trusteeship Council shall have been constituted." (P. 49.)

That was the first proposal.

The final proposal, settled after the discussions and consultation, read as follows:

"The Assembly:

Recalling that Article 22 of the Covenant applies to certain territories placed under mandate the principle that the well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilization:

[I skip paragraphs 1 and 2, and proceed to 3]

"3. Recognizes that, on the termination of the League's existence, its functions with respect to mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

4. Takes note of the expressed intentions . . . [I read that to the Court recently]."

Mr. President, before we consider the differences between these two drafts (or the first draft and the eventual resolution), it may be as well to have regard to the similarities, and there are two similarities which are very important. The first one is that both of these drafts contemplated the falling away of the League and of the League supervision, and that there would be an eventual creation of new arrangements, by agreement with the United Nations. Secondly, Mr. President, both of them were, in their wording, directed at the situation which would exist in the interim period, that is, between the two contemplated events—between the falling away of League supervision and the new arrangements to be effected by agreement with the United Nations. It is in the manner of dealing with this second factor—with this interim situation, that these two drafts are poles apart.

The first draft, Mr. President, would, if accepted, have included the specific provisions contained in its last two paragraphs—specific provisions relating to this interim period—the first being that the League's function of supervising mandated territories would be transferred to the United Nations, and the second that mandatories should continue to submit reports to the United Nations and to submit to inspection by the same—express provisions to that effect.

The second draft, Mr. President, is in its wording very much more limited, its terms being confined to taking note of the expressed intentions of the mandatories regarding the manner in which they proposed to administer the territories in that interim period. That is the marked contrast.

Mr. President, what then is the effect of this alteration in wording—what is the significance of it? My learned friends now advance a contention about it, whereas they previously did not really deal with this situation as being significant at all. Their contention now is that the alteration brought about no change whatsoever in the meaning and in the effect of the resolution. They say in effect, Mr. President, that this

new resolution merely represented a different, and a less explicit, way of saying the same things as the first resolution. That is what the argument amounts to. If we look at the verbatim record of 19 March, we find that my learned friend, Mr. Moore, in dealing with this subject—the contrast between the two resolutions—made various submissions about it, and the crucial ones were two-fold. One, I find at page 151, *supra*, where he says—"The word 'principles' is not qualified in any way, and must surely include the essential principle of international accountability". That is part of his interpretation of the speech of the Chinese delegate with reference to the final resolution.

Then he says at page 152, *supra*—

> "... it would seem obvious that the general understanding of the League Members in adopting the resolution was that all the obligations of the various mandates survived the dissolution of the League and were binding upon the Mandatory Powers pending the conclusion of new arrangements under the United Nations trusteeship system".

One finds similar contentions, Mr. President, which I need not read, in the verbatim record at page 148, *supra*.

Those are the contentions for the Applicants. In other words, the final resolution in effect means the same as what was originally raised for consideration.

Our contention is, Mr. President, that this change in wording very clearly reveals a change in intent and in effect. Before I weigh the relative merits of these contentions, with reference to the wording, let me refer to the reason which was given by the Applicants for the alteration in the wording of the resolution—the reason which the Applicants suggest for altering the wording, and the reason which we suggest for altering its sense. The Applicants state their attitude in that regard at page 151, *supra*, of the verbatim record—

> "... it is most likely that the League of Nations, notwithstanding the several undertakings by the mandatory powers to carry out all of the obligations of the mandate agreement pending the establishment of the United Nations trusteeship system, did not wish to appear to encourage delay in the early formation of the trusteeship system".

Now, Mr. President, the Court will recall that I dealt with a similar contention in regard to the proposal concerning a temporary trusteeship committee as it came before the Preparatory Commission of the United Nations. I indicated the absurd conclusions to which it leads—the absurd implications in its context as seen against the background of events at the United Nations. I submit, Mr. President, that the result is even more obviously absurd in this context of the League dissolution. Applicants' contention would involve this, that, in the expression used by Sir Hartley Shawcross, all countries interested in mandates solemnly agreed with one another on this formulation rather than on a more explicit one, and the object was to encourage themselves, or at any rate some of those interested, not to delay in submitting trusteeship agreements.

In other words, we have a number of States specially interested in mandates, the mandatories themselves and some others who were partic-

ularly interested for various reasons. They have a full discussion about all the implications. They come to a basic arrangement which is then eventually proposed for unanimous adoption by the last Assembly of the League. All the mandatories are included in this circle, this circle that may be called "the proposers" of the particular resolution. They evolve a scheme as to what is to be done and, according to my learned friends, the scheme is that they should not say expressly that there is to be any United Nations supervision in respect of mandates outside of trusteeship, because that would discourage the early submission of trusteeship agreements.

And my learned friends say that, despite the fact that the proposers do not have an express agreement on that point, they still have an implied agreement, which is to the same effect, namely that there will be United Nations supervision over mandates outside of trusteeship. Nevertheless, despite the fact that they all know that—they are all agreed upon that—they do not regard that as discouraging the early submission of trusteeship agreements. It simply, in my submission, does not make sense, Mr. President.

The much more likely and, in our submission, the obvious explanation for the change in wording, is that amongst all the countries that were interested in mandates it became apparent, during discussions, that they could not obtain unanimity on the objectives that were involved in the first Chinese proposal. That is perfectly obvious when we consider the attitude of the various parties in relation to specific mandates as we summarize them in the Counter-Memorial, **II,** at page 133—firstly, the attitude of Respondent itself—Respondent which had stated in effect that neither the mandates system nor the trusteeship system should in future apply to the Territory of South West Africa; secondly, the attitude of the United Kingdom in relation to Palestine, when it had made it clear that it had reserved its future intentions regarding Palestine completely, and thirdly the attitude of Egypt which considered that Palestine had to be regarded as having outgrown the need for being governed under mandate or trusteeship. Surely then Egypt could not agree to a resolution which would make it obligatory on the mandatory power (Great Britain) to submit to United Nations supervision in regard to Palestine.

Then Mr. President, in addition to those States, to which we refer in the Counter-Memorial, there may well have been certain States which were concerned about the possibility that if specific machinery was created—even an express resolution was taken—on the subject of United Nations interim supervision over mandates not converted into trusteeship, that that would have the effect of discouraging the early submission of trusteeship agreements. We noted that that was quite a probable attitude explaining the actions of the United Nations Members during the early months of operation of the United Nations. We have noted the fact that the majority of the members of the United Nations constituted also the majority of the Members of the League of Nations. We have noted that it was unlikely that that line of approach would have changed in this short period of months unless some special reason for it arose why the States concerned should see the matter in a new light to that which they had seen it in before. It, therefore, seems quite probable that States which had this view of the situation, would also have been opposed to the first Chinese proposal and that the grounds of their oppo-

sition would have then have been that it would then have been preferable to make no provision at all for interim supervision, because, as I have said before, they could hardly, in taking this view, have distinguished between a tacit agreement and an express agreement—a tacit agreement being concerned with something about which everybody is so clearly agreed that there can be no dispute—there can be no question about it. Everybody knows it is so, it is too clear. But how they could have entered into a tacit agreement that there was to be supervision by United Nations of territories outside trusteeship without the mandatories knowing of it—I simply cannot see how that could have happened.

So, Mr. President, those reasons indicate, in our submission, very strong probabilities that in the discussions, which we know occurred, unanimity could not be obtained about the objectives of the first Chinese proposal and that was the simple explanation for the change in wording, as far as the second draft was concerned. It appears that the representative of China himself was, in our submission, fully aware of the significance of the contrast. That appears from the contrast between what he said on the first occasion on 9 April 1946 and what he said on 12 April 1946. In both of these addresses he commenced by posing the problem, as he saw it, namely the fact that, pending new arrangements between mandatory powers and the United Nations, there would be a period of *interregnum* in the supervision of the mandatory regime, unless special provisions to the contrary were made. That was the problem as he posed it. In addressing the Committee first on 9 April he raised this problem as follows: he referred to—

> "... the position of territories under mandate and to the position which would arise on the dissolution of the League, in view of the fact that the trusteeship council of the United Nations has not yet been appointed and was not likely to be set up for some time". (II, p. 49.)

If we relate the speech to the second paragraph of the proposed resolution we find his conception of what the position would be in that interim period. There, he states that:

> "Considering that the League's function of supervising mandated territories should be *transferred* to the United Nations, *in order to avoid a period of interregnum in the supervision of the mandatory regime*..." *(Ibid.)*

That then was the problem as he saw it and as he stated it.

The same problem he mentioned also at the beginning of his second address some days later. I shall refer in a moment to the manner in which he raised it there. The contrast comes, Mr. President, in the manner in which he proceeded to indicate how that problem was to be dealt with. On the first occasion he immediately proceeded to state:

> "The Chinese delegation wished to submit a resolution recommending that the mandatory powers should continue to submit annual reports on the mandated territories to the United Nations and that they should agree to inspection by the latter, pending the constitution of the trusteeship council." *(Ibid.)*

Now we come to what Dr. Liang said on the later occasion on 12 April.

> "The United Nations Charter in Chapters XII and XIII established

> a system of trusteeship based largely upon the principles of the mandates system, but the functions of the League in that respect *were not transferred automatically* to the United Nations." (*Ibid.*, p. 50.)

This is a statement, Mr. President, of the same problem mentioned before, namely that special provision was necessary for a transfer of functions otherwise there would be an *interregnum* in the supervision of the mandatory regimes. He proceeded in the next sentence: "the Assembly should therefore take steps to secure the continued application of the principles of the mandates system." I agree with my learned friend, Mr. Moore, that the word "therefore" is significant. It is because of the fact that in the absence of special arrangements there would be an *interregnum* that it was necessary for the Assembly to do something.

Mr. President, the difference turns on the question what it is suggested the Assembly was to do. We saw what the previous suggestion was namely directed to the point of providing for interim supervision and reporting and acounting. Here the matter is put in the more general words "the Assembly should therefore take steps to secure the continued application of the principles of the mandates system" (**II**, p. 50) and if we read what the learned speaker said further, we find that it becomes absolutely clear that he was proposing a new method of dealing with that situation.

The new method proposed, Mr. President, was adopted from that of the Australian declaration, namely that: "The League would wish to be assured as to the future of mandated territories."

So what do we find: in the first proposal there is a proposed resolution involving positive action on the League's part—a positive resolution affecting a transfer of powers and calling upon the mandatory powers to submit reports and to submit to supervision on the part of the United Nations. The other proposal is that the League is to play a passive part—the League would "wish to be assured as to the future of mandated territories"—in complete keeping with the whole basis that mandatories are making statements or declarations to the League, containing assurances in the form of statement of intention of the mandatories.

Mr. President, since that assurance of the League was, in fact, established by the various statements of the mandatory powers and since they were taken note of in the resolution proposed, it was entirely consistent in those circumstances that the Chinese delegate should express his gratification because that was the new method which he had accepted—which he had, in my submission, become forced to accept in order to deal with the problem.

As we have seen, these statements pointedly made no reference to reporting and accounting to the United Nations in that interim period. They were limited to the factor of administration of the territories in accordance with the obligations under the mandate. It was, therefore, to be understood, Mr. President, that the statement of the Chinese representative, in saying what it was that he was gratified about, would also be confined to the element of administration of the territories in accordance with the principles and the obligations of the mandates system and that is what we, in fact, find.

We find that the Chinese delegate proceeds to state:

> "It was *gratifying* to the Chinese delegation, as representing a country which had always stood for the principle of trusteeship,

> that all the Mandatory Powers *had announced their intention* to administer the territories under their control in accordance with their obligations under the mandates system *until other arrangements were agreed upon.*" (**II**, p. 50.)

That was understood then as being the method by which this problem would be dealt with. That was the method by which the Assembly was to take steps to secure the continued application of the principles of the mandates system: it should take steps by being assured by the statements of the mandatory powers.

The Applicants, Mr. President, place reliance upon the concluding words of the last portion of the statement which I read, namely "obligations under the mandates system", but again, in doing so, they take those words out of their context. The context of those words is entirely confined to the concept of administering the territories under their control in accordance with those obligations.

The Applicants also, Mr. President, place reliance in their argument upon the fact that the Chinese representative regarded this resolution as a step taken by the Assembly to secure the continued application of the principles of the mandates system and they place particular emphasis on the words "continued" and "principles". Their suggestion is that in this context principles must then include the principle of report and accountability to a supervisory organ. But, Mr. President, apart from all the arguments I have already adduced to the Court to show that that was not contained in the statements of the mandatory States—that that was not understood to be so—there is also the factor of context to which I have just referred, and there is this further factor which the Applicants themselves admit in their argument, by way of a quotation from Duncan Hall. They say that "the welfare of native peoples . . . is the real heart of the system". We find that quotation in the verbatim record at page 147, *supra*.

The solution is this: that in the first resolution the Chinese delegate had sought to ensure the continued welfare of the Native peoples by a particular method. That particular method was to make special provision for United Nations supervision of a mandatory administration in the interim period. His proposal in this regard could not command general support, and in the end he had to be satisfied with this other method directed at the same purpose, and this method was that the League was to rely on the expressed intentions of the mandatories to give effect to this "real heart of the system"—"the welfare of native peoples"—in their administration of mandated territories. And therefore his statement is confined to that factor. It was a different method of dealing with the same ideal—of satisfying the League as to the future of mandated territories. That this was so realized by Dr. Liang himself is manifest not only from what I have already referred to, but also from a sentence which was not quoted by my learned friends in reading this passage to the Court, and this sentence reads as follows:

> "It *was to be hoped* that the *future* arrangements *to be made* with regard to these territories *would* apply, in full *the principle of trusteeship underlying* the mandates system." (**II**, p. 50.) (Italics added.)

There could hardly be a clearer, further manifestation of the realization that the principles of trusteeship would not in the interim period apply in full, and that the respect in which it would not apply in full would

be exactly in relation to what was the subject-matter of the first proposal, namely specific provision for interim supervision.

In the context, therefore, this address by the Chinese delegate leaves no doubt whatsoever that he realized full well the change that had come about—the change that had come about in the provision to be made for this interim period: that now there was to be no provision for accounting and reporting under the mandate—it was merely to be a matter of the mandatories giving a full assurance that they would act in accordance with the principles of the system for the well-being of the peoples concerned in the administration of the territories. And he hoped that the aspect which was lacking would be supplied in full at the later stage in the new agreements to be made between the mandatories and the United Nations.

Mr. President, we must have regard to the way in which my learned friend for the Applicants sought to interpret the wording of the resolution itself so as to reach the same result as that expressed in the first Chinese draft. His argument on the wording of the resolution was this. First of all he had to construe the resolution as referring to explicit undertakings of a binding legal nature on the part of the mandatories, and his contention was therefore this: that acceptance by Respondent of this resolution clearly involved an explicit undertaking of some sort. Otherwise, he said, the phrase "until other arrangements have been agreed between the United Nations and the respective mandatory Powers would have been meaningless, if not, indeed, misleading"—we find that in the verbatim record at page 212, *supra*. In this way my learned friend attempts to get round the explicit wording of the resolution, which does not purport to embody or record any undertaking, but merely says that it "takes note" of "expressed intentions". In this respect his argument departs, in my submission, from the clear meaning of the resolution. But his argument, I submit, is untenable when he says that acceptance by Respondent of the resolution clearly involved an explicit undertaking of some sort because, in our submission, there is nothing anomalous or meaningless in expressing an intention, as distinct from giving a binding undertaking, to continue with a present course of conduct until other arrangements are made. The effect of the acceptance of the resolution is simply an expression of intent to continue with a certain course of conduct which is now being engaged upon until new arrangements are made. And why that should be construed as being from its very nature a kind of undertaking of some sort, as opposed to a mere expression of intention—that, I must say, I do not understand.

It may be noted, Mr. President, in passing, that the ordinary meaning of this resolution, therefore, confirms Respondent's submissions regarding the sense in which the statements by mandatories are to be understood, by indicating an appreciation on the part of the Assembly as a whole that the said States did not purport to give binding undertakings, that they merely gave expressions of intention.

The second step in the Applicants' argument is the one that is of particular significance here, and that concerns the legal scope of this statement of intent, or of the suggested undertaking, as they put it. They say that the scope of the undertaking was determined by the significance of the phrase "in accordance with the obligations contained in the respective mandates". They contend, Mr. President, that the "obligations" must include "international supervision" with the conse-

quent effect that the resolution must be read as embodying agreement to render reports to the United Nations.

Mr. President, we submit that even as a matter of wording that contention is far-fetched. In its context in the resolution the word "obligations" refers only to the exercise of the functions to which the expressed intentions relate, namely "to administer them [the mandated territories] for the well-being and development of the peoples concerned". These are the "obligations" which are intended to be continued, and there is no warrant, in the interpretation of that resolution, for extending the word beyond that meaning which it clearly has in the context, and which is, I submit, in that context capable of no other interpretation.

We have pointed out, Mr. President, that that quoted phrase, "to administer them for the well-being and development of the peoples concerned", corresponds exactly with the terms of some statements by the mandatories and with the general tenor of all of them. And in addition to the wording of those earlier statements on behalf of the mandatories, Mr. President, the matter becomes even more emphatically established by reference to what the French and the Australian representatives said on the occasion of the adoption of the resolution itself in the First Committee. We find the reference to that in the Counter-Memorial, **II,** at pages 50-51. The French representative, speaking in support of this proposed resolution on 18 April, said as follows—he

> "... wished to stress once more the fact that all territories under the mandate of his Government would continue to be *administered* in the *spirit* of the Covenant and of the Charter". (Italics added.)

I repeat—"continue to be administered in the spirit of the Covenant and of the Charter" which in other words, emphasized again the crux of the whole situation—no reference whatever to accounting or reporting. The Australian representative—

> "... welcomed the initiative of the Chinese delegation in moving the resolution, which he supported. The Australian delegation had made its position clear in the Assembly—namely, that Australia did not regard the dissolution of the League as weakening the obligations of countries administering mandates. They regarded the obligations as still in force and would continue to *administer* their mandated territories in accordance with the provisions of the mandates for the *well-being of the inhabitants.* Over and above that, Australia recognized obligations under the Charter which she had already assumed as a Member of the United Nations and others which she would assume in bringing the Territories under the international trusteeship system." (**II,** pp. 50-51.) (Italics added.)

Clearly, then, there is the reference again to the two things which we noticed in the original Australian statement—the intention to continue to administer the mandated territories in accordance with the provisions of the mandates for the well-being of inhabitants, and, secondly, over and above that, the obligations under the Charter which, as has been explained before, were to be the obligations under Article 73 *(e)* of the Charter—the limited obligation of supplying information for the information of the United Nations in the limited scope of Article 73 *(e)*, and therefore the exclusion of a contemplation of accounting under the mandate.

We wish to emphasize, Mr. President, the similarity in concept, and

even in language, in all the important steps of the process, the first step being the statements of the mandatories made prior to the resolution of 18 April; the second the address of the Chinese representative in moving the resolution; the third, the words of the French and the Australian delegates in supporting the resolution, which I have just read; and the fourth, the terms of the resolution itself. All these various expressions of intent indicate the future conduct of the mandatories to consist of administration for the benefit of the inhabitants—that was all the League was being assured of, and all that it understood it was being assured of. The contrast, Mr. President, with both the terms of the first Chinese draft proposal and with the words of the Chinese representative as at that initial stage is, in the words of the honourable President and Sir Gerald Fitzmaurice in 1962, "absolutely glaring and revealing" to such an extent that they require, in my submission, no further comment.

As we will show later, Mr. President, subsequent events on behalf of all the interested parties show an entirely consistent and continuing understanding that the scope of the expressed intentions, and therefore also of the resolution, was limited, in the way I have indicated, to administration, and that it did not extend to reporting or accountability under the mandate. Taking these various elements in the situation, that picture emerges very clearly from the history of this resolution, and from the wording of the resolution, and, Mr. President, that is, I submit, therefore an indication of intent which agrees entirely with the intent we find on the part of the Members of the United Nations in the history with which I dealt yesterday.

Mr. President, it may be useful at this stage to give some attention to the question whether the events at the dissolution of the League show any contemplation on the part of the States there present as to the continuation of the mandate as an institution. We deal with that matter in our Rejoinder, **V**, at pages 60-63, and we point out that there cannot be said to have been an explicit, uniform statement of opinion on the part of the States concerned. What we want to emphasize, as we did in the Rejoinder, is this: that this duality in the attitude of the States concerned, or in the possible interpretation of their attitudes regarding the proceedings on mandates at the last session of the League—that duality—Mr. President, concerns the choice between the two alternatives for which the Respondent contends—the two alternatives being either that the mandate as a whole lapsed, or that the mandate survived without accountability to a supervisory authority. Those were the two alternatives between which their attitudes appeared to waver. There was a clear exclusion on the part of the States concerned as far as their actual attitudes were concerned; there was a clear exclusion of the position contended for by the Applicants, namely that the mandate would survive, together with accountability to the United Nations, as an integral portion thereof.

The Applicants point out in the verbatim record of their oral argument at pages 151-152, *supra*, that the Egyptian delegate stated his Government's reservation to the League resolution as it affected Palestine, and that he then said:

> "The opinion of my Government is that Palestine has intellectually, economically, and politically reached a stage where it should no longer continue under mandate or trusteeship or whatever other arrangements may be considered."

The delegate further stated: "It is the view of my Government that Mandates have terminated with the dissolution of the League of Nations . . ." and that in so far as Palestine is concerned there should be no question of putting that country under trusteeship.

Mr. President, as far as this statement is concerned, my learned friends argued as follows. I read from the verbatim record at page 152, *supra*:

> "It is important to note that the Egyptian representative clearly felt that the resolution under consideration was not acceptable because it signified that mandates continued in force and were not terminated by the dissolution of the League of Nations. Since the opinion implicit in his reservations was not controverted by any Member of the League of Nations, it would seem obvious that the general understanding of the League Members in adopting the resolution was that all of the obligations of the various mandates survived the dissolution of the League and were binding upon the Mandatory Powers pending the conclusion of new arrangements under the United Nations trusteeship system."

Mr. President, we submit that this contention which I have just read is a completely untenable one. The Egyptian attitude was that Palestine was to be given independence immediately; that was what Egypt wanted—that was the practical result for which it was contending—and for that reason the resolution was not acceptable to the Egyptian representative. His statement that the mandates had terminated was only one of the reasons advanced for advocating the immediate independence of Palestine. In the result, Mr. President, it is not clear why any of the other States should have controverted this view. Even if the other States agreed with him that as a matter of law the mandates would lapse on the dissolution of the League, there would have been no point in their saying: "I agree with you that the Mandate will lapse on dissolution of the League, and the resolution is not in conflict with that view, but it is nevertheless in conflict with your attitude regarding the future of Palestine." There would not have been any point, Mr. President, in the delegates answering in that manner, because the important thing was not the question of the view whether the Mandate had lapsed or had not lapsed, but the important thing was, what was to happen in the case of Palestine? And inasmuch as the Egyptian delegate in any event was not opposing the resolution, but merely explaining why he was abstaining, it was quite unnecessary to take him up on that point at all.

But, Mr. President, even if the Applicants were to be correct in saying that there was a general contemplation that the mandates would continue, it does not follow that this contemplation extended so far as to embrace a substitution of supervisory organs. There is nothing in the history of this Egyptian reservation to suggest such a contemplation. The Egyptian reservation did not object to supervision. It objected to the status of Palestine as a dependent or mandated territory. The silence on the part of the other delegates could therefore indicate no more than a view that this status would survive the League, the status of being a mandated territory. That view, Respondent has conceded already, is a view which may have been held by a number of the delegates—it may have been held by all of them. I am not concerned with that for the moment. What I am concerned with is the view which they took on the question whether

there was to be reporting and accounting under mandates to United Nations supervisory organs. In that regard, after all, it will be recalled, Mr. President, that the Chinese representative had said previously in that same debate, "that the functions of the League in that respect, [that is in respect of mandates] were *not transferred automatically* to the United Nations". (**II**, p. 50.) (Italics added.) And it will also be recalled that nobody in the debate controverted the Chinese representative on that point.

Mr. President, we submit therefore that this survey of the events occurring at the final session of the League Assembly shows that there was a general contemplation on the part of the Members of that Organization that supervision would lapse, or at least that it would become dormant or inoperative, on the dissolution of the League. Although this point was pertinently brought to the attention of the League by the first Chinese proposal, and again when it proposed the second resolution, the League deliberately, in our submission, refrained from making any provision for interim supervision.

But, of course, it is unnecessary for us to go so far. It is unnecessary for the Respondent to say, as we do say, that there was general agreement on this contemplation that there would be no United Nations supervision after the dissolution of the League and prior to new arrangements. All that it is necessary for us to show is that the Applicants have not established the contrary—that the Applicants have not established a general consensus by a process of necessary inference—a general consensus to the effect that there would be such supervision after the dissolution of the League. That, it seems clear beyond any doubt, the Applicants have entirely failed to establish. If we disregard even anything else, the Australian attitude makes it perfectly clear that there was no agreement on the part of Australia in that regard. We, of course, contend that the British, the New Zealand, the South African, and the French statements, read in their context, made their attitudes equally clear.

Mr. President, there is a final factor in this part of the case with which I have to deal, and that is the treatment which was accorded in practice, at this final session of the League and thereafter, to the various resolutions which had previously been taken by the United Nations General Assembly on the question of transfer of assets and assumption of functions and powers previously exercised by the League. I would like to deal with this subject, Mr. President, in relation to three matters. Firstly, I would like to deal with it in relation to those earlier resolutions of the United Nations. Secondly, I would like to deal with it in relation to the provisions of Article 102 of the Charter, which requires "registration of all treaties and international agreements entered into by Members of the United Nations". And thirdly, Mr. President, I would like to deal with it in relation to the activities of the Board of Liquidation, which was appointed at the final session of the League Assembly.

First, it may be convenient if I were to refer the Court to the wording of Article 102 of the Charter. It reads as follows:

> "1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
>
> 2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of para-

graph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations."

Mr. President, I revert to the question of the manner in which the League Assembly dealt with these prior resolutions of the United Nations General Assembly. We deal with the subject in Book II of our Counter-Memorial **(II)**, at pages 44-46. We point out there that the League Members were fully informed beforehand—even those who were not Members of the United Nations—of these various resolutions that had been taken by the United Nations General Assembly. That was done in a communication from the Secretary-General of the League dated 20 September 1945. A suggestion was made that in regard to the proposed transfer of assets the Supervisory Commission of the League should be empowered to negotiate with representatives of the United Nations, and for that purpose to draw up provisional terms of transfer, subject to the final decision of the League Assembly. I am sorry, that suggestion related not only to assets. It related to transfer in general of functions and powers, as well as assets. But eventually, because of limitations in resolutions taken on the United Nations side, the actual negotiations between the representatives of the Organization were limited to the question of the transfer of assets. Nevertheless, the League Members were fully informed of the other resolutions which had been taken in regard to functions and powers. In that regard, we find that the authors of the publication *The League Hands Over* stated as follows in a quotation at page 44 of our Counter-Memorial **(II)**:

> "Thus by the time the Assembly met in its twenty-first session it was in possession of the United Nations' plans for taking over the League's material assets and for carrying on, either directly or through one of its related agencies, all the League's most important functions and activities of a non-political character. Its main business, therefore, was 'to make provision for bringing the League of Nations to an end in orderly fashion, so that as much as possible of its surviving work can be continued without interruption and as much as possible of its property can be used to promote those high purposes of international peace and co-operation for which the League itself was founded'."

And so, Mr. President, we find that in these negotiations, a common plan was drawn up for the handing over of assets, and that common plan was approved by a resolution of the League at its final session. It was actually one of the paragraphs providing for the dissolution of the League.

Another paragraph in that same resolution providing for dissolution, provided for the appointment of a board of liquidation, which was to represent the League for the purpose of effecting its liquidation. This board, Mr. President, was specifically enjoined to do the following:

> "Subject to the provisions of this resolution and other relevant decisions taken by the Assembly at the present session, the Board shall have full power to give such directions, make such agreements and take all such measures as in its discretion it considers appropriate for this purpose." **(II**, p. 45.)

In other words, in taking action, in pursuance of this resolution to dissolve the League, the board had to act not only with reference to the

provisions of the resolution itself, and not only with reference to its discretion, but also with reference to other relevant decisions taken by the Assembly at the present session. This is a point which assumes particular significance in view of the nature of the Applicants' contention of a general tacit consensus regarding a transfer of powers, or a substitution of supervisory organs in respect of mandates.

Mr. President, we find that for the guidance of this board of liquidation, in general, and with a view to co-operating with the ideas of the United Nations in regard to the resolutions which had already been taken concerning functions and powers, the League passed two resolutions, which are set out at page 45, of the Counter-Memorial (**II**). The first one is set out in paragraph 39, under the heading "The Assumption by the United Nations of Functions and Powers hitherto exercised by the League under International Agreements". In so far as is relevant, it adopted certain resolutions regarding the custody of the original texts of international agreements, and also regarding functions and powers arising out of international agreements of a technical and non-political character.

The resolution about custody of original texts of international agreements is not quoted in our Counter-Memorial, but the effect of it was an instruction to the Secretary-General to transfer all those texts and relevant records to the United Nations Secretariat, at a time that might be convenient to the United Nations. One finds that in the relevant League document, referred to in the footnote on page 46.

The resolution about functions and powers arising out of international agreements of a technical and non-political character, took the form that:

> "The Assembly recommends the Governments of the Members of the League to facilitate in every way the assumption without interruption by the United Nations, or by specialized agencies brought into relationship with that organization, of functions and powers which have been entrusted to the League of Nations, under international agreements of a technical and non-political character, and which the United Nations is willing to maintain." (**II**, p. 45.)

The gist of it is, Mr. President, a recommendation to the governments of Members of the League to facilitate the assumption of powers and functions out of instruments of a technical and non-political nature.

There is nothing here of the nature, shall I say, of an international agreement between Members of the League on this point, or between the League and the United Nations on this point. It is merely a matter of encouraging governments of Members of the League to co-operate with the United Nations in that regard.

So here, there was no question of any agreement arising, which might require registration.

The same applied to the resolution "The Assumption by the United Nations of Functions and Powers hitherto exercised by the League", which concerns, in general, various non-political activities, and again the effect of it was that the Secretary-General of the League was directed to afford every facility for the assumption by the United Nations of those non-political activities. So, again, in that respect, there was nothing in the resolution itself of the nature of an international agreement which required registration.

The position was different, Mr. President, in regard to the common plan referring to assets, because that related to international agreement,

and the position would, in my submission, also have been different in relation to the suggested common tacit consensus on the part of everybody concerned, regarding a possible substitution of supervisory organs in respect of mandates, because what would that have amounted to? It would have amounted to an agreement between all the Members of the League and the mandatory powers, that mandates could now be regarded as being amended in that particular respect—that whereas the Mandate spoke of supervision of mandatory administration by organs of the League, the mandates are now to be regarded as amended to the effect that there will now be supervision by organs of the United Nations. That could only come about by agreement between the interested parties, who were the Members of the League, and the mandatory. It would amount to imposing upon the mandatories either a new obligation, in that regard, or an amended obligation, depending on how one looks upon it, and that could only come about by new international agreement.

In the light of this background, it is interesting, Mr. President, to note how the matter was further dealt with, first, by way of registration, under Article 102, in the *Treaty Series of the United Nations*, and then in regard to the further actions of this board of liquidation—how it viewed these various matters, and how it saw its task, and reported on the completion of its task in that regard.

The *Treaty Series of the United Nations*, Volume 1, for the period 1946-1947, contains an introduction by the Secretariat in which it explains the system to be followed in this Treaty Series. It refers first, at page XIV of this introduction, to the provisions of Article 102 of the Charter, which I have already read. It points out further, Mr. President, that Part 1 of the Series would cover cases falling under Article 102 of the Charter. It also points out, at the same page, that this Treaty Series would not only contain treaties or agreements falling only under Article 102. It would also contain treaties and agreements falling under Article 10 of certain regulations adopted by the United Nations General Assembly, which provided, *inter alia*, for the registration of treaties or international agreements entered into by the United Nations, or by one or more of the specialized agencies.

It explained, in regard to this latter class of treaties and agreements to be registered, that they would come in Part II of this Treaty Series.

Mr. President, one other point I wish to emphasize from the introduction is found on page XVI, and that concerns registration, under Part I, of treaties and international agreements falling under Article 102 of the Charter. The Secretariat says:

> "The exact meaning of the term 'treaties and international agreements' has been the subject of discussion. In this connection, the Secretariat thought it necessary to conform to the interpretation of the term 'agreement' given in the report of Committee IV/2, of the San Francisco Conference which includes 'unilateral engagements of an international character which have been accepted'."

So that interpretation is then given to treaties and international agreements for the purposes of this registration, and on the basis thereof we turn to the contents of Parts I and II, in which is set out what it was considered necessary to register in respect of these events that passed at the last session of the League Assembly.

[Public hearing of 6 April 1965]

Mr. President, at the adjournment yesterday I was dealing with certain events which followed upon the dissolution of the League as being relevant material, in that they threw further light on the intentions of the States which attended the last session of the League in April 1946. I dealt in that regard with the *United Nations Treaty Series*, and referred the Court to the introduction written by the Secretariat of the United Nations to the scheme set out in the introduction to Part I thereof, which relates to treaties falling under Article 102 of the Covenant, and then to Part II thereof, which covers cases falling under Regulation 10 of the regulations approved by the General Assembly. The differences for our purposes were that under Part I, that is, under Article 102 of the Charter, fall those cases where the parties, or some of them, were Members of the United Nations, and the treaties or agreements had of course to be entered into after the coming into force of the Charter. In the other case, under Part II—that would be under Regulation 10—fall cases outside Article 102: they could be of various classes, but for our purposes the important class would be treaties or agreements to which the United Nations itself, or a specialized agency, was a party.

I referred the Court also to the definition which was discussed by the Secretariat for purposes of their work on this introduction (at p. XVI), namely that international agreements would include unilateral engagements of an international character which had been accepted. Mr. President, that definition would, in my submission, exactly cover the construction which my learned friends for the Applicants put upon the mandatories' acceptance of the League's last resolution regarding mandates. The Court will recall that their construction is that, by accepting that last resolution of the League, the mandatories accepted engagements to observe all obligations under the mandate, including accountability, with the United Nations then substituted as the supervising authority.

On that construction the engagements by the various mandatories would have been accepted by the other Members of the League which participated in that resolution, and we would therefore have an exact case covered by this definition, set out by the Secretariat as a basis upon which they were registering treaties and international agreements in this way.

Now, Mr. President, in Part I of the volume, falling under Article 102, we find nothing of relevance to our purposes. There is nothing about mandates, as one would have expected if the construction of my learned friends was the correct one and if that had been the intent of the persons concerned.

As far as the other matters which were discussed at the final session of the League Assembly are concerned, it is not surprising that Part I contains no reference thereto. For instance, the matter of the transfer of assets took the form of an agreement between the two organizations, namely the League and the United Nations. One would therefore expect that to be dealt with in the second part of the Series and one finds, in fact, that it is dealt with there.

In regard to the question of assumption of functions, powers and activities of a non-political character by the United Nations, the Court will recall that there was nothing of the nature of an agreement, either

between the organizations or between the States concerned. The final resolutions of the League partook of the form that either the States or the Secretary-General was requested and enjoined to take all necessary steps to co-operate with the United Nations in the assumption of such functions and powers, so that there was nothing of the nature of an agreement involved in those resolutions themselves. The situation was different in regard to mandates—on the construction which the Applicants wish to place upon it—and yet it is significant, that no such agreement in regard to mandates is contained in Part I of the Series.

I might point out further, Mr. President, in that regard, that the League itself, at its final session, did not adopt any resolution on the question of political functions which corresponds with the United Nations resolution on that point. The reason for that was probably the form which the United Nations resolution took on that very point. The United Nations resolution did not express any general willingness to accept or to adopt functions of the League in regard to instruments with a political character. The idea was that each case would be adjudged by the United Nations on its own merits and there would have to be an application by the parties concerned and a decision by the General Assembly, or other organ acceding to that application. The League probably considered that it had no function in that regard, that that was a matter to be left to the *ad hoc* treatment which was envisaged in the United Nations resolution.

But, Mr. President, on the Applicants' construction of what the general agreement was in regard to mandates, that would certainly have been an exception. That would have involved engagements on the part of the mandatories and acceptance of those engagements on the part of the other States concerned; in other words, an agreement between Members of the United Nations and Members of the League—but also, to a large extent, Members of the United Nations—which would require registration under Article 102.

In the second part of this Treaty Series, Mr. President, falling under Regulation 10, one finds that the first six items all emanate from matters which were dealt with at the final session of the League Assembly. But again one finds in all those six items no reference at all to the case of mandates. One finds item No. 2 of Part II on pages 109 to 117 of this volume, which is the agreement to give effect to the common plan for the transfer of assets. The agreement partook of the form, as I have said, of the United Nations being a party to it, the League being the other party thereto acting through representatives, and this agreement therefore came to be registered under Part II of the Series.

Items Nos. 1, 4 and 6 of Part II in this volume refer to certain specific matters which were concerned with the transfer of assets. More detailed aspects, particular problems which arose, are to be found at pages 97, 131 and 140, respectively, of this first volume, and the same considerations apply to them as in the case of item No. 2.

Items Nos. 3 and 5 are agreements which refer, in part, to a transfer of assets, but they are, in fact, mainly concerned with the transfer of certain services and activities, such as library services, stenographic services, roneo services, and so forth. One finds them at pages 119 *et seq.* and 137 *et seq.* of this work.

These agreements in regard to the transfer of these services and activities were made in pursuance of the resolutions of the League and of the

United Nations on the very question of an assumption by the United Nations of non-political activities.

So, Mr. President, I submit that the omission of any agreement in regard to mandates from this whole treatment of the subject is very significant. Apart from the effect which such an omission might have on the validity of any such agreement, as is contended for on behalf of the Applicants, I submit that the more significant aspect of this omission is the indication which it affords as to the intent of the persons concerned, on the question whether there was any conception on the part of those who participated in the last session of the League Assembly and on the part of those who were charged with the execution of the decisions and resolutions arrived at on that occasion, that there was any such agreement as is contended. My submission is that this omission serves as a clear indication to the contrary, and the matter becomes even more clear if we proceed to consider, in conjunction with the registration aspect, the report of the Board of Liquidation which was appointed at that last session.

The Court will recall, Mr. President, that this Board was enjoined to have regard in the performance of its task to all relevant decisions of the League Assembly taken at its last session. I quoted that portion from its terms of reference yesterday. It is contained in our Counter-Memorial, II, page 45. (P. 420, *supra*.)

In the report itself we find, Mr. President, that the Board "very conscientiously endeavoured to comply with this requirement", and to have regard in its task to all those relevant resolutions and decisions. We find that Part I of the report, running up to page 10, is headed "General" and it is concerned, in the main, with financial aspects of the liquidation. That was in accordance with the main resolution which the League took on the question of the liquidation.

Then we pass to Part II and we find that is divided into a number of chapters, and that the headings of three of the first four chapters are very significant. The heading of Chapter 1 of Part II is "Disposal of Material Assets". The heading of Chapter 3 is "Assumption of Activities by the United Nations and Specialized Agencies". The heading to Chapter 4 is "Disposal of Non-Transferable Activities, Funds and Services".

In Chapter 1 there is a reference to the common plan and to the steps that were taken in pursuance of the common plan in regard to transfer. There is in this regard, therefore, also a reference to the agreements to which I have referred and which are registered in the volume of the Treaty Series, which I have discussed. That part of this report we find at pages 11-12.

Then, Mr. President, in Chapter 3 under the heading "Assumption of Activities by the United Nations and Specialized Agencies", we find references in the first introductory paragraph to the various resolutions taken at the last session of the League Assembly on these subjects. The matter is grouped under three headings and the report proceeds to deal with the subject-matter under these three headings. The first heading is "*(a)* Treaty Registration". The report states in this regard that—

> "The continuity of this work is of prime importance to all States and the maintenance of the system inaugurated by the League has been assured by the Charter of the United Nations. Thus there should be no break in the *Treaty Series*, of which 205 volumes have been

published by the League. Formal transfer took place on 1 August 1946. The originals of international labour conventions had already been handed over to the International Labour Office."

One has here a recording of an actual transfer which took place in this respect in pursuance of the relevant resolution of the League.

The second group is entitled "*(b)* Transfer of Powers and Functions Performed by the League under International Agreements of a Technical and Non-Political Character". The report's reference to this group reads:

"This group includes powers and functions provided for in more than fifty Conventions on communications and transit, economic and financial questions, the work of narcotic drug control, health questions, legal questions and questions of a social and humanitarian character. The duties of the League in respect of these subjects were transferred to the United Nations at dates convenient to that Organization, the last being handed over on 1 October 1946"—

again, Mr. President, action in pursuance of the relevant parallel resolutions of the United Nations, and particularly of the League, instructing its Secretariat to take the necessary action in that regard and calling upon Member States to co-operate and assist.

Thirdly, under the heading "*(c)* Transfer of Certain Non-Political Activities to the United Nations", we find these words:

"The responsibilities of the Secretariat, relating to matters mentioned under *(b)* above, the Library Service, Publication Service and the Central and Internal Services were transferred to the United Nations at dates convenient to that body, with the result that the latter was able to ensure their continuation without interruption. The last of these services was transferred on 1 October 1946."

Again, Mr. President, the same comment applies as that in regard to the previous group.

This makes the treatment of mandates in the next chapter stand out in very marked contrast. The heading of the chapter, Chapter 4, page 19, is "Disposal of Non-Transferable Activities, Funds and Services". The chapter deals, in the course of the next two pages, with some six subjects under various headings and the last heading is "(F) Mandates; Protection of Minorities". These two subjects are grouped together under this last heading. The first two sentences apply to the case of mandates and the last one to protection of minorities. I shall read the first two.

"On the proposal of the First Committee, the 1946 Assembly adopted a resolution whereby it 'recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant'."

Those words were a quotation from the resolution. The report continues:

"The mandates system inaugurated by the League has thus been brought to a close, but the Board is glad to be able to record that the experience gained by the Secretariat in this matter has not been lost, the United Nations having taken over, with the small remaining staff the Mandates Section's archives, which should afford valuable

guidance to those concerned with the administration of the Trusteeship system set up by the Charter of that organization."

Mr. President, it is very significant that all that is taken over here is the mandates section's archives with the small remaining staff—nothing else—no functions or activities. Also, Mr. President, the expectation, the anticipation, of valuable guidance which this transfer should afford, does not relate to the question of supervision over mandates as mandates. The guidance is foreseen as being valuable only to those concerned with the administration of the trusteeship system set up by the Charter. Clearly, Mr. President, there was no contemplation whatsoever on the part of the authors of this report that there was to be any supervision of mandates outside the trusteeship system.

So we find that the evidence mounts independently from all sides. We saw the very strong—the unanswerable indications of intent, as I analysed them yesterday, resulting from the actions of the mandatories; the statements on behalf of the mandatories, the history in regard to the Chinese proposals; the wording of the final resolution of the League in contrast with the earlier indications and the accumulative effect of all these factors. We pointed, also, to the way in which the mandatories were obviously understood and the light which was thrown on that by, for instance, the subsequent conduct of the parties and by the passage in the Palestine Commission's report, to which I referred. Here we get independent evidence. We get officials—we get office-bearers—who were specially charged with the execution of the decisions taken at the final session of the League, and with the duty of taking further steps in pursuance thereof. They conscientiously performed their task in relation to treaty registration and registration of international agreements, they performed their task in regard to the liquidation of the League and to assisting in the handing over of all functions and activities that were intended to be handed over to the United Nations; and they recorded that, in the case of mandates, that everything had come to an end, except for archives and a small remaining staff and the assistance which it could give in the administration of the trusteeship system.

This, Mr. President, then takes us to the next phase in the historical development, namely the further events in the United Nations after the dissolution of the League.

The Applicants in this regard gave, in their oral statement, a detailed survey of events which took place as from the time that the United Nations began operations in 1946. They then reached the following conclusions:

"... while there was disagreement among several Members of the United Nations with regard to the existence of the mandate and the obligations of international accountability, the view of the United Nations, as a whole, expressed through its resolutions on the subject, demonstrated its understanding that the Mandate remained in full force and effect and that the United Nations had supervisory authority over the Territory.

. . . . . .

Respondent, through the several declarations and statements heretofore discussed, also demonstrated its recognition of the continuance of the obligations of the Mandate after the dissolution of the League. It was not until the autumn of 1947 that supervisory

authority of the United Nations was questioned, and not until November 1948 was it argued by Respondent that the Mandate had lapsed.

Hence, the actions of the League Assembly, of the United Nations, and relevant statements and actions of the Respondent, combine to support the conclusion that the Mandate and all of the obligations contained therein survived the dissolution of the League, and that the United Nations replaced the League as the supervisory organ over the Mandate." (P. 165, *supra.*)

Those are the Applicants' contentions in regard to this period I am about to deal with although, of course, it covers, in their contention, an antecedent period also, with which I have dealt, namely the history up to the time of the dissolution of the League in April 1946.

I intend to deal with this same topic in the next phase: on the one hand, the actions of the League and the United Nations, as the Applicants call them; and on the other hand, what they term the "relevant statements and actions of the Respondent".

We shall concentrate first, Mr. President, on the question of the "relevant statements and actions of the Respondent", with due regard to their setting in relation to other events which occurred at the time, because these "relevant statements and actions" on the part of the Respondent form the crux of this whole matter. If there was to be found on the part of the Respondent any consent to or acquiescence in a substitution of supervisory organs, it would have to be found in these "statements and actions"; it could not be found anywhere else. And the Applicants accept that it is necessary to establish such consent or acquiescence on the part of the Respondent. It is, therefore, necessary, in the first place, to ascertain what these "statements and actions", fairly construed in their context and in their setting, conveyed. Secondly, the question arises, how they were in fact understood by the other parties concerned. We concentrate on this first part first, and then we proceed to consider the attitudes expressed and the action taken by other United Nations Members. Mr. President, this last factor is important, because of the indications which it affords as to the view which United Nations Members took in general of the situation in relation to mandates, and particularly the Mandate for South West Africa, but also because it affords the best evidence one can get of how the statements and actions of the Respondent were actually understood by the other Members of the United Nations. We submit, Mr. President, that when this review has been undertaken fully, and with proper regard to context, it will be apparent that the result is diametrically opposed to that contended for by the Applicants. But for the purposes of this review we have to avoid certain errors which are, in our submission, inherent in the Applicants' approach, and it may be best to point them out straight away at the beginning.

In the first place, Mr. President, the whole of the relevant evidence is to be considered, not isolated bits and pieces taken out of their setting and out of their context, and thrown together as if they afforded the only relevant evidence on the subject.

Secondly, the matter is not to be approached, as the Applicants do, from a wrong premise, to the effect that, as at the dissolution of the League, the Respondent had already indicated, and had already been understood to indicate, acceptance of a continued obligation of account-

ability under the mandate, with the General Assembly of the United Nations substituted as supervisory organ. That is the premise from which the Applicants approach their review of this part of the relevant facts —as if there had already, prior to this period, and at the stage of dissolution of the League and even prior to that stage, been manifestations on Respondent's part of acceptance of all obligations—of the continued operation of all obligations under the mandate, including accountability, and with substitution of a new supervisory organ. That premise, I submit, I have demonstrated conclusively to be a wrong one. On the contrary, Respondent together with all the other mandatories had indicated, very clearly that in respect of accountability the previous position could not be maintained: it and the other mandatories had intimated very clearly, that they considered that there could be no accountability under the mandate, and they were very clearly understood by the other Members of the League and the Members of the United Nations to have taken that attitude—the attitude being not only that there would be no accountability, but also that they would in fact not report and account in regard to compliance with their obligations under the mandate.

The Applicants, Mr. President, are also wrong in another assumption, and that is that an indication on the part of a State that the mandate itself continued in existence implied, at the same time, continued accountability under the mandate, either in relation to the suggested new supervisory organ, or at all. I have dealt before, Mr. President, with the logical distinction between those two things: with the reasons why, if at a particular time any State said that in its contemplation the mandate was still in existence, it did not necessarily mean that in that State's contemplation accountability under the mandate also remained in existence. I do not want to deal with the logic and the general principles of that distinction again at this particular stage. When I dealt with the matter before, I indicated to the Court that in our review of the facts we would demonstrate that that assumption is factually not true and that, whatever the legal position might be as to severability or inseverability of accountability from the rest of the mandate institution, the States which expressed themselves on this subject, in fact, from time to time took up the attitude that a mandate could exist but that there would nevertheless be no accountability under the mandate. This factor becomes particularly clear in the history of the events with which we are about to deal now.

I must concede at the outset, Mr. President, that statements made on behalf of the South African Government during those first few years after the dissolution of the League did convey a conception on the part of the South African Government that the Mandate as such could be regarded as still in operation, or at least that the situation was being handled by the South African Government as if the Mandate was still in force. That is clear—whatever legal significance one wants to attach to that factor is another matter with which I shall deal later in relation to the question whether the Mandate is still to be regarded as in existence in law—that that was in fact the kind of intimation that was given by the Government at that particular stage is so, and it is a fact from which I will not in the least attempt to escape.

It is also a well-known fact of history—I need not try to hide it, because there is no secret about it—that in this particular regard, i.e., on the question whether the Mandate could legally still be regarded as

in existence or not, there was a difference of opinion between the then South African Government and the one which succeeded it in 1948. And that is why one finds this reference by my learned friends to the changed attitude expressed on that particular subject as from the years late 1948-beginning 1949, and so forth. As the Court knows, there was a change of Government in 1948—we might, for convenience, refer to the previous Government as the Smuts Government; the later Government, which succeeded it in 1948, was under the leadership of Dr. Malan. And it is a well-known fact that leading members of those two Governments differed with one another on this legal question regarding the continued existence of the Mandate *qua* Mandate. That is not surprising, Mr. President, in view of the fact that those were not the only quarters in which there was a difference of opinion on that subject. The difference of opinion extended to a number of States. In our review of the attitudes of States we shall indicate to what extent States themselves, in this relevant period, differed from one another on this question, and to what extent they were inconsistent even with themselves on that point.

It is also a well-known fact that lawyers, discussing the various problems which arose in regard to the mandates system, differed from one another on this particular point. That again is not surprising, in view of the fact that the mandate was in fact a novel international institution. It did not fit in a ready made manner into the classical conceptions of sovereignty—of a cession of territory and the like—and a new understanding was necessary to assign to this novel institution its exact place in the concepts of international law.

We know, for instance, Mr. President, that many students of the subject looked upon the mandate institution as something which involved a cession of territory to the mandatories, subject, however, to conventional obligations—treaty obligations—which comprised both the substantive obligations under the mandate and the obligation of accountability to the League. In other words, according to that view the mandate institution was something in the nature of ownership subject to an onus—subject to what we might call, in our law, a servitude—or what is called an easement in English law—something of the nature of a burden resting on title—so that, if and when the League disappeared, and if with the disappearance of the League that burden was seen as disappearing, then the ownership itself blossomed forth into something absolute. (I use the term ownership, of course, by way of analogy—the concept here would be full sovereignty pursuant to a cession of territory in the beginning.) I am not contending for that construction, I am merely pointing out that it is a well-known fact that many lawyers held that type of view of the situation. This Court in 1950 showed that it was very fully aware of that fact—of those differences of opinion which had arisen between lawyers in this regard. That is why one finds that in its discussion of the basic question whether the Mandate was still in existence, the Court itself, in the main opinion, and particularly Sir Arnold McNair in his separate opinion, concentrated on questions of this kind. The Court emphasized that the whole concept of a cession of territory was inapplicable here; that it was not a question of cession of territory subject to treaty obligations, but that the title that was given to a mandatory was a limited one, that the powers given were limited to the purpose of executing the trust which was imposed on the mandatory for the benefit of the inhabitants of the territory. But I am pointing to these various questions of what one might

call a legal nicety which arose between lawyers, between States, and between all interested persons, as being a very natural explanation for the degree of vacillation and difference of opinion which manifested itself in that period also between the two successive South African Governments. And, Mr. President, what I do want to emphasize at this particular stage is that there was no difference of opinion whatsoever between the said South African Governments on the question whether there was accountability under the Mandate to the United Nations. There the attitude taken by the two Governments was exactly the same and absolutely consistent.

It was not only so, as far as the South African Governments—those two successive Governments—were concerned; it also applied to United Nations Members at the time, namely to the way in which they saw the situation. A number of them, as I have said, expressed themselves to the effect that the Mandate had lapsed. Others considered that the Mandate had not lapsed, but our review will show that during the period 1946 to 1949 there was almost complete agreement on the part of United Nations Members on the fact that, outside trusteeship, there was no accountability in respect of administration over mandated territories to the United Nations.

Then, Mr. President, there is a further respect in which the Applicants approach this whole review in the wrong manner, in our submission. It relates to a confusion between two other concepts which are really to be kept separate—an attempt to equate or assimilate those two concepts. There is, Mr. President, on the one hand, the concept of supervision by an international organization of administration of a territory, and, on the other hand, the concept of coming to an agreement with such an international organization about the future status of such a territory. The one is the continuing concept of international supervision, the other is that of a specific arrangement made with an organization—an agreement made with it regarding the future status of the territory. These two concepts, as the Court will be aware, the Applicants attempted to assimilate in their argument, and, I submit, completely without any justification whatever. Notionally and as a matter of logic the two concepts are entirely distinct. Under the concept of supervision by an international organization, that is, one of a continuous process involving the passing of value judgments over acts of government and administration as and when they arise—depending on the policy pursued in the particular organization, or on the specific rules that there may be in regard to the exercise of its power of supervision—there may be a greater or a lesser amount of interference in the acts of government and administration on the part of the supervisory authority. And that might happen at any time. The whole process, as I have emphasized, is of a continuous and recurring kind. It is, therefore, seen, from the point of view of the party who submits to it in practice, as an extremely onerous obligation. How onerous, would depend, of course, on the exact policy of the supervising authority.

The other concept, Mr. President—that of coming to an agreement with an organization—an international organization—about the future status of a territory—is something quite different. It is something which is confined to a particular occasion, that occasion being the attempt to secure agreement between the State which seeks it and the other Members of the organization. It is an act which is intended purely to avoid subse-

quent disputes and controversies about the status of a territory. The whole approach to a case of that kind on the part of States which may refer such a question to an organization like the United Nations, appears to be this: here we have an international organization, composed of the large majority of the States in the world, and, if we can now, by agreement between ourselves and that organization, find a mutually acceptable solution to the question of the future of a particular territory, then that should for all practical purposes exclude further controversy and difficulty about it—at any rate, controversy as to questions of the status of that territory and the exact relationship between it and the State which referred the matter to the international organization.

The fact, therefore, Mr. President, that such an agreement is sought about a new arrangement in regard to the future status of a territory, cannot by any stretch of imagination imply, or hold within itself, any concept of submitting to the supervision of that organization regarding administration of that territory.

There are many practical examples by which I can illustrate this distinction. Let me take as a first example the final resolution of the League Assembly. The Court will recall that in the last paragraph of that resolution the League gave expression to a contemplation that other arrangements between the mandatory powers and the United Nations might be agreed upon. Nevertheless, the history of that resolution, its wording, and all the factors with which I dealt yesterday and this morning, demonstrate that on the part of the participants in that resolution there was no concept of supervision by the United Nations over mandated territories before such new or fresh arrangements might be agreed to. The distinction between those two notions was quite clear in the contemplation of the very States which were present at the time of adoption of that final resolution. And it stands to reason that it should have been so. They contemplated that the new arrangements might have results one way or the other, as my learned friends concede. The new arrangements—the new agreements—might involve trusteeship over a territory previously under mandate, and that trusteeship would then involve the kind of supervision which is provided for in the Charter of the United Nations in respect of trusteeship. The arrangements might provide that a territory should become independent—a situation which would involve no supervision whatsoever. Or the arrangements might provide that a territory would be divided, as eventually happened in the case of Palestine. Or they might have provided that there would be incorporation of a territory with another territory, as was proposed in regard to South West Africa. Surely, therefore, the mere fact that there was a contemplation that such new agreements might be entered into with the United Nations did not involve any concept of supervision by the United Nations as a necessary corollary. It was something which, if it was to originate, would have had to originate from a new agreement with the United Nations.

The next example I would like to bring to the notice of the Court is cases where reference to the United Nations for purposes of coming to a new agreement about status did not concern a mandated or trust territory at all. Let us take, Mr. President, the case of Eritrea. That case was dealt with in the Peace Treaty of Paris—the treaty with Italy—of 10 February 1947. In terms of that treaty it was decided that Eritrea would remain under British control until the United Kingdom, France, the United

States and the Soviet Union had decided on the territory's future. It was further decided and agreed that if those four powers could not agree, the matter should be submitted to the General Assembly of the United Nations. In fact, the four powers could not reach agreement, and the matter was then submitted to the General Assembly. On 17 May 1949 there was a vote on a resolution providing, *inter alia*, that Eritrea should be split into a western part, to be given to the Sudan, and an eastern part, to be ceded to Ethiopia; but this proposed resolution was rejected by the General Assembly. On 21 November 1949 the Assembly adopted by a majority of votes a resolution that Eritrea should form a federation with Ethiopia. One finds the references, Mr. President, in the General Assembly *Official Records*, Fourth Session, 250th meeting, dated 21 November 1949. The reports from the First and the Fifth Committees which were considered, were documents A/1089 and A/1109, respectively. There was a minority proposal, supported, *inter alia*, by the Soviet Union, that Eritrea should be made independent, but that was rejected.

Then, Mr. President, we have a case where parties try to agree amongst themselves—a small, limited group of parties; they attempt to agree between themselves on the future of a territory, pursuant to a situation which has arisen after a war. The territory is not a trust territory; it is not a mandated territory; it is not under any international supervision whatsoever. They, however, agree amongst themselves that if they cannot come to agreement on this particular point, they will submit the matter to the international organization; and when a decision is given by that international organization which leads to complete agreement upon the subject, the question is settled. Then one gets a settled condition, and the potential dispute is no longer in existence. It is, Mr. President, an action similar to action which is taken by a State through ordinary diplomatic channels after there has been an upheaval like a revolution, or a similar condition, and that State or government therefore finds it necessary to obtain international recognition. It is the same idea, although not exactly fitted into the same legal moulds and legal concepts, of course. I am not suggesting that; but there is the same idea of eradicating a difference of opinion, and dispute about it, so as to have a settled situation.

That is indeed the manner in which the South African representative at the last session of the League expressed his conception of the matter. May I refer the Court to the statement in the Counter-Memorial **(II)**, at page 47:

> "... it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South-West Africa a status under which it would be internationally recognized as an integral part of the Union".

Another example, Mr. President, falling in the same category as Eritrea, is the case of West Irian—the same category in the sense that this was not a trust territory, or a territory under international supervision—and yet the question of its future was, at a particular stage, referred to the United Nations by the powers concerned. There was an agreement of 15 August 1962 between the Netherlands and Indonesia, and that provided, amongst other things, that after the General Assembly of the United Nations had accepted a joint resolution proposed by these

two States, the Netherlands would cede West Irian to a new international body to be called the United Nations Temporary Executive Authority. This temporary body would cede West Irian to Indonesia on 1 May 1963. We find the reference to this in United Nations document A/5170. There was a draft resolution sponsored by Indonesia and the Netherlands (reference A/L 393), incorporating this agreement, which was proposed to the General Assembly and adopted by it on 21 September 1962 (reference in the records of the General Assembly, 17th Session, 1127th Meeting, pp. 49 *et seq.*)—again, Mr. President, a case where there was no question whatsoever of international supervision, but where this procedure was adopted in order to get a settled condition—in order to achieve a new arrangement with a settled practical result—in regard to the future status of a territory.

The fact that this had nothing to do with any concept of international supervision was, indeed, stressed in the debate by the representative of India, Mr. Krishna Menon. We find this at page 57 of this debate. His words were these:

> "We also want to say that this period of the presence of the United Nations is in no sense a period when its authority will be exercised as a kind of supervisory authority in the place. The United Nations will have very limited functions."

Palestine itself, of course, Mr. President, affords a similar example, except for the fact that Palestine was a mandated territory. But there, too, the Mandatory Power, the United Kingdom, in referring the matter to the United Nations, made it perfectly clear that this was not submitting the case of Palestine to United Nations supervision. The details of the situation in that regard have been brought into dispute by my learned friend's argument, and those details will be dealt with at a later stage when dealing with the attitudes of the various States upon the question of mandates at that particular time. I am merely mentioning at this stage in broad outline what, in our submission, and as the details will later show is clearly a case where a matter was referred to the United Nations for a solution as to the further status of a territory, although there was no anticipation whatsoever and no conception of international supervision over that territory.

Mr. President, the United Nations Charter, Article 1, might usefully be referred to in this regard, to indicate the wide objectives of the Organization and the sense, the *practical* sense, in which questions of this nature may be brought before that Organization. In paragraph 1, Article 1, we find one of the purposes of the United Nations stated as follows:

> "To bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

In the third paragraph we find this:

> "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character . . ."

In the fourth paragraph, Mr. President, we find: "To be a centre for harmonizing the actions of nations in the attainment of these common ends."

It seems perfectly obvious that when a matter of that kind is referred to the United Nations, it need have no bearing whatsoever on any question of supervision of administration.

I know, Mr. President, that the Applicants have a rather ingenious argument in this regard. They go back to the time of the League and of the mandates system, and they let us look at the interrelationship between Article 6 and Article 7, paragraph 1, of the Mandate. They say Article 6 provided for supervision, and that the body assigned to that task of supervision was the Council of the League.

Now, Article 7 (1) provides for a possible modification of the terms of the Mandate—a modification which may, or may not, lead to a change in the status of the territory. Machinery is agreed upon whereby it would be possible to effect such a modification. The machinery provides for agreement between the mandatory and an organ of the international organization. For that purpose, the choice is made of that same organ which exercises the supervisory function, and my learned friends say, and I agree with them entirely, that if one makes an agreement of that kind, it is sound common-sense to make one's choice in that way because that is the organ which would know most of the intimate details of the problem and would be in the best position to exercise a judgment on the question whether there is to be a modification of the terms of the Mandate, or not.

So far, so good, Mr. President, but it does not follow that that combination is always to apply. In particular, Mr. President, it does not follow that the reverse process is to apply. We must remember that in the League system we begin with an agreement on the part of all concerned that there is to be international supervision. That we find in Article 22 of the Covenant. It is only when we come to the mandate instruments that we find this provision in Article 7 (1). It does not appear in the Covenant itself; it is something consequential—something subsequently agreed upon. That is the order of events, therefore, in the case of the arrangements actually made in the case of mandates. But, Mr. President, if one starts from the initial position that there is no conception of international accountability, and there is an intention of making provision for a change in the status of the territory, or an idea of taking actual steps in order to secure a change in the status of the territory, then the mere fact that that contemplation involves going to a particular international organization about it, surely cannot possibly carry with it a contemplation that there must also be this more onerous obligation, about which nobody has said anything, namely that of international supervision by that organization over the actual administration of the territory.

The logic simply does not work, Mr. President. It does not apply.

It is, then, against this background, and with an appreciation of these distinctions, that the facts of the period under consideration are to be reviewed and dealt with.

In commencing their analysis of the relevant historical occurrences, as they called them, at the United Nations between the years 1946 and 1949, the Applicants said the following, in the verbatim record at page 153, *supra*:

> "It is quite clear that events at the United Nations during the autumn of 1946, that is to say, several months after the dissolution of the League of Nations, indicate the general understanding of the United Nations Organization and of the Respondent, that the man-

dates had not lapsed and were subject to the supervisory authority of the United Nations."

Mr. President, this period during the autumn of 1946, referred to by the Applicants in this passage which I have read, may perhaps be called the crucial period in issue between the Parties in this case in regard to the question now under dissussion—the question concerning Article 6, or international accountability—because, Mr. President, the Applicants admit that as from September 1947 there were explicitly clear statements on behalf of the South African Government at the United Nations; in other words, during the time of what I have termed "the Smuts Government", there were these explicit statements which rejected any idea of United Nations supervision in respect of South West Africa. They are on record; the Court knows what they are. But the Applicants suggest that, somehow, these statements are to be seen as involving a change of ground on the part of the South African Government. They are to be seen as inconsistent with a prior commitment on the part of the South African Government on this question.

Mr. President, I shall show, with respect, that this contention rests purely on a fallacy. The scrutiny of the events, and I submit that it has, for purposes of this conflict between the Parties, to be a very close scrutiny, will show, in my submission, that there is no substance in this suggestion on the part of the Applicants at all. But it does make it necessary, as I have said, to look very closely at the record of the period April 1946 to September 1947.

I shall refer, first, to the Applicants' contentions in that regard, and, in answering them, I shall endeavour to make clear what the attitude of the Respondent is in regard to this period. The Applicants refer, first, to a memorandum prepared by the Secretariat of the United Nations—that is United Nations document A/117 of 16 October 1946. In that document reference was made to a letter addressed by the Secretary-General on 29 June 1946 to "the States administering territories now held under mandate", those being the words used in the letter. Those States, of course, included the Union of South Africa, and the Applicants also drew attention to the following expressions in the letter, namely "States administering trust territories now held under mandate" and, also, "the mandatory powers". These are quotations from the verbatim record at page 153, *supra*.

Now, Mr. President, the Applicants also say that according to that memorandum the Secretary-General received from the mandatory powers replies which indicated that four of the mandatory powers understood that their mandates were still in existence, notwithstanding the dissolution of the League. He contended that they had indicated that, by the use of such expressions as "the mandated territory of New Guinea", "the mandated territories of Togoland and the Cameroons", "the territories in Africa under United Kingdom mandate", "the Mandated Territory of South West Africa". This we find in that same verbatim record at pages 153 to 154, *supra*. Now, Mr. President, this statement by the Applicants may be correct, as far as it goes. It is also correct, as the Applicants say, that Belgium gave no indication of her view as to whether it considered the territory of Ruanda-Urundi still to be under mandate, and that New Zealand, in its reply, referred to Western Samoa as "the former mandated territory". This indication by New Zealand is the opposite of the view expressed by Australia, the United Kingdom, France

and South Africa. Those features are there in the report. That is certainly so. But, Mr. President, whatever the views of the said powers and of the Secretary-General of the United Nations may have been at the time as to the continued existence of the mandates—views which from the very memorandum itself appear not to have been unanimous—there is nothing in the memorandum which suggests that either the Secretary-General or any of the States in question held the view that the United Nations had replaced the League as supervisory authority or organ under the mandates. There is nothing on that point in the memorandum. Indeed, Mr. President, as we shall indicate later in our argument, all of those States, with the sole exception of Belgium, expressed, in the proceedings of the United Nations, contrary views in the years 1947 and 1948, making it clear that, in their view, there was no supervisory power on the part of the United Nations in respect of mandates not converted into trusteeship.

So, Mr. President, that memorandum and the covering letter and the replies thereto do not assist the Applicants one jot towards establishing that there was submission to United Nations supervision.

Next, Mr. President, Applicants deal with the Respondent's submission to the United Nations in 1946 of its proposal regarding the incorporation of South West Africa.

The Applicants refer, in this regard, to the statement made by the Respondent's representative to the Fourth Committee of the General Assembly on 22 January 1946 when he stated, amongst other things, that, when the freely expressed will of both the European and Native populations of South West Africa had been ascertained, the decision of the Union "would be submitted to the General Assembly for judgment". (P. 154, *supra*, and Counter-Memorial, **II**, p. 42 for a fuller text of this particular statement.)

Mr. President, I was dealing with the Applicants' arguments concerning the submission by the Respondent to the United Nations in 1946 of its proposal regarding incorporation of South West Africa in the territory of the Union. The Applicants say that the meaning of the words "for judgment" was elucidated by the Respondent's Prime Minister in a statement to the Fourth Committee on 4 November 1946, when he, that is, General Smuts, said:

> "... international responsibility precluded it from taking advantage of the war situation by effecting a change in the status of South West Africa without proper consultation either of all the peoples of the Territory itself, or with the competent international organs". (P. 154, *supra*.)

In addition, Mr. President, Applicants quote from a memorandum submitted to the United Nations by Respondent with regard to this proposed incorporation, and a covering letter dated 17 October 1946. The reference is to the verbatim record, pages 155 to 156, *supra*, and that letter was United Nations document A/123.

Now the Applicants make a point of the fact that the letter itself twice referred to South West Africa as the "mandated territory", and they say that the memorandum was based on the assumption that the Mandate was still in force. On the same point they cite portions of the memorandum in which expressions were used such as—"the termination of the mandate", "the future status of the mandated territory", "the mandatory", and so forth. That is still in the verbatim record, pages 155 to 156.

They then quote, Mr. President, three short passages from statements made in the Fourth Committee regarding Respondent's proposal for the incorporation of South West Africa. The first passage is from a statement by Respondent's then Prime Minister, General Smuts, to the effect that Respondent could not ignore the wishes of the people of South West Africa who wanted incorporation, and "had no alternative but to bring their wish before the General Assembly". That we find in the same verbatim record, page 157, *supra*.

The other two statements which they quote, one by Mr. Dulles of the United States and the other by Mr. Liu Chieh of China, will be dealt with later by us.

And now comes the Applicants' contention, or conclusion, based upon these factors to which I have referred—that is stated by them in the verbatim record at page 158, *supra*—

> "Thus by the end of 1946 Respondent had not, at any time, indicated a view that the Mandate for South West Africa had lapsed, or that the United Nations had no supervisory authority over the Territory.
>
> On the contrary, Respondent had on several occasions indicated its understanding that the Mandate was still in force and effect and that the United Nations had supervisory authority."

Mr. President, of course one part of this conclusion is correct, as I have intimated before. The Respondent's Government at the time was, as appeared from its conduct and the expressions it used, apparently of the opinion that as a matter of law the Mandate had not come to an end with the dissolution of the League. But apart from that, all these conclusions stated by the Applicants in this passage, which I have read to the Court, are unfounded, particularly two, on which the whole passage turns—the first one being that by the end of 1946 Respondent had not, at any time, indicated a view that the United Nations had no supervisory authority over the Territory; and the second, the statement that Respondent had on several occasions indicated its understanding that the United Nations had supervisory authority. Neither of those statements is supported by the facts relied upon by the Applicants, or by any facts on record, or by any relevant evidence that we could find.

There was no such occasion at any time on which Respondent had indicated its understanding that the United Nations had supervisory authority. And the suggestion that the first indication to the contrary was given by Respondent after the end of 1946 and not before, is also factually incorrect. In this respect, Mr. President, there is one item in the record of events which is very significant and which was omitted by my learned friends, on behalf of the Applicants, in their review of this part of the history. That is a fact dealt with in Respondent's Counter-Memorial, **II**, at page 54.

The Applicants cite passages from statements made by General Smuts in addressing the Fourth Committee in November 1946, with regard to the incorporation proposal. In the verbatim record at page 154, *supra*, they refer to the statement of 4 November 1946, and at page 157 of the same record they refer to an extract from a statement of 16 November 1946. But, Mr. President, in so doing they omit to mention a very pertinent statement made by General Smuts in a debate of 13 November 1946, when he explained that it would not be possible for Respondent, and that

Respondent was not obliged, to submit a trusteeship agreement for South West Africa. And he went on to say that if the Assembly did not agree to incorporation, as was then being proposed by him, then Respondent—

> "... could take no other course than to abide by the declaration it had made to the last Assembly of the League of Nations to the effect that it would continue to administer the territory as heretofore as an integral part of the Union, and to do so in the spirit of the principles laid down in the mandate".

The passage is set out in full in the Counter-Memorial, **II**, at page 54.

It may be noted, Mr. President, that General Smuts used the expression "in the spirit of the principles laid down in the mandate". It has that correspondence of phrase with what was stated by the United Kingdom representative, regarding the principles of the Mandate, in the statement at the final League session. And in regard to the spirit of the principles laid down in the Mandate, that accords with an expression which, the Court will recall, was used by the United Nations Special Committee on Palestine.

General Smuts proceeded to add something which had not been contained in the statement to the last Assembly of the League, when he said this:

> "In particular the Union would, in accordance with Article 73, paragraph *(e)*, of the Charter, transmit regularly to the Secretary-General of the United Nations 'for information purposes, subject to such limitations as security and constitutional regulations might require, statistical and other information of a technical nature relating to economic, social and educational conditions' in South West Africa."

That is at page 54 of the Counter-Memorial **(II)**.

Mr. President, I demonstrated yesterday, and the Applicants have conceded, that the submission of information in accordance with Article 73 *(e)* of the Charter does not amount to report and accountability as contemplated in Article 6 of the Mandate, and that it does not involve supervision as that term was understood in the mandates system.

I demonstrated, Mr. President, in relation to the Australian statement at the last session of the League Assembly, that an attitude of being obliged to send the limited information under Article 73 *(e)* is necessarily inconsistent with the view of being under the more extensive and onerous obligation of reporting and accounting under the Mandate.

General Smuts' statement is, therefore, very significant in that on this first occasion after the dissolution of the League on which any South African representative ever said anything to any of the international organs on the question of reporting, it was brought directly into line with the provisions of Article 73 *(e)* of the Charter. He did not use the word reporting—he said that the Union would "in accordance with Article 73 *(e)* ... transmit regularly to the Secretary-General ... for information purposes" this limited information.

The statement of General Smuts was ambiguous in one respect, Mr. President, when read in its full context, and that was in the use of the phrase "in accordance with"—"in accordance with Article 73 *(e)* of the Charter". That may have meant one of two things. It may have meant that General Smuts was expressing a contemplation that there

was, in law, an obligation on the Union Government to act in accordance with that Article in respect of South West Africa, as long as it remained outside trusteeship. That is one possibility. The other possibility is that he was merely indicating something which he would do voluntarily, although not obliged thereto, and that the type of information which he would give, would be of the same nature as, and of the same kind as that referred to in Article 73 *(e)*. That is, as I say, the ambiguity inherent in the use of this expression "in accordance with Article 73 *(e)*".

This ambiguity was cleared up in later statements made in regard to this attitude of the South African Government by its representatives at the United Nations. It was then made clear that the latter of these two alternatives was what was intended. But that is not my point for the moment.

What is important for my present purposes is this, that the mere fact that General Smuts indicated that there would be no reporting and accounting beyond this limited extent to which he was referring here, that in itself, Mr. President, indicated an attitude entirely inconsistent with acceptance of an obligation of reporting and accountability, and it intimated at the same time, in fact, that there would be no such reporting and accounting under the Mandate, with the United Nations as the supervisory organ.

This factor is of fundamental importance in assessing what Respondent's statements and actions during the time under review amounted to and what significance is to be attached thereto. The statement therefore, Mr. President, entirely refutes the assertion by the Applicants that by the end of 1946 Respondent had not at any time indicated a view that the United Nations had no supervisory authority over the Territory.

The statement is also important because of the time at which it came. It was the very first occasion after the dissolution of the League upon which it was appropriate for the Respondent to say anything on the subject at all—upon which it could be said to have become incumbent upon the Respondent to say anything to international organs. It was barely six months—it was a little more—after dissolution of the League that the statement came. It came after the submission of the application for incorporation of South West Africa—of the proposal in that regard—which had come under covering letter of 17 October, the Court will recall. That was only about six months after the dissolution of the League, and the statement to which I have referred came in the debates which followed upon the submission of that proposal to the United Nations. It came in the very next month—in November 1946.

After the dissolution of the League, Mr. President, the Respondent's first concern in respect of South West Africa was to bring this application, or this proposal, in regard to incorporation, before the General Assembly as soon as possible and it did so. It did so at the very first opportunity, that being when the General Assembly met again in the fall of 1946, and it was, as I say, in relation to this very proposal during the debate, when the question arose in the Fourth Committee: "Now suppose the application for incorporation is not acceded to, what are you then going to do?" And we get this reaction from General Smuts that there was no obligation to submit a trusteeship agreement and that the intention of his government was to proceed with the status quo—to administer the Territory in accordance with the principles ot the Mandate—in the spirt of those principles—and, in addition, he added that there would be this reporting

—this submission of information of a limited character—under Article 73 *(e)*.

The later attitude, Mr. President, expressed in a letter of July 1947, to which I shall refer, and in the statements by the South African representative, Mr. Lawrence, to the United Nations in September and in November of that year, was entirely consistent with the attitude taken up by General Smuts.

Mr. President, this consistency of the attitude of the Respondent appears more clearly, when we have regard to these various facts mentioned by the Applicants in support of their statement to the contrary—their statement that Respondent had on several occasions indicated its understanding that the United Nations had supervisory authority. When those statements are analysed it will be found in each instance, Mr. President, that they have no bearing whatsoever on this question of supervisory authority at all.

The Applicants appear to argue that inasmuch as the Respondent had placed its proposal regarding the incorporation of South West Africa before the General Assembly for judgment the Respondent had, therefore, thereby recognized that the United Nations had supervisory powers over the Mandate. That appears to be their argument. Now this contention, in our submission, is entirely unfounded for the reasons which I gave this morning as to the distinction between the two concepts —the concept of submitting to supervision by an international organization, and the concept of approaching that organization with a view to agreement about the future status of a territory. The object of Respondent's proposal for incorporation to the General Assembly was very clear in the context. It was to obtain agreement between the Respondent and the United Nations to a change in the status of South West Africa.

The Court will recall that it was contemplated in the last resolution of the League Assembly that "other arrangements may be agreed" upon between the United Nations and mandatories as to the future of mandated territories. That very contemplation, coming as it did from a unanimous decision of the Assembly of the League, indicated a view that such a course would have effective results in practice; that if and when there should be agreement between the mandatories and the United Nations on points of that nature in regard to the future status of mandated territories, then that would be a result that would from a practical point of view be effective, in that it would be recognized by other members of the international community.

And therefore, Mr. President, it was quite natural to regard the United Nations as one of the competent international organs for that purpose. I might point out that when General Smuts spoke of the "competent international organs", he was speaking in general—he was speaking of what the contemplation had been in wartime, before the creation of the United Nations Organization and while the League was still the competent international organ; but he spoke in general because he was really speaking *ex post facto* of what the contemplation had been before, namely that there could, for purposes of bringing about a change of status of this nature, be a change in competent international organs, and there had, in his view, occurred such a change, there being a competent organ, that is, competent in the sense that when agreement was reached with that organ, an effective new arrangement would come into effect—effective in the sense that it would be recognized by other members of the

international community. And I have pointed out that this was the very way in which the matter was put by the Respondent's statement to the League on the subject in April of 1946.

And Mr. President, the very fact that the Respondent, through General Smuts, in the debates on this same topic, indicated that it recognized no supervisory authority on the part of the United Nations, that it would merely submit information in accordance with Article 73 *(e)* —that in itself refutes the suggestion that Respondent saw, or was understood as seeing, its submission of the incorporation proposal as a submission to United Nations supervision. Surely the evidence on a subject of that nature is to be viewed as a whole, and not in its pieces the whole here being that there is a submission of the incorporation proposal, and in the debates on it the South African representative, the Prime Minister, intimates clearly that there is no submission to United Nations supervisory authority. That part of the evidence surely cannot be ignored, and the other part relied upon as if that carried any intimation of an acceptance of the United Nations as a competent authority from a supervisory point of view.

But the Applicants, Mr. President, by a process of what one might call telescopic reasoning, seek to apply a passage in the 1950 Advisory Opinion in such a way as to find support for their contention—in such a way as if something in support of their contention had been stated in the 1950 Opinion. I shall have to refer the Court to the relevant passages, both in the Opinion and in this argument of the Applicants, to trace how this particular point was made by them and to analyze its value or lack thereof.

The Court will recall that there occurs in the 1950 Opinion at page 142 the following passage:

> "By thus submitting the question of the future international status of the Territory to the 'judgment' of the General Assembly as the 'competent international organ', the Union Government recognized the competence of the General Assembly in the matter."

Now, Mr. President, that "matter" with which the Court was dealing in this passage was the matter of modification of the status of South West Africa. That was the "matter" dealt with by the Court as an entirely separate question, put to it with a view to its advisory opinion—an entirely separate question from that of continued supervision under Article 6 of the Mandate. The question of the modification of the status of the Territory was dealt with in the Opinion at pages 141 to 143. It is dealt with under a heading of its own, namely Question *(c)*, as had been put by the United Nations to the Court. Question *(c)* read:

> "Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?"

and it is in the course of discussion of that question that the passage occurs which I have read.

The other question, namely whether the Union of South Africa was obliged to submit to supervision by the United Nations after the dissolution of the League, is discussed in a much earlier portion of the Opinion, at pages 136 to 138, and in between came the discussion of certain other

questions, particularly the question whether there was an obligation to submit to a trusteeship agreement.

So, Mr. President, the words in the passage "competence of the General Assembly in the matter" therefore had to do only with modification of status and nothing with the question of supervisory organs.

Immediately after this passage the Court proceeded, in this later part of its Opinion dealing with modification of status, to say the following—I read at the top of page 143:

> "The General Assembly, on the other hand, affirmed its competence by Resolution 65 (I) of December 14th, 1946. It noted with satisfaction that the step taken by the Union showed the recognition of the interest and concern of the United Nations in the matter"—

still, Mr. President, therefore, "in the matter"—this same matter of the question of modification of the status of the Territory.

Now we find that the Applicants, by a peculiar process of piecemeal reference, transplant these statements and findings of the Court onto the question of supervisory powers—the question in respect of which they were not intended to be stated by the Court at all. At page 154, *supra*, of the verbatim record the Applicants say this—that "The submission of the question of the termination of the Mandate to the General Assembly is of particular significance". They then quote in this context the passage from the 1950 Opinion at page 132, I have read, which indicated that the Union, by submitting the matter to the judgment of the Assembly, recognized the competence of the Assembly in the matter. On the very next page of the verbatim record this passage is again quoted, but now we find it is quoted in a different context—it is quoted in the context of a submission made regarding the lapse or existence of the Mandate and of supervisory authority. I would like to read that to the Court—the introductory reasoning which leads up to the quoting of this passage again at this particular page. My learned friend, Mr. Moore, is speaking:

> "Since, in the autumn of 1946, Respondent had not yet begun to argue that the Mandate as a whole had lapsed, or that the United Nations had no supervisory authority over its administration of South West Africa, the only reasonable inference to be drawn is that reached by this Court in 1950, which is: [and then follows the quote again]
>
> > 'By thus submitting the question . . . the Union Government recognized the competence of the General Assembly in the matter'."

Later in that same record, Mr. President, at page 158 of the verbatim record, the Applicants then refer to General Assembly resolution 65 (I), which featured in this further passage which I have read to the Court regarding the question of modification of status. And the Applicants there say this:

> "A final observation concerning this point is that the General Assembly, by resolution 65 (I), '. . . affirmed its competence . . .' over the mandated territory of South West Africa."

These last words, Mr. President—"over the mandated territory of South West Africa"—are of course the Applicants' own words, but just prior to those they had put in quotes the words ". . . affirmed its competence . . .", being the words used by the Court in this different context of competence regarding a possible modification of status. It will be

observed therefore that something said by the Court in the 1950 Opinion regarding modification of status is gradually modified into "competence over the mandated territory of South West Africa". But this, as the Court will see, is only a half-way stage—the process goes further, and the full circle is joined at page 159, *supra*, of the verbatim record. Here the Applicants say this:

> "Whereas by resolution 65 (I) of 14 December 1946 the General Assembly 'affirmed its competence' (to use the phrase of this Court) over the administration of South West Africa, 'this competence was in fact exercised by the General Assembly in resolution 141 (II) of November 1st, 1947 . . .' " [and they say] "(see the 1950 Opinion at page 137)."

Now, Mr. President, if we then look at the Advisory Opinion at page 137, it becomes clear immediately from the page reference that that falls in the earlier part of the Opinion dealing with the question of supervisory jurisdiction in respect of South West Africa. As I indicated to the Court before, that part of the Opinion appears on pages 136 to 138, and that is where we find this statement by the Court to the effect that by resolution 141 (II) of 1 November 1947 the General Assembly had exercised a competence—a competence relating, in that context of the Court's reasoning, to the question of supervisory powers.

And so, Mr. President, statements from the portion of the Opinion dealing with the change of status have been transplanted into, and linked with, the statement in the different portion dealing with supervision, to produce what I submit to be an entirely distorted result, which is now imputed to the Court as if it were the reasoning of the Court. In fact, the statement of the Court regarding competence exercised by resolution 141 (2) had no connection with the nature of the competence which the Court later, and in an entirely different part of its Opinion, found to have been affirmed by the General Assembly through its resolution 65 (I) of 14 December 1946.

The Applicants have used this device of interposing their own words —the words being "over the administration of South West Africa"— between the two unrelated phrases taken from the Court's Opinion; and they thereby create the misleading impression that the Court in its 1950 Opinion expressed the view that the General Assembly, by its resolution 65 (I), regarding the incorporation proposal, affirmed competence over the administration of South West Africa, that is, in the sense that the United Nations had supervisory authority. The Court never said that. By this process—to which I could give a name, but I would rather desist from doing so—something is imputed to the Court which is the Applicants' contention, but which was certainly never said by the Court. The Court could not have expressed any such opinion, because it was clear that resolution 65 (I) had nothing to do with supervision of mandated administration. The resolution merely stated that the General Assembly was unable to accede to the proposal for incorporation, and that it recommended that South West Africa should be placed under the trusteeship system. There was nothing in that resolution to indicate that the General Assembly was regarding itself as possessing supervisory jurisdiction in respect of South West Africa.

Apart from this process relating to the Court's reasoning in 1950, Mr. President, the Applicants in our submission in fact advance no

argument regarding Respondent's proposal for incorporation, in support of their contention that Respondent had indicated its understanding that the United Nations had supervisory authority. Those words, in the Applicants' contention, we find in the verbatim record at page 158, *supra*. There is nothing which they advance in support of that contention that would indicate an understanding of that kind. The only argument we find is this process of reasoning with reference to the Court. They do, however, Mr. President, seek to make the point that the debates in the Fourth Committee of the General Assembly in the autumn of 1946 "indicate clearly that the general understanding of the Members of the United Nations and of the Government of the Union of South Africa was that the Mandate was still in force and that the United Nations had general supervisory authority over Respondent's administration of the territory". That is in the verbatim record at page 157, *supra*; and in support of this statement they quote three short extracts from speeches made in the Fourth Committee during November 1946.

The first extract is from the speech of General Smuts, to which I have already referred. That is the extract in which he referred to the fact that the people of South West Africa wanted incorporation, that the Union Government could not ignore that wish and in which the words relied upon by the Applicants appear, viz. that the Government "had no alternative but to bring their wish before the General Assembly".

The other two extracts were from speeches made by Mr. Dulles of the United States of America and Mr. Liu Chieh of China. We find the references in the verbatim record at page 157, *supra*.

Now, Mr. President, in neither of these two speeches, nor in the address of General Smuts, was any view indicated regarding supervisory authority or supervisory functions. Mr. Dulles merely stated that "the information at the disposal of the General Assembly did not enable it to approve the incorporation of the mandated territory of South West Africa". How that could be said to have any bearing on the question whether there was a conception that the General Assembly as at that time was possessed of supervisory jurisdiction in respect of South West Africa, I simply do not understand.

Mr. Liu Chieh of China expressed the view that "South West Africa should be placed under the Trusteeship System rather than continued as a Mandate". How that could have any bearing on the question of supervisory jurisdiction, I do not know.

General Smuts, in using the expression that the Union Government had no alternative but to bring their wish before the General Assembly, was speaking in the context of what the wishes of the people—inhabitants—of South West Africa were. He was indicating that there were these strong wishes on their part, and he, as representing the mandatory government, therefore could not sit still about the matter; something had to be done about it. In that sense he had no alternative but to take steps for incorporation that would be internationally recognized, and therefore to adopt the course which he was adopting in bringing the matter before the General Assembly. Surely in the context nothing more emanates from that statement than this general purport, and how that can be said to have any bearing on a question of supervisory jurisdiction is again something which I do not understand.

Not one of these speeches, therefore, Mr. President, in any way supports the Applicants' contention of a general understanding that the

United Nations had general supervisory authority over Respondent's administration of the territory. We shall later show that in fact the general understanding among Members of the United Nations was indeed the very opposite, but I am still concentrating for the time being on the acts and statements of the Respondent in this particular context in order to see whether they afford any basis whatsoever for these arguments on the part of the Applicants.

Now, in the context of this argument of the Applicants regarding the significance to be attached to this referring of the incorporation proposal to the United Nations judgment in 1946, the Applicants advert to something which they call "The near identity of Respondent's actions with regard to proposals for incorporation, taken in 1935 under the League . . ." That is the end of the quote from the verbatim record at page 155, *supra*.

This may be a convenient place, therefore, to deal with this matter of what happened in 1935, in order to indicate how completely the Applicants can take events out of their context; put a distorted significance upon them, and then use that distorted significance as a basis upon which to build an argument.

My learned friend, Mr. Moore, on behalf of the Applicants, stated as follows in the verbatim record at page 139, *supra*:

> "In 1935 Respondent put before the Permanent Mandates Commission a proposal for the incorporation of South West Africa as a fifth province of the Union, but when met with a critical attitude by most of the members of the Commission, decided not to go ahead with its plan for incorporation."

I stress these clear words, Mr. President: the Respondent put before the Permanent Commission a proposal for incorporation, but when met with a critical attitude Respondent decided not to go ahead with its plan for incorporation.

In the verbatim record we find no authority quoted for this proposition stated by my learned friend, Mr. Moore, and no authority was subsequently furnished by the Applicants to us. Later on the same day, Mr. President, my learned friend, Mr. Moore, referred to a statement by the South African representative to the Permanent Mandates Commission. Quoting Mr. Moore's words, the statement was made "in response to a critical reaction from the Commission on the proposed incorporation of South West Africa as a fifth province of the Union". That is in the verbatim record at page 155, *supra*.

Then this statement made by Respondent's representative himself is quoted from the Counter-Memorial, **IV**, page 80. I need not read that statement now because it is not relevant. My point concerns Mr. Moore's phrase, "the proposed incorporation of South West Africa".

Mr. President, when regard is had to the facts set out in the pleadings, with full reference to the relevant authorities, it immediately becomes clear that there is no justification for using this language at all—of talking of any proposal for incorporation on the part of the South African Government at the time, of talking of any plan for incorporation at the time—of talking of any proposed incorporation of South West Africa as a fifth province of the Union as at that time.

I now give the Court brief references to what the pleadings contain on this point. In the Memorials, the Applicants stated that "the Union gave

indications at an early date of its intention to incorporate the territory of South West Africa as a fifth province". That is in the Memorials, **I**, page 39. The Applicants then referred to a debate during the sixth session of the Permanent Mandates Commission, and the Memorials continued: "Thereafter, the proposal frequently drew the Commission's attention and, in 1934, the Legislative Assembly of South West Africa adopted a resolution contemplating the incorporation of the Territory." That is still in the Memorials, at page 39.

Then followed, Mr. President, in the Memorials, a brief discussion of the events in the Permanent Mandates Commission, of the appointment of the Van Zyl Commission by the Respondent Government, of the findings of the Van Zyl Commission, of the reaction of the Union Government thereto, and of the attitude of the Permanent Mandates Commission. All this we find in the Memorials, **I**, at pages 39-40.

We found it necessary to deal in our Counter-Memorial with these facts, because of the impression created by the Applicants' exposition that there was a proposal or plan for incorporation at the time *on the part of the Union Government*. The references to our dealing with the matter are to be found in the Counter-Memorial, **II**, pages 29-31, and **IV**, pages 78-81. And what we stated in regard to this 1935 episode was as follows. Firstly, we pointed out that during 1934 the Legislative Assembly of South West Africa, as a reaction to certain Nazi activities in the territory, adopted a resolution which urged, *inter alia*, that South West Africa "be administered as a fifth province of the Union, subject to the provisions of the . . . Mandate". Those were the words forming the gist of the resolution adopted in South West Africa by its Legislative Assembly. We give that in the Counter-Memorial, **IV**, page 79.

We pointed out next that during 1934 the Permanent Mandates Commission discussed this resolution, merely because it had come to their attention, and not because any proposal in that regard had been put before it by the Respondent Government. We pointed out that although opinions between individual members of the Commission differed, the majority who spoke tended to regard such an arrangement as being incompatible with the Mandate. As I say, individual members differed on that point, but the majority who took part in that discussion appeared to think that such an arrangement would be incompatible with the Mandate.

That we give at the same page, but we also pointed out that the Commission's resolution was merely to this effect. It was—

> ". . . to [reserve] its opinion as to the compatibility of the course proposed by the Legislative Assembly with the mandate system until it had been informed in due course of the point of view adopted by the mandatory Government in this connection and been acquainted with all the factors of the problem". (**IV**, p. 80.)

Again, this is an indication of the fact that the Union Government did not indicate what its point of view was and, whether it intended doing anything about the matter. The discussion merely emanated from the fact of the passing of this resolution by the Legislative Assembly of South West Africa.

We pointed out next that, in 1935, the South African representative told the Permanent Mandates Commission that the Constitution Commission had been appointed—that was the Van Zyl Commission—that

the purpose of that appointment was, *inter alia*, to consider the future constitution of South West Africa, and that South Africa, and I quote from his words, "would never take any action in this respect until it had first communicated its intentions to the Mandates Commission itself". The Permanent Mandates Commission welcomed this statement, which we find in the Counter-Memorial, **II**, p. 30, and **IV**, p. 80.

The Constitution Commission, or Van Zyl Commission, then expressed the view that there was no legal objection to the administration of South West Africa as a fifth province of the Union subject to the terms of the Mandate. The Union Government endorsed this legal opinion but, Mr. President, it nevertheless, notified the Permanent Mandates Commission that it felt "that sufficient grounds have not been adduced for taking such a step". That we give in the Counter-Memorial, **IV**, p. 81.

All we have at this stage is a legal opinion to the effect that it would be competent, and not inconsistent with the Mandate, to administer South West Africa as a fifth province of the Union. Nevertheless, the Union Government did not intend to take any active steps in that regard because it found that, from a practical point of view, sufficient grounds had not been adduced for taking such a step.

When this was communicated to the Permanent Mandates Commission, the Commission expressed no view on—

> "... a method of administration the scope of which it has had no opportunity of judging and the adoption of which, according to the statement of the mandatory Power, is not contemplated". (**II**, p. 31.)

Consequently, the Permanent Mandates Commission confined itself "to making all legal reservations on the questions". *(Ibid.)*

So that exposition is crystal-clear. There was no suggestion of any proposal by the South African Government, and no suggestion of any plan for incorporation. In so far as there was any discussion in this regard, it emanated from a resolution of the South West Africa Legislative Assembly on the question of possible administration, under the Mandate, of South West Africa as a fifth province of the Union. Views were expressed by the Constitution Commission as to the legality, or otherwise, of a proposal of that kind, but there was no proposal whatsoever even to put that into effect, let alone to have any incorporation of South West Africa into the Union.

Now, Mr. President, we find that after we had given this exposition, there was no challenge of it in the Applicants' Reply at all. Indeed, at page 252 of the Reply, **IV**, there is a reference to a statement made during the 26th session as a reaction to what is correctly stated there to have been "a resolution of the Legislative Assembly of South West Africa ... advocating the incorporation of South West Africa as a fifth province of South Africa 'subject to the provisions of the said Mandate' ".

So, there is no contesting of our survey at all, and yet Applicants now come forward with what I have read out to the Court in this regard from their oral statement. In particular, Mr. President, no "proposal" as alleged was "put before the Permanent Mandates Commission"; secondly, the actual proposal, the resolution of the Legislative Assembly, did not involve the incorporation of South West Africa, but merely a particular method of administering it under the Mandate, and, thirdly, it follows that the Respondent did not decide, in the Applicants' words, "not to go ahead with its plan for incorporation".

It is, with the greatest respect, difficult to understand how Applicants can make such completely inaccurate allegations at this stage, after the full discussion of the incident in the pleadings, in which our version was apparently accepted and not challenged by the Applicants in their Reply, and without putting any fresh authority before the Court for the version which is now given to it.

It need hardly be said, Mr. President, that on this true view of the events of 1935 they in no way lend support to the contentions now advanced by the Applicants regarding the significance and effect of Respondent's submission in 1946 to the United Nations of its proposals regarding incorporation of South West Africa.

The Applicants say that the Respondent's statement in 1935 to the Permanent Mandates Commission, namely that it "would never take action in this respect [that is, to administer South West Africa as a fifth province] until it had first communicated its intentions to the Permanent Mandates Commission itself" (**IV**, p. 80) and those are the Applicants' words—was a recognition on Respondent's part of the Permanent Mandates Commission as "the competent international organ". (P. 155, *supra*.) They argue from there that submission of a similar proposal to the General Assembly of the United Nations in 1946, must be construed as being a recognition, on Respondent's part, of the General Assembly of the United Nations as the competent international organ.

Mr. President, surely the analogy is completely false, and there is no substance in this comparison at all, quite apart from the fact that there was, indeed, no proposal regarding incorporation whatsoever in 1935.

The Permanent Mandates Commission, it will be recalled, had, in the first place, itself no authority to take decisions regarding mandates; it could not impose its will upon any mandatory; it was an advisory body advising the Council of the League, which was the supervisory body. For that reason alone, the analogy fails. But it fails, Mr. President, for a much more serious reason, and that is that in 1935, there was no question involved of a change of status. The debates which arose in the Permanent Mandates Commission really concerned the question of whether such administration of South West Africa, as a fifth province of the Union, was compatible with the present status of the territory as a mandated territory. It was a legal question, therefore, namely whether, if there was to be such administration, that could occur within the framework of the existing status of South West Africa as a mandated territory, or whether legally a change of status would be involved. That was the subject of debate in the Permanent Mandates Commission. But the matter never came to any proposal or to any consideration being given to the possibility of a change of status, for the very reason that the Union Government never made a practical proposal to the effect that it was going to administer the territory as a fifth province of the Union.

The Union Government treated that question, which was purely one of desirability, as a matter of policy. It decided at that stage that there was no such desirability. Therefore, at that particular time the matter was purely one relating to discretion on the part of the mandatory and, in so far as it may be relevant, of supervision in respect thereof on the part of the supervisory organs of the League. This was, therefore, purely and simply a question, to the extent to which it had developed at that particular stage, which could only involve a matter of supervision and not a question of a change of status. It had never come to a situation where

there was acceptance on all sides that something could only be done by effecting a change of status, so that there was a proposal to be considered for a change of status.

There is, therefore, Mr. President, no analogy whatsoever between the two events, and nothing which can help the Applicants in their contention that, by bringing before the United Nations General Assembly in 1946 the question of a possible change of status of South West Africa, anything was being suggested or conveyed by the Union Government regarding a question of supervision.

Next, Mr. President, we consider the question of Respondent's conduct after its proposal for incorporation was rejected by the General Assembly.

The Applicants introduced this part of their argument with the following statement:

> "Although Respondent in September 1947 indicated for the first time a view that the United Nations had no supervisory authority over South West Africa, statements made by Respondent up to that time, during the year 1947, indicated precisely the opposite view." (P. 158, *supra.*)

Mr. President, in support of this statement the Applicants cite passages from two communications addressed by Respondent to the Secretary-General of the United Nations in the year 1947.

The first communication was a letter dated 23 July 1947 in which Respondent replied to the General Assembly's invitation in resolution 65 (I) of 14 December 1947 to propose a trusteeship agreement for South West Africa.

The Court will recall that there was that resolution 65 (I) in response to the incorporation proposal, inviting South Africa to submit a proposed trusteeship agreement for South West Africa, and this letter was written in response to that invitation.

Respondent in its letter stated that it could not ignore the wishes of the inhabitants of South West Africa who wanted incorporation, and Respondent said:

> "In the circumstances, the Union Government has no alternative but to maintain the *status quo* and to continue to administer the Territory in the spirit of the existing Mandate." (P. 159, *supra.*)

Another passage in the letter, which was quoted for their purposes by the Applicants at the next page of the verbatim record, read as follows:

> "It will, however, be recalled that the interests of the native inhabitants were fully provided for with specific safeguards under the Mandate and that the administration of South West Africa and the implementation of those safeguards have been uniformly satisfactory ever since the inception of the mandatory system. They feel confident, therefore, that their continued administration of the Territory in the spirit of the Mandate will equally merit the satisfaction of the United Nations.
>
> To that end the Union Government have already undertaken to submit reports on their administration for the information of the United Nations."

It is on the basis of these quotations, Mr. President, that the Applicants advance the contention that Respondent evidenced a recognition of the supervisory authority of the United Nations. In Respondent's submis-

sion, the passages do not bear out that contention whatsoever. The important fact of this letter—the crucially important fact—is that when it speaks of reports—"the Union Government have already undertaken to submit reports on their administration for the information of the United Nations"—the reference is to the speech by General Smuts in November of the previous year where he made it clear that those reports would be furnished in accordance with Article 73 *(e)* of the Charter. That was, in fact, the only previous occasion on which anything at all had been said on the subject of submission of reports and that was, in fact, the occasion which is identified by this language—the undertaking "to submit reports on their administration for the information of the United Nations".

As I explained earlier, Mr. President, there could, in terms of this explanation of General Smuts, be no accounting and supervision as had been the case during the time of the League of Nations, but merely submission of certain information for a limited purpose, and this is *precisely* and *all* that was confirmed by the letter of 23 July 1947. The letter, therefore, does not in the least support this contention of the Applicants regarding recognition of the supervisory authority of the United Nations.

In fact, Mr. President, it is interesting to note, as we go along, the links between these various relevant and crucial statements on behalf of the Respondent—first, the statement at the final session of the League, of an intention to continue with the present administration for the benefit of the inhabitants, in accordance with the obligations of the mandate, then, a reference by General Smuts in November 1946, back to what had been stated on that occasion, and statement that there would be a maintenance of the status quo and that he intended also to send reports in accordance with Article 73 *(e)*, and, finally, this letter of 23 July referring back again to the previous statement by General Smuts where he had made it clear that his only reference to giving information to the United Nations at all was in accordance with Article 73 *(e)*.

[Public hearing of 7 April 1965]

Mr. President and honourable Members, I was dealing at the conclusion yesterday with the subject of Respondent's conduct after its proposal for incorporation was rejected by the General Assembly. I referred in that regard to an argument advanced by the Applicants in the Oral Proceedings to the effect that statements by Respondent, up to September 1947, indicated precisely the opposite view. (Pp. 158-159, *supra*.) As I pointed out, this statement of the Applicants sought to support this argument by reference to two communications addressed by Respondent to the Secretary-General of the United Nations in the year 1947.

The first one was the letter of 23 July 1947, with which I have dealt—the letter responding to the invitation of the Assembly in resolution 65 (I) to submit a trusteeship agreement for South West Africa. I submitted that this letter does not support the Applicants' contention regarding recognition of the supervisory authority of the United Nations, but that, on the contrary, the letter identified itself with the previous statement by General Smuts in this regard, in which he had made it quite clear that the information to be furnished would be of the limited nature in accordance with Article 73 *(e)* of the Charter.

The second communication, Mr. President, relied upon by the Applicants in our submission, likewise does not support their contention.

That is the communication dated 22 September 1947, referred to by the Applicants at page 159, *supra*, of the verbatim record. All that that letter intimated was that the Legislative Assembly of South West Africa had fully discussed General Assembly resolution 65 (I) of 14 December 1946 and had passed a resolution expressing appreciation of and thanks for the firm stand taken by General Smuts before the United Nations Organization in connection with the proposed incorporation of South West Africa. It added, Mr. President, that the Legislative Assembly—

> "trusts that the United Nations Organization will grant the wishes of the large majority of the inhabitants of this Territory, European as well as non-European". (P. 159, *supra.*)

Now, Mr. President, this resolution 65 (I) of the United Nations dealt, of course, only with the proposal in regard to incorporation. It made no mention of supervision of the administration of South West Africa. The discussion and contents of the resolution by the Legislative Assembly and its expression of its appreciation of and thanks for the stand taken by General Smuts can, therefore, have no bearing whatsoever on the question of supervision.

Perhaps the Applicants' contention is that the sting lies in the tail of this resolution, where the Legislative Assembly said that it trusted that the United Nations Organization would grant the wishes of the large majority of the inhabitants. But, Mr. President, even that, at the most, contemplates a competency on the part of the General Assembly to grant such a request—a request relating to the future status of the Territory—in other words, again a matter which is totally unrelated to the subject of a supervisory power on the part of the General Assembly.

We now come, Mr. President, to statements made on South Africa's behalf, as from September 1947, which, on the Applicants' representation of the situation, are to be seen as constituting a complete *volte face* on the part of the Respondent. It will be recalled, Mr. President, that the Applicants say that it was only in September 1947 that Respondent "indicated for the first time a view that the United Nations had no supervisory authority over South West Africa". (P. 158, *supra.*)

Later the Applicants put this point as follows: "It was not until the autumn of 1947 that supervisory authority of the United Nations was questioned." (P. 166, *supra.*)

Now, Mr. President, this first statement is factually incorrect, as I have already demonstrated—the statement to the effect that it was in September that Respondent first indicated a view that the United Nations had no supervisory authority.

The second statement, namely that it was not until the autumn of 1947 that this supervisory authority of the United Nations was questioned—is not only incorrect in the same respect, but gives an incorrect impression of what actually happened when the statement to which the Applicants refer, was made. The impression created, Mr. President, is that the United Nations was already exercising, or was seeking to exercise, supervisory authority over the Territory of South West Africa and that South Africa, after at first agreeing to, or acquiescing in, this situation, or remaining silent about it, then turned round and questioned that authority. Mr. President, in fact, nothing of that kind occurred. Up to September 1947 and, indeed, until 1948, as we shall show, there had been no expression of view, either by Respondent, or by any other member of the

United Nations, that the United Nations had supervisory authority in respect of South West Africa—none whatsoever, either from Respondent's side or from the side of any other Member of the United Nations. In these circumstances, in our submission, there could have been no questioning of authority in September 1947 and, in fact, the statement which the Applicants have in mind did not take the form of a questioning of authority at all. I shall give the Court the sequence of events and the link between these events in a somewhat fuller form than we gave them in the pleadings, particularly in order to meet this argument—this presentation of the facts—on the part of the Applicants.

The matter began in this way: A question was asked by the representative of Denmark at the thirty-first meeting of the Fourth Committee of the General Assembly on 25 September 1947, and I wish to read in that regard from the Summary Records, General Assembly, *Official Records*, Second Session, Fourth Committee, page 8.

> "Mr. Lannung (Denmark), considered that there was no legal obligation on the Union of South Africa to submit a trusteeship agreement. He noted with appreciation statements by the Government of the Union of South Africa that the Territory would be administered in the spirit of the Mandate. He asked the representative of the Union of South Africa to be good enough to explain certain passages of document A/334, especially with regard to the *status quo* and the transmission of reports, to indicate if possible, what was in the mind of his Government as to the procedure to be followed in examining the information transmitted, and to state whether the Union of South Africa would agree to the submission of petitions."

May I point out, Mr. President, the context of this debate. It was concerned, *inter alia*, with document A/334 (Fourth Committee, Second Session, p. 133), i.e., the letter of 23 July 1947 which we discussed yesterday—the very letter on which the Applicants rely as indicating, in their words, "precisely the opposite view". (Pp. 158-159, *supra*.) The Court will recall that that letter was the one to which I also referred when I commenced this morning—the letter written in response to the invitation of the General Assembly that a trusteeship agreement should be submitted in respect of South West Africa. It was in that letter, after the request had been declined for reasons given therein, that the statement was made that the status quo would be maintained and that, with reference to the question of reporting, the Union had already indicated its willingness to submit reports for the information of the United Nations. The fact that this document A/334 was this very same letter appears, Mr. President, from this same volume of the Summary Records of the Fourth Committee, to which I have just referred, at page 134. There the document is set forth as an annexure in that volume.

That was the subject of discussion. It was the fact that South Africa was not acceding to the invitation of the General Assembly to submit a trusteeship agreement and its intimation that it would maintain the status quo but submit reports for the information of the United Nations. That, then, was the subject-matter on which Mr. Lannung of Denmark asked for further clarification, remarking that, in his view, there was, also, no legal obligation on the Union to submit a trusteeship agreement. Mr. Lawrence, on behalf of the South African Government, replied two meetings later, two days later, i.e., at the 33rd Meeting of the

Fourth Committee on 27 September 1947. There is, Mr. President, a Summary Record of his reply in the same volume to which I have just referred, at pages 15-16. The extract which we quote in our Counter-Memorial, **II**, at page 57, is not an extract from this Summary Record. It is a fuller report which we found in a report of the Fourth Committee to the General Assembly. That report was an annexure in the Records of the Plenary Sessions for that period, and we give the reference in our footnote 1 at page 57 of the Counter-Memorial (**II**); the reference is *U.N. Doc.* A/422, in *G.A., O.R., Second Sess., Plenary Meetings*, Vol. II, p. 1537. I should like for present purposes to refer the Court to both the Summary Record and this more detailed version of what Mr. Lawrence said. From the Summary Record at page 15 it appears clearly that the information was supplied in reply to the request of the Danish representative at the 31st Meeting regarding clarification of Document A/334. Now, for the fuller version of what Mr. Lawrence said, I should like to refer the Court to the other source, which I have mentioned: the annexure in the Record of the Plenary Meetings. It starts at page 1537, and is a report of the Fourth Committee to the General Assembly. I read at page 1538:

> "At the thirty-third meeting of the Committee on 27 September 1947, in response to a request by the representative of Denmark for amplification of the proposal to maintain the *status quo* in South West Africa and to continue to administer the Territory in the spirit of the Mandate, particularly with regard to the United Nations and its organs, the representative of the Union of South Africa explained that the annual report which his Government would submit on South West Africa would contain the same type of information on the Territory as is required for Non-Self-Governing Territories under Article 73 e of the Charter. It was the assumption of his Government, he said, that the report would not be considered by the Trusteeship Council and would not be dealt with as if a trusteeship agreement had in fact been concluded. He further explained that, since the League of Nations had ceased to exist, the right to submit petitions would no longer be exercised, since that right presupposes a jurisdiction which would only exist where there is a right of control or supervision, and in the view of the Union of South Africa no such jurisdiction is vested in the United Nations with regard to South West Africa."

Mr. President, there was, therefore, nothing of the nature of questioning authority which was being asserted against the position of the Union of South Africa. It was purely a statement made in response to a request for clarification of a position which had already been stated in the earlier letter of 23 July (Document A/334), and every item in this statement was in response to that request.

I may in that regard point out, also, that this statement resolved the ambiguity to which I referred before, which was present in General Smuts' statement of the previous year, in November 1946, when he had said that information would be submitted in accordance with Article 73 *(e)*. The Court will recall that I pointed out that that did not make it clear whether General Smuts accepted that there was an obligation in law to deal with the situation in terms of Article 73 *(e)*, or whether he merely indicated that he would voluntarily, although not obliged to do so, act in accordance with Article 73 *(e)*—i.e., submit information correspond-

ing with that required under Article 73 *(e)*. That ambiguity is cleared up in this statement by Mr. Lawrence, in which he said that the information—the annual report—

> "would contain the same type of information on the Territory as is required for Non-Self-Governing Territories under Article 73 *(e)* of the Charter". (**II**, p. 57.)

That point is, if anything, made even clearer by one statement in the Summary Record. In the Record of the Fourth Committee deliberations to which I referred before, at page 16, we read this sentence:

> "The Union of South Africa did not claim that South West Africa was a colony, but it was willing to submit annual reports like those required for the Non-Self-Governing Territories under Article 73 *(e)*." (*G.A., O.R.*, 4th Committee, Second Session, at p. 16.)

In other words, he made it perfectly clear that there was no conception that the case fell under Article 73 *(e)* as a matter of law, but that to submit information of the kind as is provided for in Article 73 *(e)* would be a voluntary action on the part of the Government of the Union of South Africa.

So, Mr. President, there was no question here of United Nations supervisory authority being challenged or questioned in any way; this was merely an amplification of an attitude which had previously been expressed, and the way in which the explanation originated makes it perfectly clear that there is no substance whatsoever in the Applicants' suggestion of a change of front, or a change of ground, on the part of the South African Government. This was an explanation given in September 1947, some three months after the letter of 23 July—an explanation given on the first occasion that one was asked for as to exactly what was meant in that letter. It gave more details as to what the attitude conveyed in the letter was intended to mean.

Later, during that same session of the United Nations in November 1947, Mr. Lawrence had occasion to revert to this point, and he stated it in much the same way as before, but in slightly different words. In the Counter-Memorial, **II**, at page 57, we quote his statement in the General Assembly, as follows:

> "... the Union of South Africa has expressed its readiness to submit annual reports for the information of the United Nations. That undertaking stands. Although these reports, if accepted, will be rendered on the basis that the United Nations has no supervisory jurisdiction in respect of this territory they will serve to keep the United Nations informed in much the same way as they will be kept informed in relation to Non-Self-Governing Territories under Article 73 *(e)* of the Charter."

Again the position was made explicitly clear. I may just emphasize the wording of that first sentence: "the Union of South Africa has expressed its readiness to submit annual reports for the information of the United Nations." It is striking that the language is really of the same import as that contained in the letter of 23 July on that same point.

Upon analysis, therefore, Mr. President, it is in our submission clear that whatever conclusions may be drawn from Respondent's conduct over the years 1946-1947 as to its view regarding the continuation of the Mandate, the record shows that, with regard to the question of super-

vision, the Applicants are entirely wrong when they say, as they said in the verbatim record, at page 166, *supra*, that the relevant statements and actions of Respondent over the period "support the conclusion that ... the United Nations replaced the League as the supervisory organ over the Mandate". Indeed, Mr. President, in our submission the only conclusion which can be drawn from Respondent's actions and statements over that period points in the opposite direction and, as has been made clear in Respondent's pleadings, Respondent's attitude in this regard has been consistent throughout. We deal with this whole subject of later conduct on the part of the Respondent in the Counter-Memorial, **II**, pages 57-96, and there is no dispute between the Parties, as far as I can see, on the aspect of later conduct, except for a minor point with which I shall deal later. The essence of the dispute in this regard seems to centre around the period up to September 1947, Applicants' contention being that there was a change of attitude on Respondent's part in September 1947. For the reasons I have just given I submit that that contention is entirely without substance, that there is nothing whatsoever to support it.

Now, Mr. President, as to subsequent events, events subsequent to September 1947, it is not necessary to go into detail—I can very briefly refer to some of the salient features.

In September 1947 Respondent, in compliance with its earlier voluntary undertaking, submitted to the United Nations a document containing information regarding South West Africa. The information was of the type and of the limited nature mentioned in Article 73 *(e)* of the Charter. The document was referred to as a report, but it in no way resembled the report which Respondent had made in the life-time of the League in terms of Article 6 of the Mandate.

Indeed, Mr. President, when the report was examined by the Trusteeship Council, mention was made in the debates of the fact that that report consisted of only 56 pages, whereas, so the debates revealed, Respondent's report to the League Council in 1939, in compliance with Article 6 of the Mandate, had consisted of about 250 pages. We find that reference in the record of the Trusteeship Council's second session, 15th meeting, 12 December 1947, at page 483.

In addition, Mr. President, it was, as the Court is aware, customary during the life-time of the League of every mandatory to have a representative present at the deliberations of the Permanent Mandates Commission, when the annual report for the particular mandated territory was discussed.

Throughout the existence of the League, Respondent was always represented at such discussions, and, in fact, Respondent was responsible for introducing the practice of sending the Administrator of the Territory himself to represent the Mandatory at such discussions. But, Mr. President, when this information was submitted to the United Nations in 1947 there was, in this regard also, a markedly different attitude on the part of the Respondent; the Respondent declined to send a representative to attend the discussion in the Trusteeship Council.

All this was still in 1947, Mr. President. I mentioned yesterday the difference of opinion which appears to have arisen between the successive Governments—the Smuts Government, and the later Government of Dr. Malan—on the legal question whether the Mandate was still in force. I emphasized that on the question of the United Nations not having any supervisory jurisdiction the attitude of the two Governments was exactly

the same, and consistent. All these events took place in 1947, in the time of the earlier Government.

The Trusteeship Council, Mr. President, at its second session in 1947, decided as follows (I read from the record of the Trusteeship Council's second session, first part, sixth meeting, 1 December 1947, p. 132): "The Secretariat would be requested to furnish the Government of the Union of South Africa with the date of the examination of the report, in accordance with a resolution of the General Assembly, and to say that the Government's representative would be welcome, if it wished to send one." A letter was duly sent to the Respondent on 2 December 1947, to which the Respondent replied on 5 December 1947. (One finds the reference in the same volume to which I have referred—a record of the tenth meeting, 5 December 1947, p. 294.) The reply read, in the relevant part:

> "I am directed to thank you for your letter of 2nd instant notifying that the Report of South West Africa, which was submitted for the information of the United Nations, is to be examined on December 8th. My Government is appreciative of the final paragraph of the letter, and, although it will not avail itself of the courtesy expressed therein, desires me to say that if, after examination, any supplementary particulars within the Chapters of the Report are desired, it will be happy to transmit further available data in writing, for your information." (Trusteeship Council, 2nd Session, 1st Part, 10th Meeting, 5 December 1947, p. 294.)

In the result, Mr. President, the report was discussed in the Trusteeship Council without any representative of the Respondent Government being present. After consideration of the report, the Trusteeship Council, on 12 December 1947, passed a resolution which in its relevant parts reads as follows:

> "*Having* taken note of the communication of the Government of the Union of South Africa dated 5 December 1947;
>
> *Resolves* that the report in certain particulars appears to be incomplete and that opportunity should therefore be taken of the offer of the Government of the Union of South Africa to transmit, if desired, further available data;
>
> That the Government of the Union of South Africa be invited to supply supplementary information before the month of June 1948 on the questions attached hereto in order that the Council may be able to submit its observations to the General Assembly at its next session." (Trusteeship Council, 2nd Session, 1st Part, 15th Meeting, 12 December 1947, p. 509.)

The reference is to the same volume as before, the record of the fifteenth meeting of the Trusteeship Council, 12 December 1947, page 509.

In response to this request, Mr. President, the Respondent submitted further information under cover of a letter dated 31 May 1948. The relevant part of the letter is quoted in the Counter-Memorial, **II**, page 59, and the letter is instructive because it contains an apt summary of the development of the matter up to that point, and of the attitude of the Government of the Union of South Africa in that regard. I read, Mr. President, from the quotation at page 59 of the Counter-Memorial **(II)**. The Respondent there—

> "re-iterate(d) that the transmission to the United Nations of information on South West Africa, in the form of an annual report or

any other form, is on a voluntary basis and is for purposes of information only. They have on several occasions made it clear that they recognize no obligation to transmit this information to the United Nations, but in view of the wide-spread interest in the administration of the Territory, and in accordance with normal democratic practice, they are willing and anxious to make available to the world such facts and figures as are readily at their disposal... The Union Government desire to recall that in offering to submit a report on South West Africa for the information of the United Nations, they did so on the basis of the provisions of Article 73 *(e)* of the Charter. This Article calls for 'statistical and other information of a technical nature' and makes no reference to information on questions of policy.

In these circumstances the Union Government do not consider that information on matters of policy, particularly future policy, should be included in a report (or in any supplement to the report) which is intended to be a factual and statistical account of the administration of the Territory over the period of a calendar year. Nevertheless, the Union Government are anxious to be as helpful and as co-operative as possible and have, therefore, on this occasion replied in full to the questions dealing with various aspects of policy. The Union Government do not, however, regard this as creating a precedent. Furthermore, the rendering of replies on policy should not be construed as a commitment as to future policy or as implying any measure of accountability to the United Nations on the part of the Union Government. In this connexion the Union Government have noted that their declared intention to administer the Territory in the spirit of the mandate has been construed in some quarters as implying a measure of international accountability. This construction the Union Government cannot accept and they would again recall that the League of Nations at its final session in April 1946, explicitly refrained from transferring its functions in respect of mandates to the United Nations."

Mr. President, the attitude of the Respondent in this regard was repeated in a statement to the Fourth Committee on 9 November 1948. I wish to read only a brief extract from that statement. The Respondent's representative said:

"the Union could not admit the right of the Trusteeship Council to use the report for purposes for which it had not been intended: still less could the Trusteeship Council assume for itself the power claimed in its resolution, i.e. 'to determine whether the Union of South Africa is adequately discharging its responsibilities under the terms of the mandate ...' Furthermore, that power was claimed in respect of a territory which was not a trust territory and in respect of which no trusteeship agreement existed. The South African delegation considered that in so doing the Council had exceeded its powers." (**II**, pp. 59-60.)

Mr. President, our Counter-Memorial also sets out the attitude adopted by the Respondent in a letter dated 11 July 1949 to the Secretary-General. The relevant part of this letter is quoted at page 61 of the Counter-Memorial (**II**), and I wish to read just a brief portion of it, because much of it is repetitive of what I have just read out of the earlier communications:

"The recommendation of the General Assembly that the Union should continue to supply information on its administration of South West Africa has been given most careful consideration.

It will be recalled, however, that the Union Government have at no time recognized any legal obligations on their part to supply information on South West Africa to the United Nations, but in a spirit of goodwill, co-operation and helpfulness offered to provide the United Nations with reports on the administration of South West Africa, with the clear stipulation that this would be done on a voluntary basis, for purposes of information only and on the distinct understanding that the United Nations has no supervisory jurisdiction in South West Africa."

I stop there for the moment. This was the letter, Mr. President, which proceeded to state the reasons why the Union Government had come to the conclusion that it would serve no good purpose to continue to submit these reports. I do not have to go into all these reasons; the Union Government pointed out that it hoped that the Trusteeship Council—

"would approach its task in an entirely objective manner and examine the report in the same spirit of goodwill, co-operation and helpfulness as had motivated the Union in making the information available.

These hopes have not been realized. Instead the submission of information has provided an opportunity to utilize the Trusteeship Council and the Trusteeship Committee as a forum for unjustified criticism and censure of the Union Government's administration not only in South West Africa but in the Union as well. Inferences and deductions have been drawn from the information submitted which are quite inconsistent with facts and realities. The misunderstandings and accusations to which the United Nations discussions of this subject have given rise have had repercussions both in the Union and in South West Africa, with deleterious effects on the maintenance of the harmonious relations which have hitherto existed and are so essential to successful administration. Furthermore, the very act of submitting a report has created in the minds of a number of Members of the United Nations an impression that the Trusteeship Council is competent to make recommendations on matters of internal administration of South West Africa and has fostered other misconceptions regarding the status of this Territory.

In these circumstances the Union Government can no longer see that any real benefit is to be derived from the submission of special reports on South West Africa to the United Nations, and have regretfully come to the conclusion that in the interests of efficient administration no further reports should be forwarded. In coming to this decision the Union Government are in no way motivated by a desire to withhold from the world factual and other information regarding South West Africa published in accordance with the customary practice of democratic nations, and information of this nature previously embodied in annual reports to the League of Nations or the United Nations will continue to be made available to the general public in the form of statistics, departmental reports, reports by the Administrator to the South West African Legislature, blue books, and other governmental publications." (**II**, pp. 61-62.)

Mr. President, the later history makes it clear that this attitude on the part of the Respondent was maintained throughout, and the Applicants, as I understand them, do not argue to the contrary.

In the result, I submit that the record clearly shows that, in so far as Respondent's acts and statements are concerned, it at no time consented to or recognized United Nations supervision over the Mandate. On the contrary, as from the time that the United Nations began operations, Respondent indicated that there would be no accounting and no supervision, and Respondent acted accordingly throughout.

It may, at this stage, Mr. President, be convenient to deal with a further point which the Applicants made regarding conduct on the part of Respondent. This is the one exception to which I referred before concerning conduct on Respondent's part after September 1947 to which reference was made by the Applicants in their argument.

They said according to their verbatim record:

> ". . . notwithstanding Respondent's new assertion in 1948 that the Mandate as a whole had lapsed, Respondent indicated several times that it was still possessed of *rights* under the Mandate Agreement for South West Africa". (P. 163, *supra.*)

For this proposition Applicants rely on three statements made during 1948 by Mr. Eric Louw, Respondent's representative, in the course of debates in the General Assembly—Plenary and Fourth Committee.

Now, Mr. President, let me say at once, before dealing with these statements, that Respondent does not, in its submission to this Court, contend that if the Mandate has lapsed, Respondent would, nevertheless, retain rights or powers under the Mandate. That is not our contention, but I pointed out yesterday that, in terms of various theories, held by lawyers at various times before this Court pronounced on the subject in its Advisory Opinion of 1950, such a result would have been a logical possibility. If the Mandate were to be viewed—as I indicated yesterday it was apparently viewed in terms of certain theories—as involving a cession of territory subject to treaty obligations (the treaty obligations being the obligations under the Mandate, the trust obligations operating for the benefit of the inhabitants, and the additional obligations of submitting to the League's supervision in that regard), one could have the result that the treaty obligations could fall away, and that the session would then operate as vesting sovereignty absolutely in the mandatory. That, we know, was a view which was propounded. It is in conflict with the subsequent finding of the Court in that regard in the Opinion of 1950. It is not a view which I am submitting to the Court as one which ought to be accepted. I am only pointing out that, on the basis of viewing the situation in that light, the result arrived at (namely that the powers or the rights, which the Mandate conferred, could remain in existence without the legal obligations which were contained in treaties, continuing to be binding upon the Power to which the cession had been made) would have been a perfectly logical one. And the attitude could then be that the sacred trust, as provided for in treaty obligations—which treaties would have fallen away, according to that theory—would no longer have *legal* force, although the moral obligation to act in accordance with the spirit of the Mandate, would still exist and still be recognized by the Power concerned.

Whether that was a theory which Mr. Louw had in mind when he

made these statements, or whether he approached the matter on a much more practical footing, in referring to the policy of acting in accordance with the spirit of the Mandate, is not clear to me on reading these statements. Some of them appear to have indications one way; some, the other way. The attitude is not fully explained in any of them. For instance, Mr. President, the first statement made by Mr. Louw, on 18 November 1948, when he addressed the Fourth Committee with regard to a draft resolution which recommended, *inter alia*, that South West Africa be placed under the Trusteeship System (p. 163, *supra*), suggests that Mr. Louw may quite possibly have had in mind either of these alternatives which I have mentioned—either the alternative that, on a particular theory of law, the obligations could have fallen away, leaving the rights or powers under the Mandate, or, the more simple alternative that, although the Mandate lapsed *in toto*, as a matter of law, there was a course of conduct which recognized the spirit of the Mandate, and, that, in order to test whether Respondent was, in fact, acting in the spirit of the Mandate, regard was accordingly to be had to what the rights and obligations of the mandatory had been under the Mandate which was to be regarded as having lapsed.

The statement reads as follows:

> "Mr. Louw pointed out that the provisions of the second operative paragraph of that draft resolution precluded any possibility of arriving at the agreement contemplated in the League of Nations' last resolution on the question. According to that resolution, the mandatory power was to continue to fulfil its functions until new agreements had been concluded . . . The representatives of the Union of South Africa felt that the paragraph was contrary to the provisions of the Charter inasmuch as it disregarded rights possessed by the Union of South Africa under the Mandate and the Charter." (P. 163, *supra*.)

The Court will see that the context is one of questioning whether the United Nations had any right to interfere with a particular situation. The last sentence may have emanated from a legal theory of the nature I have mentioned, or the idea may merely have been that South Africa was, in terms of the resolution of the League on 18 April 1946, to fulfil its functions until new agreements had been concluded, and that this expectation necessarily entailed a continuation of the situation as it existed under the Mandate, and that the United Nations had no power to interfere with it. That may have been the simple basis upon which this argument was propounded.

It is not clear, Mr. President, which of the two ideas underlay the statement, but, as far as I can see, it does not matter whatsoever for purposes of the present argument. In particular, I cannot see how anything involved in the question whether one is to interpret that particular statement in one way or another, can possibly affect the question of supervision of mandatory administration, because this statement is not directed to such a question at all.

The Applicants seek to connect this statement of Mr. Louw in 1948 with a statement made by another representative of Respondent in the General Assembly in 1946, which included these words: "... together with its right of full liberty of action, as provided for in paragraph 1 of Article 80 of the Charter." (P. 164, *supra*.)

A propos of this, my learned friend, Mr. Moore, said in his argument: "The view seems to have been that Article 80 (1) of the Charter provided for rights, but not for obligations." *(Ibid.)*

Mr. President, my learned friend seems to have lost sight of the date of this last statement. That date was 17 January 1946, as will appear from the Counter-Memorial, **II**, p. 41. In other words, it was some months *prior to* the dissolution of the League.

The Respondent has never suggested that the Mandate lapsed in whole or in part, whether as regards rights or as regards obligations, prior to the dissolution of the League. During the period between the coming into force of the Charter and the dissolution of the League, Article 80 (1) would, indeed, have been significant in demonstrating that nothing contained in the Charter derogated from Respondent's rights or obligations under the Mandate. Therefore, that earlier statement, Mr. President, is not at all relevant on the question of what the effect of dissolution of the League would be.

The next statement by Mr. Louw, which is relied on by the Applicants, is one of 9 November 1948, made in the Fourth Committee, when he said:

> "... the closer union scheme was nothing new or startling. The right to incorporate the territory of South West Africa was inherent in the former Mandate ..." (P. 164, *supra.*)

We can consider this statement, Mr. President, in conjunction with the third one relied upon by the Applicants, which was made by Mr. Louw on 26 November 1948, when he quoted a cable received from the South African Prime Minister, which stated:

> "The South African Government is exercising a right which has never been disputed to administer the territory as an integral part of the Union, pursuant to the power granted in the original Mandate." *(Ibid.)*

Mr. President, the matter then in issue concerned the provision for direct representation of South West Africa in the Union Parliament, and the question was whether South Africa, by announcing its intention to make such provision, was going back on its previous statement that it would not proceed with incorporation of the Territory. That was the question at issue in these debates.

It was purely a matter of comparing what South Africa was proposing to do, with a statement it had made before to the effect that it did not intend, as a matter of policy, to proceed with incorporation of South West Africa, and of seeing whether there was any inconsistency between those two things. Now, the South African attitude, expressed in the telegram from the Prime Minister and by Mr. Louw himself, was that the projected step did not amount to annexation, but involved the performance of an act which had been permitted by the Mandate. The Mandate was, in this context, specifically called "the former Mandate", by Mr. Louw, and in the telegram of the Prime Minister it was referred to as "the original Mandate". In this context, Mr. President, the statement seemed to have amounted to nothing more than an explanation that South Africa was acting entirely in accordance with its self-imposed limitation of administering the Territory in the spirit of the Mandate. That was all that the context indicated. This limitation involved a voluntary abstention from unilateral incorporation, but not an undertaking to abstain from acts of closer association which had been per-

mitted under the Mandate. That was what Mr. Louw was intimating to the United Nations. The extent of the rights granted by the Mandate was consequently relevant to this discussion. The gist of the argument was merely that, if one acts in the spirit of the Mandate, one has regard not only to the obligations imposed by the Mandate, but also to the rights which could be exercised under the Mandate. A few days previously Mr. Louw had put this matter explicitly in the same way to the Fourth Committee, and I quote from the Fourth Committee records 1948, Part I, 81st Meeting, 16 November 1948, page 346. Mr. Louw said:

> "The closer union scheme was nothing new or startling. The right to incorporate the Territory of South West Africa was inherent in the former Mandate, and the present Government was going no further than the Union Government had proposed to go in 1934, when the League of Nations had raised no objection.
>
> Mr. Louw repeated that it was the intention of the Union Government to administer the Territory of South West Africa in the spirit of the mandate of the League of Nations." (Fourth Committee, 1948, Part I, 81st Meeting, 16 November 1948, p. 346.)

Upon analysis, therefore, Mr. President, nothing in Mr. Louw's statements appears to be relevant to the present issue. There is certainly nothing in them, as far as I can see, which even tends to support the contention of the Applicants to the effect that Respondent had by its conduct recognized that the United Nations had replaced the League as the supervisory organ over the Mandates. How these statements could have any bearing upon that question has, I must say, somehow escaped me.

Mr. President, I may, therefore, summarize our contentions in regard to the actions and statements of the Respondent, as referred to by the Applicants, in their arguments, namely from the date of the dissolution of the League until the end of 1947. That is the crucial period on which the Applicants rely, the period during which they say that a certain attitude of acquiescing in, or consenting to, United Nations supervision over the Mandate was manifested by the Respondent, before the change-about came in the Fall of 1947.

Mr. President, one finds, on analysis, that the only relevant statements from Respondent's side during that period—the only relevant ones on the question of accountability as distinct from the question whether the Mandate was still in existence—amounted to three. The first one was the statement of General Smuts in November 1946, which we find in the Counter-Memorial, **II**, at pages 53-54. The second was the letter of 23 July (also referred to as United Nations Document A/334) which is quoted in the Counter-Memorial, **II**, at page 55. The third was the statement of Mr. Lawrence in September 1947 quoted in the Counter-Memorial, **II**, at page 57, and followed by his later statement of November of that year, quoted on the same page of the Counter-Memorial.

What is significant about these statements, Mr. President, is their absolute consistency and the link which there is in each of them with the earlier statement on the subject by the Union Government.

The statement of General Smuts in November of 1946 referred back to the intention which had been expressed on behalf of the South African Government at the last session of the League Assembly. It identified itself with that expression of intent and added something which had not

been stated before, namely that there would now be a submission of statistical and other information, in accordance with Article 73 *(e)* of the Charter. The very first intimation, on behalf of the South African Government, of the submission of any information, or reports, or anything of that kind, was limited to the scope of Article 73 *(e)* of the Charter. And that, in itself, indicated that there was no contemplation of the more onerous obligation of reporting and accounting under a mandate.

The second statement to which I have referred, namely in the letter of 23 July 1947 (Document A/334), although it did not in terms refer back to the statement of General Smuts, could, judging by the meaning of its words and by its context, only have referred back to that statement because there was no other statement to which it could have referred in stating that the South African Government had already indicated its willingness to submit reports for the information of the United Nations. The Smuts' statement was the only one to which that sentence could have been intended to relate. It mentioned specifically, "for the information of the United Nations", thus identifying itself on that point, with the earlier statement by General Smuts; and more than that, when Mr. Lawrence came to give his fuller explanation of what the attitude of the Union Government was in this regard—i.e., maintenance of the status quo and submission of reports for the information of the United Nations—he specifically gave that explanation with reference to what had been intended to be conveyed in the letter of 23 July 1947. There was, therefore, Mr. President, an absolutely consistent attitude—all these relevant statements, one after the other, were linked and clearly maintained the same attitude throughout. It was merely a matter of amplifying later what had already been stated before.

In these circumstances, it seems, Mr. President, that there was possibly a measure of misapprehension in one portion of the minority opinion of this Court in 1956—a portion on which the Applicants apparently rely, although they do not specifically refer to it in this portion of their argument. It is the portion, at page 65 of that 1956 report, which reads as follows:

> "An important element of the situation then existing [that was after dissolution of the League] was referred to on a number of occasions by the Court [that is the Court in 1950] in the reasoning of its Opinion: that is, the willingness expressed by the Union of South Africa to regard itself as continuing to exercise its Mandate, to continue to administer the Territory in accordance with the provisions of the Mandate and to continue to render reports to the United Nations." (*I.C.J. Reports 1956*, p. 65.)

There is this reference, Mr. President, to a willingness expressed by the Union of South Africa to continue to render reports to the United Nations. It is put as if that was a general attitude expressed by the Union of South Africa—and that that was how it indicated its attitude with regard to the consequences of dissolution of the League.

When we refer back to the 1950 Opinion on this point we find that in the portion of the Opinion which deals specifically with the question of accountability there is no reference whatsoever to any statements made by, or on behalf of, the Union Government. That is the portion of the Opinion at pages 136 to 138 to which I referred yesterday. We find a

reference to the statements of, and on behalf of, the Union Government only in respect of the earlier question decided by the Court, namely whether the Mandate was still to be regarded as of legal force and in existence. We find that those statements are dealt with at the bottom of page 134, over on to page 135 and up to the top of page 136. We find, Mr. President, that there is nothing in any of the statements, there referred to, which resembles the general description we find in the 1956 Opinion—in the passage which I have just read—except on one point, and that I shall mention in a moment.

The various matters referred to in that portion of the Opinion were, firstly, the declaration made on 9 April 1946 in the League Assembly; next, the memorandum submitted on 17 October 1946 on the question of proposed incorporation, in which the Union Government was still referred to as being the mandatory—purely on the question, therefore, whether the Mandate was still in existence; next, the reference to the statement of 4 November 1946 by General Smuts, not the one to which I am referring about reporting—about giving information under Article 73 *(e)*—but an earlier statement in which General Smuts had repeated the declaration which the representative of the Union had made previously to the League of Nations, and lastly, a reference to the letter of 23 July 1947 to the Secretary-General of the United Nations. This last constitutes the only exception to which the general statement in the 1956 minority opinion could possibly have been intended to relate. I shall read that passage in the 1950 Opinion:

> "In a letter of July 23rd, 1947, to the Secretary-General of the United Nations, the Legation of the Union referred to a resolution of the Union Parliament in which it was declared 'that the Government should continue to render reports to the United Nations Organization as it has done heretofore under the Mandate'. It was further stated in that letter: 'In the circumstances the Union Government have no alternative but to maintain the *status quo* and to continue to administer the Territory in the spirit of the existing Mandate.' " (*I.C.J. Reports 1950*, p. 135.)

Now, Mr. President, the reference to this phrase "continue to render reports to the United Nations . . . as it has done heretofore under the Mandate" is not a reference to anything said by, or on behalf of, the Union Government to the United Nations, or in any international context. It is purely a reference to a phrase occurring in a resolution, as it is here called, of the Union Parliament. It was not even a resolution of the Union Parliament. It was a resolution of one of the Houses of the Union Parliament—a resolution of the House of Assembly in the Union Parliament.

The distinction is a very important one. In South African constitutional law, which follows the British pattern in this respect, which will be well-known to members of the Court, the individual Houses of Parliament have no legislative powers, except for internal rules of procedure and so forth. In law the effect of a resolution is, therefore, merely something in the nature of a communication to the Government—a request to the Government—an expression of opinion which it is expected that the Government will heed but which the Government is not bound to do so. A government which does not pay heed to an expression of opinion, or a request, or a resolution of one of the Houses of Parliament, may incur

certain political consequences as a result thereof, but no legal consequence will result therefrom.

To put the matter at its extreme, Mr. President, suppose in such a resolution of one of the Houses of the Union Parliament there had been an express provision to this effect, viz. that the Union Government ought to accept accountability to the United Nations and continue to render reports on the basis of being accountable under the Mandate to the United Nations, it would have had no legal force or effect whatsoever unless the Union Government, the Mandatory, had acted upon that request and had conveyed it to the United Nations as being its own attitude. That would be the only step which could have any effect in this regard.

But, Mr. President, if one reads this resolution of the House of Assembly of the Union Parliament in its proper context, it is perfectly clear, of course, that nothing of the kind which I have just suggested, was intended to be suggested in that resolution. The full terms of the resolution were quoted and set out in the letter of 23 July, and we quote them, as being part of the letter in the Counter-Memorial, **II**, at page 55. That statement at the end "that the Government should continue to render reports to the United Nations Organization as it has done heretofore under the Mandate", is to be read in the context of the resolution as a whole, and the second paragraph of the preamble reads as follows:

> "Whereas the League of Nations has since ceased to exist and was not empowered by the provisions of the Treaty of Versailles or of the Covenant to transfer its rights and powers in regard to South West Africa to the United Nations Organization, or to any other international organization or body, and did not in fact do so."

In other words, Mr. President, the contemplation of this resolution was that there was to the United Nations no transfer of powers or rights which had vested on the part of the League in regard to mandates.

Mr. President, I was referring the Court to the terms of the resolution of the House of Assembly of the Union Parliament, set out in the Counter-Memorial, **II**, at page 55, and conveyed in Respondent's letter of 23 July 1947 to the Secretary-General of the United Nations. I pointed out that, in terms of the second preamble of that resolution, the House of Assembly clearly expressed its view that no supervisory powers in respect of mandates had passed from the League to the United Nations. In the light of that context, the phrase at the end of the resolution "that the Government should continue to render reports to the United Nations as it has done heretofore under the Mandate" can, at most, be said to be a piece of ambiguous draftsmanship. It could hardly, in the light of the second preamble, have been intended to mean reporting of the exact kind which had taken place to the League of Nations under the Mandate, in the sense of accounting in regard to compliance with mandate obligations. It could at most, have been intended to refer to the act of sending reports as had happened under the Mandate. That this was how the matter was understood by the Union Government appears clearly from the manner in which this resolution was then conveyed to the Secretary-General and also from the statement, in this very letter of 23 July 1947, by the Government on that subject. And that, after all, is the operative part of this letter—that is the communication from the Mandatory of its attitude to the United Nations, the wording there being: "The Union

Government have already undertaken to submit reports on their administration for the information of the United Nations", thus referring back to the earlier statement by General Smuts and the further explanation by Mr. Lawrence some two or three months later, in September 1947.

Therefore, Mr. President, it appears that nothing occurred in this period which was relevant as being an expression of Respondent's attitude about the matter, nothing more than these items to which I have referred, namely Smuts' statement, the letter of 23 July and then Mr. Lawrence's further explanations in September and November 1947, and these make the consistent attitude of the Respondent Government in this regard clear beyond any doubt.

In fact, what is also significant about this is that nobody in the United Nations misunderstood the Respondent's attitude in this regard. This appears from the immediate reaction in debates by United Nations Members during the years 1946 and 1947, and even in 1948 and 1949 when certain of the governments concerned—a very small minority—seemed to have had second thoughts about the whole position. But as far as immediate reactions were concerned, reactions indicating the manner in which the other governments—the other Members of the United Nations—had understood the Union's attitude, there was absolute unanimous confirmation of what I have been submitting to the Court, namely that outside of trusteeship there would be no obligation on the part of the Union Government to report and account to the United Nations in respect of its administration of South West Africa.

In the light of the Applicants' oral contentions on this aspect of the matter, i.e., the actions of the United Nations in relation to the statements and actions of the Respondent, my learned colleague Mr. Muller, gave very special attention thereto. The intention was that he would deliver this portion of the argument to the Court but unfortunately he is indisposed today and cannot do so. I very much regret that the Court will not have the benefit of hearing his address on the matter. However, I have the benefit of his very full notes and, fortunately, the story, in its main essentials and features, is absolutely clear and is not a difficult one to tell.

The Applicants in their presentation, in their oral argument, contended in this regard that actions of the United Nations supported the conclusion "that the United Nations replaced the League as the supervisory organ over the Mandate". That we find in the verbatim record at page 166, *supra*. Now, in the elaboration of their presentation the Applicants contended that these actions comprised, firstly, certain resolutions of the General Assembly and, secondly, statements made by Members of the United Nations regarding the Mandate for South West Africa and also regarding other mandates.

I shall deal first with the resolutions, Mr. President. The first of the resolutions relied upon by the Applicants was General Assembly resolution 65 (I) of 14 December 1946. The Court will recall that that was the resolution taken on the Respondent's proposal regarding possible incorporation of the Territory. The Court will also recall that in this resolution the General Assembly rejected the proposals regarding incorporation and recommended that South West Africa should be placed under the trusteeship system. Taking into account, therefore, this scope and purpose of the resolution, it seems quite clear that it did not indicate at all any understanding that supervisory powers of the League of Nations over the

exercise of the Mandate had passed to the United Nations. The wording of the resolution does not indicate that and nothing which can be inferred from it, contains any indication to that effect. Indeed, Mr. President, as we pointed out, it was in the very debates leading up to this resolution that General Smuts made his clear statement, in November 1946, that reports concerning South West Africa would be furnished for limited information purposes only. It is significant that in those very debates, this statement by General Smuts elicited no protest from any of the Members of the United Nations to the effect that Respondent would be subject to United Nations supervision in respect of the Mandate for South West Africa, outside of trusteeship. There was not a single State which, in those lengthy debates on the subject of possible incorporation of South West Africa, reacted to General Smuts' statement by saying: "You are now intending to do less than what your obligation requires of you. You are obliged, quite outside of any trusteeship, to report and account for compliance with the Mandate to the United Nations." Not a single State took that attitude.

Clearly, Mr. President, the three extracts which the Applicants quoted from the Fourth Committee speeches in 1946 (we find them in the verbatim record at p. 157, *supra*) do not evidence such an understanding, in any way. I have dealt with those already and I have indicated that each one of those dealt merely with Respondent's proposal for incorporation and did not touch upon any question of supervision at all. That is all, as far as resolution 65 (I) and the debates in regard to that resolution are concerned.

But now we find that the Applicants also rely on General Assembly resolution 141 (II), of 1 November 1947, in presenting an argument regarding actual exercise of competence by the United Nations of supervisory authority over South West Africa. That was the contention advanced in the verbatim record at page 159, *supra*. They refer in this regard, Mr. President, to a passage in the 1950 Advisory Opinion in which the Court stated: "this competence was in fact exercised by the General Assembly in resolution 141 (II) of November 1, 1947." (*I.C.J. Reports 1950*, p. 137 and the verbatim record at p. 159, *supra*.)

I shall deal later, Mr. President, with the view expressed by the Court in this regard in 1950. I shall submit that in its context it is not what is contended for by the Applicants, but I will deal later with that question.

At present I merely want to deal with the content of the resolution and with the Applicants' own arguments in regard thereto. At page 159, *supra*, of the verbatim record the Applicants say that: "The resolution urged the Government of the Union of South Africa to propose a trusteeship agreement for South West Africa", and I quote from what they say. They say it authorized—

> "the Trusteeship Council in the meantime to examine the report on South West Africa recently submitted by the Government of the Union of South Africa and to submit its observations thereon to the General Assembly".

That statement, as far as it goes, Mr. President, is correct. But now, what is important regarding the matter in issue is the understanding which the United Nations had of the nature and the purpose of the report in question, and correspondingly of the task which was being assigned by the General Assembly to the Trusteeship Council in that regard. This

contemplation appears from the preamble of the resolution, which read as follows:

> "*Whereas* the Government of the Union of South Africa in a letter of 23 July 1947 informed the United Nations that it has decided not to proceed with the incorporation of South West Africa in the Union but to maintain the *status quo* and to continue to administer the Territory in the spirit of the existing mandate, and that the Union Government has undertaken to submit reports on its administration for the information of the United Nations;" (Gen. Ass. Res. 141 (II) of 1 November 1947).

That is the preamble of this very resolution relied upon by the Applicants, a preamble indicating a contemplation exactly in accordance with what I have been advancing to the Court all this morning and part of yesterday, on what the attitude was as expressed by the Union Government to the United Nations.

In no way, in our submission, does this resolution indicate that the actions which it set in train were to involve an exercise of supervisory power. Indeed, Mr. President, I shall show that the very body to which this report was referred, namely the Trusteeship Council, did not regard it as such. The Trusteeship Council did not consider that it was required to exercise a supervisory power in respect of this report.

The Applicants say in this regard in the verbatim record, page 160, *supra*:

> "In accordance with resolution 141 (II) of the General Assembly, the Trusteeship Council did examine the report submitted by the Respondent for the year 1946.
>
> Although the Council, in the exercise of its competence, did not agree upon the extent of supervision, there was no doubt as to the legal authority of the Council to examine the report of the mandatory power and submit observations thereon. Notwithstanding the dissolution of the League, it was agreed that the Mandate continued in full force and effect, and that the United Nations was the proper supervisory authority."

The Court will note that the Applicants make this emphatic statement that it was agreed in the Trusteeship Council, firstly, that the Mandate continued in force, and, secondly, that the United Nations was the proper supervisory authority. In support of this statement—a completely unqualified one, the Court will notice—the Applicants cite three extracts from statements made in the Trusteeship Council by representatives of, respectively, China, Belgium and the United States of America. That we find in the verbatim record of 19 March, page 160, *supra*. I submit, Mr. President, that an analysis of the attitudes adopted by the Members of the Trusteeship Council, and by saying the Members I mean all the Members, and not only some, leads to an entirely different conclusion. I emphasize the attitude of *all* Members, because this again appears, with respect, to be a case where the Applicants have isolated a small portion of the relevant evidence, presented it as being all that is to be taken into account as relevant and then drawn their conclusions from that.

In accordance with Article 86 of the Charter the Trusteeship Council in the years 1947-1949 comprised the representatives of the following States—I shall give them numbers in alphabetical sequence: (1) Australia, (2) Belgium, (3) China, (4) Costa Rica, (5) France, (6) Iraq, (7) Mexico,

(8) New Zealand, (9) the Philippines, (10) the Soviet Union, (11) the United Kingdom, and (12) the United States of America. It will be noted, Mr. President, that five of these States were former mandatories—Australia, Belgium, France, New Zealand and the United Kingdom. They would in the nature of things have had a particular interest in the future of these territories; it is to be expected that they would have given serious thought to this whole question, and, in particular, Mr. President, they would have been aware of all the antecedents leading up to the situation with which this Council was then confronted, particularly if there had been tacit agreements between all interested parties—general understandings which were so clear that it was not necessary to reduce them to writing or express terms, because everybody knew about them. Certainly these States *par excellence* would have known of such arrangements and such understandings.

In these circumstances I shall analyse the attitude adopted by each of the member States of this Trusteeship Council in the order I have indicated, i.e., the attitude they adopted with regard to Respondent's obligations to the United Nations in respect of its administration of South West Africa. In some cases the attitude appears clearly from statements made on behalf of these States in the Trusteeship Council itself. In some cases it is necessary to go beyond what was stated in the Trusteeship Council, and to read those statements in conjunction with others made by delegates of the same States also in the General Assembly—Plenary and Fourth Committee at the relevant times.

I begin, therefore, to deal with (1) Australia. Mr. President, the attitude adopted by the Australian representatives was absolutely clear and unambiguous. I refer, first, to extracts from the statements of Mr. Evatt and Mr. Forsyth as set forth in the Counter-Memorial, **II**, at page 275. I do not intend to read them all, but I would like to read Mr. Evatt's statement made in Plenary Session, as given on that page.

> "Therefore, there is no gap in the Charter of the United Nations. If the Union of South Africa does not bring its Territory under the Trusteeship System, it is still, in my view, a Non-Self-Governing Territory. The Union Government will have to give, voluntarily, reports for the information of the Secretary-General. The Secretary-General can do as he chooses with this information."

In regard to Mr. Forsyth's statement in the Trusteeship Council, Mr. President, there is a short extract quoted in the *Counter-Memorial* at page 275. I would prefer to read a fuller extract from the same statement, that is, from the source indicated at page 275 of the Counter-Memorial—a statement in the Trusteeship Council on 12 December 1947:

> "Further, I think the position is strengthened when we ask ourselves this question: what is the purpose for which this report was submitted? That purpose appears in the resolution of the General Assembly in which it is stated that the 'Union Government has undertaken to submit reports on its administration for the information of the United Nations'. The purpose is quite clearly stated there: 'for the information of the United Nations.'
>
> That is quite different from the purpose for which reports are submitted on Trust Territories. The reports on Trust Territories are submitted not merely to inform the Trusteeship Council but to enable the Trusteeship Council to exercise its main function, the

supervision of administration. In the case of South West Africa, which is not a Trust Territory, the Trusteeship Council does not have the function of supervising administration. The administration of South West Africa has been reserved by the Government of the Union of South Africa as its own concern, and that Government, not having placed the territory under trusteeship, does not recognize the power of the Trusteeship Council to supervise its administration. There is, therefore, a fundamental difference between the purpose for which the report on South West Africa is submitted and the purpose for which reports on Trust Territories are submitted. That also explains why, in the case of Trust Territories, there are the additional functions of considering petitions and of sending visiting missions to the territory. I submit that the purpose of this report is entirely different or, at least, there is a very great difference between the purpose as regards this report and the purpose for which reports on Trust Territories are submitted." (Trusteeship Council, Second Session, *First Part*, 15*th Meeting*, p. 477.)

One could hardly have it more clearly and explicitly stated, Mr. President. The attitude is perfectly clear—there was no obligation at all to enter into a trusteeship agreement. Respondent, in the absence of a trusteeship agreement, would have to give, voluntarily, reports for information purposes in terms of Article 73 of the Charter, but that would not involve supervision, as in the days of the League. The purpose would be a limited one directed at giving information, in contradistinction to supervision, as made so clear in the statement by Mr. Forsyth which I have just read.

Then we come to the case of Belgium, and I refer to the extract from a statement by Mr. Ryckmans in the Fourth Committee on 12 November 1948, as quoted in the Counter-Memorial, **II**, page 282:

"Under the Mandate System, South West Africa had been administered under a C Mandate, and it had always been understood that the Territory would eventually be incorporated in the Union of South Africa.

On the other hand, [he] felt bound to draw the attention of the South African representative and the Committee to the terms of Article 80, which provided that nothing in Chapter XII of the Charter should be 'construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples . . .'. That included the people of South West Africa, who, having had the benefit of international supervision under the Mandate System, could not be deprived of that right."

I also refer, Mr. President, to statements made by the same representative in the Trusteeship Council on 1 December 1947, and in the Fourth Committee on 17 November 1948. The first one—1 December 1947 to the Trusteeship Council—reads as follows:

". . . there is a point arising out of the President's statement upon which I should like to comment. I do not think it advisable to tell the representative of the Union of South Africa that the Trusteeship Council will examine the report submitted by the Union Government as if it were a report from a Power administering a Trust Territory. This is a controversial question. We shall in fact examine this report as we examine any other, but in principle we should

consider it in the same way as it would have been considered by the Permanent Mandates Commission. There is, however, no need to mention this. It is sufficient to say that the Trusteeship Council will, as authorized by the General Assembly, examine the Union of South Africa's report on the Territory of South West Africa on a given date, and it is unnecessary to state that the report will be dealt with in the same way as a report on a Trust Territory. Should we do so, we might receive the reply: 'This report must not be examined as a report on a Trust Territory but as one on a mandated territory.' I therefore think it unnecessary to specify this." (Trusteeship Council, Second Session, First Part, Sixth Meeting, 1 December 1947, pp. 124-125.)

As regards the other statement to the Fourth Committee on 17 November 1948, I wish to read only a brief portion. I quote again from Mr. Ryckmans:

> "It was to be hoped that the Committee could agree upon a workable resolution which would imply that the Union of South Africa was not legally bound to place the Territory of South West Africa under the Trusteeship System, but which would ask the Union Government, in exchange for United Nations recognition of the situation, and acceptance of its administration of South West Africa, to admit the Trusteeship Council as the heir of the Mandates Commission and to grant it the right to examine annual reports and petitions." (Fourth Committee, 17 November 1948, pp. 362-363.)

Here, we find, Mr. President, a kind of in-between attitude, if I may call it that, an attitude that under Article 80, paragraph 1, of the Charter, the peoples of South West Africa had a "right" to international supervision; but an acknowledgement apparently, on the other hand, that the machinery for bringing into existence such international supervision had not yet been established; and therefore urging upon the Trusteeship Council the finding of a workable resolution which would ask the Union Government to recognize the Trusteeship Council in exchange for recognition from the United Nations. It was to be an agreement "in exchange for United Nations recognition of the situation, and acceptance of its administration of South West Africa". The Union Government would then be asked "to admit the Trusteeship Council as the heir of the Mandates Commission, and to grant it the right to examine annual reports and petitions".

In so far as the representative of Belgium may have attached to Article 80, paragraph 1, higher significance than I have just attempted to express, it is significant that the Applicants now say that they do not in their argument attribute such a higher significance to Article 80, paragraph 1.

We come to the third one on the list—China. The Applicants in their oral presentation at p. 160, *supra*, quote a passage from a statement made by Mr. Liu Chieh in the Trusteeship Council on 1 December 1947, in which he stated, *inter alia*, as follows:

> "I think that by design and by general acceptance the functions and responsibilities of the Mandates Commission have fallen upon the shoulders of the Trusteeship Council."

I would like to refer the Court to statements made in the same year by the same representative of China, in the General Assembly—Plenary

and Fourth Committee—as quoted in the Counter-Memorial, II, page 275. I read first the statement in the Fourth Committee:

> "The only choice lay between trusteeship and the grant of independence. Article 80, paragraph 2, of the Charter further proved the obligatory character of the [the trusteeship] system . . . If the Union of South Africa placed South West Africa under trusteeship, it would not be deprived of the administration of the territory; and the only change would be the placing of that administration under international supervision."

This was in September 1947. It was a contemplation, therefore, that if the territory were not placed under trusteeship, it would not be under international supervision. But we have that very much more clearly and explicitly, Mr. President, in the next statement, the one in plenary on 1 November 1947:

> "We are told that the Union of South Africa would administer the Territory of South West Africa in the spirit of the Mandate of the League of Nations. I do not doubt the sincerity of this statement on the part of the Union of South Africa, but we all know that the mandate system has ceased to exist and that the Trusteeship System has been established. Would it not be more desirable to administer *the Territory in question under a living system* than under the shadow of a ghost system?" (**II**, p. 276.)

And then, Mr. President, I want to follow this up with the statement made in the Trusteeship Council by the same representative on 12 December 1947:

> "As the draft resolution submitted by the representative of Iraq might be brought forward at a later stage, I should like to take this opportunity to make one or two brief remarks. I think the first three paragraphs just state the facts, although I do not know whether the third paragraph is called for because it is evident from the Charter that we are not claiming jurisdiction over South West Africa as a Trust Territory.
>
> If we state that the report is in fact not as comprehensive as reports previously submitted by the Government of the Union of South Africa, as Mandatory, to the Permanent Mandates Commission, it may be contended at once that this report was not prepared as a report to the Permanent Mandates Commission or to any Commission of that nature. I say this because it is a report of the Government of the Union of South Africa on South West Africa and was not prepared on the basis of questionnaires either by the Permanent Mandates Commission or by the Trusteeship Council." (Trusteeship Council, Second Session, 15th Meeting, 12 December 1947, p. 498.)

The points which emerge from these various statements, Mr. President, in my submission, are these:

In so far as there is a statement by the representative of China, that by design and by general acceptance, the functions and responsibilities of the Mandates Commission have fallen upon the shoulders of the Trusteeship Council, that is suggested very tentatively. He makes it plain that they have to be careful in their approach to this whole matter in order to attempt to arrive at agreement with the mandatory power,

which is much the same attitude that was expressed by the representative of Belgium in the statements to which I have already referred.

We start off with statements which indicate that, but for trusteeship, there would be no international supervision—statements indicating the contemplation that outside of the trusteeship system, there was no room for international supervision.

We find, then, this somewhat inconsistent statement that, by design and general acceptance, the functions and responsibilities of the Mandates Commission have fallen upon the shoulders of the Trusteeship Council. But, Mr. President—and this is important—we do *not* find that the Chinese representative said that South Africa had, by consent, submitted to such supervision; that South Africa, by doing so-and-so, or stating so-and-so, had done anything of the kind. We do not find the Chinese representative saying that the general understanding at the final session of the League Assembly was that there would be a transfer of supervisory powers from the League to the United Nations, in respect of madates not converted into trusteeships, as was originally contemplated and proposed in the first Chinese proposal on that occasion, and as was allegedly maintained as a general intent underlying also the final resolution.

I proceed with State number four on the list, Costa Rica.

I wish to refer to a statement made by Mr. Canas in the Fourth Committee on 17 November 1947, as quoted in the Counter-Memorial, **II**, page 282:

> "The United Nations should not act as though its hands were tied by the Mandate. It had not been a party to the mandate agreement, and could not therefore be obliged to act in accordance with its provisions. Indeed, the Union of South Africa itself did not consider that the Mandate was still in existence, since it had stated that it would administer the Territory of South West Africa in the 'spirit' of the Mandate. As a legal contract between the Union of South Africa and the League of Nations, the Mandate had disappeared with the League, and there had been no provision whereby the United Nations became a party to the Mandate."

I wish to refer, Mr. President, to a further extract from a statement by Mr. Morales in the Trusteeship Council on 12 December 1947:

> "The point under discussion is whether the Mandate has expired or not. I do not know how far the Council can succeed in determining hastily whether or not the Mandate is still in force.
>
> It would be well to avoid the word 'Mandate' and any reference to the spirit or letter of the mandate. Perhaps we could use some better word in conformity with the spirit of the Charter, for although we know the Charter is barely two years old, the Government of the Union of South Africa is one of the Members of the United Nations and, as such, is bound to fulfil the terms of the Charter. That would obviate the difficulty of using the word 'Mandate' which is, as we have said, so controversial." (Trusteeship Council, Second Session, 15th Meeting, 12 December 1947, p. 506.)

So it seems, Mr. President, that in the views of the representatives of Costa Rica, the Mandate had disappeared with the dissolution of the League; consequently, there could have been no contemplation on the

part of these representatives that there was any obligation of reporting and accountability, under the Mandate, to the United Nations.

Next we come to State number five, France.

We cite in the Counter-Memorial, **II**, at pages 276 and 283, statements made by Mr. Garreau in the Trusteeship Council in 1947, and in the Fourth Committee in 1948. I shall first read the statement made in the Trusteeship Council in 1947:

> "That text [of the General Assembly Resolution] was very carefully drafted after lengthy discussion because the Assembly, in referring the report of the Government of the Union of South Africa to the Trusteeship Council, wanted above all to take the first step in the direction of international supervision over the former mandated Territory of South West Africa, pending reconsideration of the Assembly resolution by the Government of the Union of South Africa and a decision of that Government in that connexion . . .
>
> Indeed, in the absence of a trusteeship agreement, the Council—and the same would have been true of the Fourth Committee—could examine the report of the South African Government only for information." (**II**, pp. 276-277.)

This is a very clear and explicitly stated attitude.

I now quote from the Fourth Committee records in 1948:

> "The French delegation had frequently had occasion to recall that the Trusteeship System had been substituted for the Mandate System. Once the League of Nations had ceased to exist, so had the institutions which functioned under its aegis. When the United Nations was set up, there remained nothing of the Covenant of the League of Nations except its moral influence. The Mandate System was reconstituted as the Trusteeship System with certain characteristic differences . . .
>
> The South African Government had on several occasions expressed its desire to administer the Territory of South West Africa in the spirit of the Covenant. It accepted the moral obligation of ensuring the well-being and the development of the population, leading it in due course to autonomy and ultimately to independence." (**II**, p. 283.)

The attitudes of these representatives, Mr. President, are clear. They go so far as to suggest that, with the disappearance of the League, the legal force of the Mandate disappeared, and with it also the legal obligations, so that what remained was the moral influence of the Charter and a moral obligation in the case of the South African Government to ensure the well-being and development of the population. This is an attitude entirely inconsistent with any suggestion of supervisory powers, on the part of the United Nations Organization, emanating from the Mandate—supervisory powers in respect of an obligation of accountability under the Mandate—and, therefore, a conclusion that the information is submitted for information purposes only.

We come to number six on the list, Iraq.

We have statements by Mr. Khalidy and Mr. Jamali in the General Assembly—Plenary and Fourth Committee—and in the Trusteeship Council, all in 1947.

In the Fourth Committee, Mr. Khalidy—

"... pointed out that the trusteeship system of the United Nations had replaced the mandate system ...

The mandate system had ceased to function. The Union of South Africa had not accepted the trusteeship system, to which there was no alternative. The trusteeship system offered the only legal right to administer a territory formerly under mandate." (**II**, p. 277.)

Mr. Jamali stated in the Plenary:

"Now the League of Nations is dead, but the principles underlying the mandates are not dead. Chapter XII of the Charter certainly replaces Article 22 of the Covenant ...

There is no obligation [to place a Mandated territory under the Trusteeship system], but those members of the General Assembly who worked on the trusteeship Chapter of the Charter at San Francisco will remember that, although there was no obligation on the mandatory power to put a territory under the Trusteeship System, it was implied that the mandatory Power would either put such a territory under trusteeship in due course, or declare its independence ...

There is no further alternative ...

I believe that the retention of the Territory of South West Africa, neither under the Trusteeship System nor as an independent territory, is a retrograde step. It is contrary to the spirit of the Charter, and it is a denial of the right of the United Nations to supervise the welfare and freedom of all peoples all over the world." *(Ibid.)*

Mr. Khalidy made a statement to the same effect in the Trusteeship Council in 1947, Mr. President—shorter but still to the same effect—cited in the Counter-Memorial, **II**, page 278, which I am not going to read to the Court.

The attitude is a clear one. The Mandate is dead and, therefore, there is no possibility of supervision in terms of the Mandate—only two possible alternatives—trusteeship or independence—nothing in between.

Then we have Mexico, number seven on the list.

The attitude adopted by Mexico, Mr. President, appears from statements made by its representative on the Trusteeship Council during the years 1947 to 1949, and the representative was Dr. Luis Padilla Nervo, who was then Ambassador Extraordinary and Minister Plenipotentiary, and Permanent Representative of Mexico to the United Nations.

I have to refer to certain aspects of these statements, in order to get the gist of the attitude taken on behalf of Mexico on that particular occasion.

The attitude is best understood, Mr. President, after consideration of a full statement made by the honourable representative for Mexico on the subject of South West Africa, in the General Assembly on 1 November 1947:

"The Government of the Union of South Africa decided not to place the mandated Territory of South West Africa under the Trusteeship System, but to continue to maintain the *status quo* and to administer the Territory in the spirit of the Mandate. That position is not, I believe, in accordance with the spirit and the intent of Chapter XII of the Charter of the United Nations, which provides that all territories previously held under mandate, if not granted independence, shall be brought under the Trusteeship System.

Could we say that the fourth paragraph of the preamble of the resolution before us (document A/422) goes too far? [That was the paragraph which urged the Government of the Union of South Africa to propose a trusteeship agreement.] We do not think so. We believe that the discussions held in San Francisco with regard to this matter, which concluded with the establishment of an International Trusteeship System, are in themselves evidence of the fact that the signatory Powers were determined to ensure that the mandated territories would continue to be under international supervision. They were determined to ensure that the mandated territories would not revert to the status of colonies by the very fact of the liquidation of the League of Nations and the termination of the mandate system. The Charter, which is far superior to the Covenant of the League of Nations as an instrument of international co-operation, had to include and did include precepts which represented a step forward, not backward, in respect of the system of mandates.

It has been said that the world took a very long step forward when Article 22 of the Covenant of the League of Nations came into force. Can we now deny that Chapter XII of the Charter of the United Nations was intended to be not only a substitute for Article 22 of the Covenant of the League of Nations but, what is more important, a step along the same road? Neither the framers of the Charter of the United Nations nor the framers of the Covenant of the League of Nations ever intended that the mandated territories should revert back to the status of colonies. South West Africa will be nothing but a colony if we agree to the position taken by the Government of the Union of South Africa.

The representative of the Union of South Africa has stated in the Fourth Committee that maintaining the *status quo* does not, of course mean that the Government of the Union of South Africa claims that the Mandated Territory is a colony. The Government of the Union of South Africa recognizes that it is not a colony.

However, if the Territory is no longer a mandate and if it is never to be a Trust Territory, what will be the result? The representative of the Union of South Africa devises a new and anomalous category and states that the position of the territory is *sui generis*. The representative of the United States of America very correctly stated in the Fourth Committee that the Union of South Africa 'does not have a legal title to the Territory of South West Africa'." (Plenary Meetings, 105th Plenary Meeting, 1 November 1947, pp. 594-595.)

Now, Mr. President, may I refer back to his statement in the Trusteeship Council on 1 December 1947—that was at the Trusteeship Council meeting, 6th Meeting, 2nd Session, 1st Part, 1 December 1947—at page 129 of the record:

"As every member of the Council knows, my Government adopted a clear position in regard to the matter of South West Africa when it came before the General Assembly. But I believe the question before this Council now is much simpler. [This is now before the Trusteeship Council.] The Union of South Africa has voluntarily placed before the General Assembly a report which concerns the Territory of South West Africa. The General Assembly, as the sole judge of what to do with that report, decided to send it to the Trusteeship

Council for its consideration, and requested that the Council make its observations regarding the report. That is all this Council, in my opinion, has to do now."

I refer next to a statement in the Trusteeship Council on 23 July 1948, by the same honourable representative. The reference is to the records of the Trusteeship Council, 3rd Session, 31st Meeting, 23 July 1948, page 408:

"Mr. Padilla Nervo (Mexico) pointed out that his delegation had always shared the opinion of the Fourth Committee of the General Assembly to the effect that the Government of the Union of South Africa should propose a draft trusteeship agreement for the Territory of South West Africa. The fact that the Council considered the report presented by the Union of South Africa did not in any way mean that it consented to deal with a third category of territories not specified in the Charter. Mr. Padilla Nervo observed that, following the debate in the Fourth Committee, it had been decided to entrust the consideration of the report in question to the Trusteeship Council, and not to another Committee of the General Assembly or to the Committee on Information from Non-Self-Governing Territories, precisely so as not to create the impression that South West Africa was receiving the same treatment as a non-self-governing territory. Since the report in question related to a former mandated Territory, it was natural that it should be dealt with by the Trusteeship Council, as it was the latter's duty to study reports relating to all other former mandated Territories.

In studying the report, the Council would not in any sense be approving the South African Government's attitude, but only discharging the duties inposed on it by the General Assembly."

Then we come to a further statement in the Trusteeship Council, at the same meeting, 23 July 1948—pages 414-415 of the record:

"Mr. Padilla Nervo said the Council was examining the report of the Union of South Africa in quite special circumstances. That it had been called upon to do so by a resolution of the General Assembly did not mean it would be the practice of the Council in the future to examine the reports which the South African Government might submit to the United Nations. The next session of the General Assembly would have to take a decision on that point."

Now, Mr. President, upon analysis, it would seem that the view of the representative of Mexico was that it was an essential characteristic of all mandates to be under international supervision. His attitude was, further, as we understand it, that there was at least a moral obligation to enter into a trusteeship agreement. If this moral obligation was not complied with, then South West Africa would, in effect, be nothing but a colony, and, in this context, all it could mean would be that it would be free of international supervision. We note, Mr. President, that the honourable representative of Mexico agreed with a statement made by Mr. Dulles of the United States, and which read as follows:

"The Union of South Africa had no legal title to the Territory at present, because its only title was a mandatory under the League of Nations." (*G.A., O.R.*, Second Session, 38th Meeting, 7 October 1947, p. 50 and **II**, p. 281.)

That indicates, Mr. President, that the attitude was that the Mandate had lapsed—the Mandate was legally no longer in operation—and that being the premise surely it would follow that there could be no concept of international supervision, of a duty to submit to report and accountability under the Mandate, as a mandate. That fits in entirely with the concept that, if South West Africa was not put under the trusteeship system, then it would, in effect, be nothing but a colony.

We note, also, Mr. President, that the honourable representative said in the Trusteeship Council that "the Union has voluntarily placed before the General Assembly a report"; secondly, "the fact that the Council had considered the report did not in any way mean that it consented to deal with a third category of States not mentioned in the Charter"—a third category obviously meaning "in addition to trusteeship territory and non-self-governing territories". We note, Mr. President, that he further referred to a "former mandated territory".

It seems perfectly clear that this representative of Mexico certainly did not understand that the South African Government had, in any way, previously committed itself by consent, or by acquiescence, or by any similar process, to accountability in terms of the Mandate to the United Nations.

I have had to read through several extracts from these statements in order to extract the gist from them, because there was no particular statement which, in a few lines, specifically directed attention to the point, but, upon this analysis, and upon taking the salient features of these statements, they admit of only one construction, in my submission—only one interpretation—and that is that there was no contemplation whatsoever of an arrangement, as contended for by Applicants, namely that the Mandate was in existence and that South Africa had accepted substitution of United Nations organs, as supervisory organs, in respect of its obligations under the Mandate—organs to which it would have to report and account for compliance with substantive obligations under the Mandate. The statements make it perfectly clear that there was no contemplation even of the Mandate still being in existence, but, apart from that, no contemplation of any international supervision on the basis of the Mandate, and that, if the Territory was not placed under trusteeship, it would, in effect, have the status of a colony.

Next we come, Mr. President, to the case of New Zealand, that is No. 8 on the list. We refer first to a statement by Sir Carl Berendsen, in the Fourth Committee, on 27 September 1947:

> "Speaking as the representative of New Zealand, he favoured the international supervision of all backward peoples, but maintained that there was no legal obligation on any Mandatory Power to place a mandate under the trusteeship system. The Committee could not therefore accuse the Union of South Africa of failing in its duty." (**II**, p. 278.)

I proceed to refer to a statement in the Trusteeship Council on 12 December 1947, by the same speaker, quoted at the same page of the Counter-Memorial. We have a fuller extract available, Mr. President. The reference is the same as is given in the Counter-Memorial, and to put this into its proper perspective, I would like to read from this fuller extract:

"I am sorry to say, and I shall explain why in a moment, that I must agree with the representatives of Australia and Costa Rica. [The Court will recall this is a statement in the Trusteeship Council, it is on the question of the nature of the function which the Council now has to perform in regard to this report which the South African Government had sent to the United Nations and which had been sent to the Council for its attention by the General Assembly.] This is not a Trust Territory. We derive no powers from the Charter. Our only powers are derived from the resolution of the General Assembly, and our powers are limited by that resolution. Under that resolution we are specifically authorized to examine the report on South West Africa recently submitted by the Government of the Union of South Africa. It is no concern of ours whether it is obligatory or not obligatory on a former mandatory to bring the mandated area under the Trusteeship System. That is no concern of ours at all. It is no concern of ours whether the Government of the Union of South Africa was right in not bringing that area under the Trusteeship System. It is no concern of ours whether they have the legal power to decline to do so. All of those things are quite beyond our purpose here.

There was, as we all remember, a very considerable argument in the past two General Assemblies as to whether there was a duty on a mandatory to bring a mandated area under trusteeship. There was a difference of opinion, a very considerable difference of opinion. I am one of those who felt—and I am convinced as usual that I was right—that there is no legal obligation, that the Union of South Africa was legally entitled to take the course that it took. But I am also one of those, one of very many, who feel it is unfortunate that the Union of South Africa did take the course it did.

I would not suggest for a moment that in examining this report the representatives around this table are confined to the actual words of the report. They are entitled, if we are to deal with the report responsibly, to take into account what is within their knowledge. But we are not entitled—and I regret it very much indeed—we are clearly not entitled to send a visiting mission. We are clearly not entitled to accept petitions. We are clearly not entitled to hear oral representation." (Trusteeship Council, Second Session, First Part, 15th Meeting, 12 December 1947, pp. 478-480.)

A very clear statement, Mr. President, in which regret is expressed about the practical implications of the situation: the New Zealand representative would very much have preferred to have the practical situation different but, as he saw the legal situation, quite obviously the United Nations had no supervisory powers in respect of this matter.

Next, No. 9 on the list, we come to the Philippines. We have two statements by General Romulo in the Fourth Committee during 1947, as quoted in the Counter-Memorial, **II,** page 279. The first statement was made on 25 September 1947 and read as follows:

"The Union of South Africa had contended that it had obtained its power from the League of Nations, but it had forgotten the new obligations it had assumed under the Charter. Chapter XI of the Charter contained a declaration which applied to all the Non-Self-Governing Territories, whether mandated or not. That declaration

embodied obligations which far exceeded those of the mandate system. The resolution of the Union Parliament implied that these obligations would be fulfilled by the submission of information."

Next we have his statement of 8 October 1947, still in the Fourth Committee:

"While supporting the draft resolution submitted by the representative of India, [he] could not subscribe to the fifth paragraph of that proposal, to the effect that South West Africa was 'at present outside the control and supervision of the United Nations'. Chapter XI of the Charter applied to all the Non-Self-Governing Territories ...

According to Article 103 of the Charter, obligations under the present Charter superseded other international obligations, and that meant in effect that the Union of South Africa was bound to fulfil its obligations under Chapter XI as long as South West Africa remained outside the trusteeship system."

In other words, Mr. President, there is a contention for no more than what is provided for in Article 73, or Article 73 *(e)*, of Chapter XI of the Charter in so far as may be relevant to this particular point.

We also refer, Mr. President, to extracts from statements by Mr. Ingles in the Trusteeship Council later in the same year. The first one was at the meeting of 1 December 1947—*T.C.O.R.*, Second Session, First Part (to which I have referred before), at page 128:

"The point has also been raised that we are not considering a report from a Trust Territory but a report from a territory under mandate. One of the obligations assumed by the Mandatory Power in this particular territory is to receive petitions. As I understand it, under its mandate the mandatory is to receive petitions. I refer to the procedure followed by the Mandates Commission; that Commission could receive petitions from people of the mandated territories. If, as contended by the representative of China, the Trusteeship Council takes the place of the Mandates Commission, then pursuant to the authority of the Mandates Commission to accept petitions, the Trusteeship Council may accept such petitions as long as they concern matters embraced in the report.

I should like to support, therefore, the suggestion made by the representative of Iraq that, in case a petition is made by the people of South West Africa that they should be heard on the report, their petition should be accepted by the Trusteeship Council." (Trusteeship Council, Second Session, First Part, 15th Meeting, 1 December 1947, p. 128.)

A further statement on 12 December, Mr. President, in the same Trusteeship Council, page 476, reads:

"It is stated in the resolution that the Union Government is going to 'maintain the *status quo* and to continue to administer the territory in the spirit of the existing mandate ...'

The least that this Council could do, therefore, is to examine this report in the same way that the Permanent Mandates Commission used to examine the reports of the Union of South Africa. I say that is the least which this Council could do, because I also associate myself with the observations of the representative of China to the effect that the Trusteeship Council could examine the report as if

it were a report from a Trust Territory." (*Ibid*, 12 December 1947, p. 476.)

Mr. President, there we see an inconsistent attitude, inconsistent with the earlier extracts which I read to the effect that there could only be consideration of voluntary information on the basis of Chapter XI of the Charter.

It was not consistent attitude but still, in so far as it identified itself with the general statement of the Chinese representative that for purposes of examination of this report the Trusteeship Council was to be regarded as having taken the place of the supervisory organs of the League, there is no reference whatsoever to anything which may be said to have involved agreement or consent on the part of the Union of South Africa. On the contrary, there is a pointed reference to the attitude taken up by the Government of the Union of South Africa, namely that it was continuing to administer the Territory in the spirit of the Mandate.

[Public hearing of 8 April 1965]

I was dealing yesterday with the attitudes expressed, one by one, by the 12 States which were members of the Trusteeship Council during the years 1947-1949. This was in answer to the Applicants' contention that within the Council it was agreed that the Mandate continued in full force and effect, and that the United Nations was the proper supervisory authority. I dealt at the conclusion with the attitudes expressed by nine of the States, and I proceed now to the tenth one, the Soviet Union.

The statements to which I shall refer are all contained in the Counter-Memorial, **II**, the first one being at page 281. There Mr. Stein said as follows:

> "It is also known that the South African Government refused to comply with this recommendation [to submit a trusteeship agreement] and set up an absurd juridical status for South West Africa which consisted in the administration of South West Africa being carried out 'in the spirit of the League of Nations Mandate'. I say that this is an absurd juridical status, since now, in 1947, after the League of Nations and the mandate system have ceased to exist, and reference is made to this system in order to conceal the actual annexation of South West Africa."

The next reference is on page 284 **(II)** of the Counter-Memorial—a statement in the Trusteeship Council in July 1948 by Mr. Tsarapkin:

> "... his delegation held that the Trusteeship Council could not consider the report submitted by the Government of the Union of South Africa, because the status of the Territory was at present undetermined. While it was true that the Union of South Africa had declared that it would administer the Territory in the spirit of the existing mandate, it should not be forgotten that both the mandate system of the League of Nations and the Permanent Mandates Commission no longer existed. Hence, there was no legal basis for the administration of that Territory by the Union of South Africa."

In August of the same year there was a further statement by the same speaker:

> "He was of the opinion that a report on the Territory of South West Africa could be considered only after this Territory is included

> in the Trusteeship System and a Trusteeship Agreement is approved by the General Assembly . . . He considered that there exist only two alternatives to deal with the former Mandated Territory of South West Africa—either this Territory should become an independent State or should be included in the Trusteeship System . . ." (**II**, p. 284.)

So, Mr. President, there was a very clear and unambiguous attitude—the mandates system no longer existed, nor did the Mandate, and the United Nations had no supervisory powers outside the trusteeship system.

Then we come to the attitude of the United Kingdom, the next one on the list, No. 11. I refer to the same page of the Counter-Memorial, where the following statement by Sir Alan Burns in the Trusteeship Council on 4 August 1948 appears:

> "The Council had been asked to consider the report on the administration of South West Africa simply because that Territory was formerly under mandate, and the General Assembly hoped soon to see it placed under the Trusteeship System. It was important, therefore, to bear in mind that the Council's consideration of the report on the administration of South West Africa and its report thereon to the General Assembly were *sui generis*; the Council had no right to assume that the General Assembly would take any particular course of action on the basis of the Council's reports."

I emphasize, Mr. President, the statement that the Council had been asked to consider the report "simply because that Territory was formerly under mandate, and the General Assembly hoped soon to see it placed under the Trusteeship System".

Then there is a later statement, given at page 286 of the Counter-Memorial (**II**)—a very explicit one:

> "It could not be said that the Government of the Union of South Africa had repudiated its previous assurance since it had complete liberty to decide whether or not to transmit information."

That was said in the course of the debates on that subject on November 1949, when the decision of the Union Government had been conveyed that it would no longer submit information as before.

That again makes it clear, Mr. President, that in the contemplation of the United Kingdom there could be no accountability to the United Nations because Respondent had complete freedom to decide whether or not to transmit information.

The last one on the list—not the least—No. 12—is the United States of America. There I would like to refer the Court first to a statement by Mr. Dulles in the Fourth Committee in October 1947; we get that in the Counter-Memorial, **II**, at page 281:

> "The Union of South Africa had no legal title to the territory at present, because its only title was a Mandatory under the League of Nations."

This is, therefore a clear attitude, Mr. President, that the Mandate no longer existed. This was in October 1947.

In the records of the Trusteeship Council of 1 December 1947 there is a statement by Mr. Gerig which is not quoted in the Counter-Memorial. I should like to read it to the Court now—the reference is Trusteeship Council, Second Session, 1st Part, 6th Meeting, pages 130-131:

"*Mr. Gerig* (United States of America): 'I am substantially in accord with the representative of Mexico. I think the only real question left before us is what to do with the petitions relating to South West Africa referred to in document T/55. I think there were some members of the Council who felt that we should hear such petitioners orally. If we did that, we would be treating this territory as if it were a Trust Territory, and I think everyone now agrees that we are not going to treat it as a Trust Territory.

On the other hand, it is a mandated territory, recognized as such by everyone, including the Union of South Africa. As has been said here before, petitions were examined by the Mandates Commission, and we actually have a petition before us. I think the question will be whether we shall consider this petition to be admissible or not. That seems to be still an open question. Otherwise, it seems to me that the procedure with reference to this report is entirely clear'."

The Court will recall that the Applicants in the course of their argument quoted this excerpt: "... it is a mandated territory, recognized as such by everyone, including the Union of South Africa" (p. 160, *supra*). Before commenting on that, and the contrast between this statement and the one by Mr. Dulles which I have just read, I should also like to refer to the statement by Mr. Gerig, the same speaker, in the Trusteeship Council on 12 December: we cite that in the Counter-Memorial, **II,** at page 281. Mr. President, I wish to emphasize that this statement was made on 12 December 1947, some 12 days after the previous statement I have just read, and during the course of the same debate in the Trusteeship Council as to what the approach of the Council ought to be to the particular report which had been submitted by the Union for information purposes:

"It was said here [Mr. Gerig said] earlier this afternoon, and I did not hear any member object, that while we all hope—my delegation as much as any delegation feels that way—that there will be a trusteeship agreement for this territory, we do not, in the absence of a trusteeship agreement, have supervisory functions over this territory. Therefore, I do not think we ought to imply that we do have supervisory functions to ensure that the Union Government discharges its duties under the present mandate, admitting that it exist." (**II,** p. 281.)

Mr. President, in these various statements on behalf of the United States we find an exact replica of the general situation which we find amongst the various States at the time. We find uncertainty, disagreement, or inconsistency—call it what you will—on the point whether the Mandate was still in existence. Here we have two representatives of the same State, one saying that in his view South Africa no longer had any title to administer South West Africa, because the Mandate must be considered as having lapsed; the other representative saying, two months later, that everybody was in agreement that the Mandate was in existence.

But, Mr. President, the other important aspect is this, that this second speaker proceeded from the basis that the Mandate was in existence but as a clear and explicit view to the effect that the United Nations had no supervisory authority in respect of the Mandate. That illustrates the antithesis which existed at the time; it was an antithesis between these two attitudes or views, namely that either the Mandate had lapsed,

or that if it existed, it existed without supervisory authority on the part of the United Nations. There was no support whatsoever, Mr. President, for the attitude contended for by the Applicants, namely that the Mandate was in existence, with supervisory authority on the part of the United Nations.

I have now come to a stage where I should summarize the effects of this total review, but before doing so, I would like to revert to the attitude adopted by China. The Court will recall that I looked for a passage yesterday which I had in mind but could not find it at the time. It is on record in the Counter-Memorial, **II,** at page 282. It is a statement that was made by Mr. Liu Chieh in the Fourth Committee on 9 November 1948. It may be as well that I could not find it yesterday, because on checking it for context yesterday afternoon, I found that in the speech as a whole, which was made on that occasion, there are other passages which very clearly indicate what the attitude of the Chinese delegation was at that time. I refer, Mr. President, to the *Official Records of the Fourth Committee*, Part I, which relate to the period 21 September to 22 November 1948. I quote from page 294 (*G.A., O.R.*, Third Session, 4th Committee), where the address by the representative of China started:

> "Mr. Liu Chieh expressed appreciation of the gesture which had been made by the Union of South Africa under the administration of Field Marshal Smuts in transmitting to the United Nations a report on South West Africa."

Mr. President, I need hardly emphasize the significance of the expression "the gesture which had been made by the Union of South Africa". It clearly reveals no contemplation on the part of the speaker that there had been a legal obligation to submit any information at all, let alone to report and account under a mandate.

The speaker proceeded—I am reading from the same page:

> "He refuted the South African representative's assertion that the Trusteeship Council had exceeded its competence by examining the report on South West Africa submitted to the United Nations by the Union Government, and, in turn, reporting thereon to the General Assembly. The Trusteeship Council in so doing, had merely carried out the instructions of the General Assembly to that effect, as expressed in its resolution of the previous year."

Mr. President, again there is no reliance on the premise that there was an obligation to report and account on the part of the Union and the corresponding power of supervision on the part of the Trusteeship Council. There is merely a reference to the fact that the Trusteeship Council was required to act on the instructions of the General Assembly, and in fact did so.

Then, Mr. President, at the top of the next page we find this passage:

> "He felt that certain of the points raised by the South African representative required an immediate answer. Only a year ago, the Union Government had informed the United Nations that it had decided not to proceed with the incorporation of the Territory, but that it intended to maintain the status quo and continue to administer the Territory in the spirit of the Mandate. It also undertook to submit reports on the Territory for the information of the United Nations." (*Ibid.*, p. 295.)

Now this address, as the Court will recall, was delivered in 1948. It referred back to statements made the previous year (1947) by the Union Government, making it perfectly clear that there was no misunderstanding whatsoever on the part of the delegation of China as to the basis upon which the reports were to be submitted—they were to be submitted "for the information of the United Nations". And it was in this context, then, that the speaker proceeded to deal with the question whether there was any obligation under the provisions of the Charter to enter into a trusteeship agreement. He arrived at an affirmative conclusion, and in the course of his reasoning said (at p. 296), as follows:

> "It was true that as no trusteeship agreement had been concluded for South West Africa, the United Nations could not intervene or exercise its power of supervision in regard to that Territory. But paragraph 2 of Article 80 imposed an obligation to conclude such an agreement without delay." (**II**, p. 282.)

Mr. President, it seems, therefore, summarizing the attitude of the delegation of China, that it amounted to this: in general, that delegation was in agreement with the proposition that outside trusteeship, there was no power of supervision on the part of the United Nations. The delegation contended, however, that there was an obligation—a legal obligation—to enter into a trusteeship agreement. And, arguing apparently from that premise, its attitude in the previous year (when a report before the Trusteeship Council submitting information from the Union Government), was apparently that, as this opportunity had been afforded by the Union Government for exercising a function similar to that which had been exercised by the Permanent Mandates Commission, that opportunity was therefore to be used by the Trusteeship Council; and that for that purpose the Security Council could be viewed as exercising a similar function to that which had previously been assigned to the Permanent Mandates Commission. But, Mr. President, there was full recognition of the fact that there had been no agreement—nothing in the nature of consent or acquiescence on the part of the South African Government—to a substitution of supervisory organs for purposes of accountability under the Mandate. That appears very clearly from all these passages I have read.

That seems to have been the Chinese attitude at the time, and the attitude of the other State which identified itself with them—the Philippines—with whose attitude I dealt yesterday.

Therefore, Mr. President, we may summarize the attitudes taken by the 12 States represented on the Security Council at the time as follows: first of all, there were at least five of these States which took up the attitude that the Mandate had lapsed on dissolution of the League. They were: Costa Rica, France, Iraq, Mexico and the Soviet Union. A sixth State—the United States of America—stated through one of its representatives a view that the Mandate had lapsed; through another that it had not lapsed—that it was in existence, but without accountability.

Then, on the question whether there was any supervisory authority on the part of the United Nations outside trusteeship, we find that nine States held a very clear and unqualified view on that point, to the effect that outside a trusteeship agreement there was no such supervisory power on the part of the United Nations. These States were: Australia, Costa Rica, France, Iraq, Mexico, New Zealand, the Soviet Union, the United

Kingdom and the United States of America. I have, of course, included in this list the States which took the view without more, that the Mandate had lapsed, because from that it would follow that there could not have been accountability under a mandate to the United Nations.

Two further States with which I have just dealt—China and the Philippines—took a view which in general appeared to agree with the attitude of these nine States, except that they took a different line as to what the functions of the Trusteeship Council could be in respect of the particular report which it had before it in 1947. The attitude appeared to be that, although, in general, there was no supervisory power on the part of the United Nations outside of trusteeship, there was an opportunity for the Trusteeship Council to perform functions similar to those which had been performed by the Permanent Mandates Commission.

The twelfth State was Belgium, whose attitude was, on the one hand, that by virtue of Article 80 (1) of the Charter the people of the Territory were entitled to have the Territory supervised. That was in principle their general attitude; but on the other hand, Belgium recognized that there had been no agreement by South Africa to have United Nations supervisory organs substituted for those of the League. That point we emphasized yesterday when dealing with the statements made on behalf of Belgium.

Not in one single case, therefore, Mr. President, of these members of the Trusteeship Council, do we find an attitude supporting, or corresponding with, that taken up by the Applicants in this case. Not one of them took up the attitude that there was agreement, consent, acquiescence, on the part of the South African Government to a substitution of supervisory organs, and that on that basis the United Nations had supervisory functions or powers, outside trusteeship.

It is true that the Council did consider the Respondent's report for the year 1946, which had been submitted voluntarily for the limited purpose of furnishing information, but it is clear that the Applicants are completely wrong when they say, with reference to the Trusteeship Council, firstly, that it was agreed that the Mandate continued in full force and effect, and, secondly, that it was agreed that the United Nations was the proper supervisory authority.

Mr. President, I have dealt specially with the views expressed by the 12 members of the Trusteeship Council, in order to refute the explicit statement advanced by my learned friend, Mr. Moore; but the same result as I have just stated to the Court, follows from an analysis of the attitudes adopted over the years 1947-1949 by all the Members of the United Nations.

We have included in our Counter-Memorial, firstly, references to debates concerning the question of South West Africa, in which member States participated over the years 1947-1949, and gave, as fully as we could find from our investigations, all references to debates in which this question was raised, in which any attitude whatsoever was expressed by a Member of the United Nations over those years. The reference is Annex A to Book II of the Counter-Memorial **(II)**, pages 258-274.

Secondly, we gave extracts from statements made in such debates. These are those from which I have read, to some extent, in the review I have just given the Court. They are contained in pages 275-286 of the Counter-Memorial **(II)**.

I shall not now take up the time of the Court by reading more exten-

sively from all these statements. It will suffice, Mr. President, to repeat very briefly the conclusions which we draw in our Counter-Memorial from these statements, and to indicate to what extent, if any, those conclusions have been affected by anything contended for by the Applicants in these Oral Proceedings. The conclusions to which I shall refer are set out in Book II of the Counter-Memorial (**II**), at pages 65-71.

The first one of importance is that throughout the period 1947-1949, the Respondent repeatedly stated its attitude, namely firstly, that it was not obliged, and was not prepared, to enter into a trusteeship agreement; and, secondly, that in the absence of such an agreement, the United Nations would have no supervisory jurisdiction in regard to South West Africa. The Members of the United Nations could not have been unaware that that was the attitude of the South African Government—it was stated clearly, explicitly and repeatedly. In the year 1947, Mr. President, when the statement to this effect was made early in the debate, in September, by Mr. Lawrence, not a single State either alleged or suggested that there was at any time an agreement, express or implied, or any understanding, whereby the League's supervisory powers over the Mandate became vested in the United Nations, or whereby Respondent became obliged to report and account to the United Nations regarding compliance with its substantive mandate obligations. Not a single State stated that attitude during the whole of 1947. In spite of the fact, as we point out, thirdly, that in addition to Respondent, 40 other States participated in the debates on South West Africa in that year, and that at least 14 of these States, either expressly, or by clear implication, acknowledged that, in the absence of a trusteeship agreement, the United Nations would have no supervisory jurisdiction in respect of South West Africa.

These 14 States were Australia, China, Colombia, Cuba, France, India, Iraq, the Netherlands, New Zealand, Pakistan, the Philippine Republic, the Soviet Union, the United States of America and Uruguay.

Fourthly, we point out that similar views were expressed also on behalf of at least four other States during 1948 and 1949. These States were Canada, Costa Rica, Greece and the United Kingdom.

Fifthly, Mr. President, we point out that it was only from the end of 1948 that certain States began to contradict in any way Respondent's contention regarding supervisory powers, or the absence thereof, on the part of the United Nations. These States were Belgium, Brazil, Cuba, India and Uruguay.

Now, Belgium's attitude, as I have already indicated, Mr. President, rested on Article 80 (1) of the Charter: it was simply a broad attitude to the effect that the people of the Territory were entitled to have international supervision. On the other hand, Belgium's representatives acknowledged in their statements that there had been no agreement on the part of South Africa to a substitution of supervisory organs.

Brazil, Mr. President, stated an attitude (we record in the Counter-Memorial, **II**, at p. 285), by way of an argument very much on the lines of the "organized international community" theory, which the Applicants advanced at previous stages in these proceedings, but which they no longer appear to advance as a theory which by itself leads them to their conclusion.

The view adopted by Brazil was that, inasmuch as South West Africa had been placed under the mandate system of the League of Nations, it was "under the supervision of the Community of Nations, namely the

General Assembly". This attitude, Mr. President, involved the idea that, on the basis of this theory, there was no necessity whatsoever for alleging, or establishing, a new consent on Respondent's part, at the time of transition. In fact, there was, on the part of Brazil, no allegation whatsoever that there was in the transition stage such a fresh consent or agreement on Respondent's part regarding a substitution of supervisory organs.

Cuba's attitude was not a consistent one. At first it was to the effect that Respondent's report could not be examined by the United Nations because "South West Africa was neither a Trust Territory, nor a Non-Self-Governing Territory". (*Ibid.*, p. 276.) The argument was, Mr. President, that the Charter recognized only three categories of States or territories; firstly, trust territories, secondly, Non-Self-Governing Territories, and thirdly, independent States. There was, therefore, no scope, on the basis of that attitude, for carrying on with a mandate as a mandate, let alone any scope for carrying on with an obligation of accountability under a mandate. That was the attitude stated for the first time on 26 September 1947, and again in a similar statement on 8 October 1947.

Later, Mr. President, Cuba argued differently—

> ". . . the rights and duties of the United Nations were the same as those of the League of Nations for both organizations represented the international community". (**II**, p. 285.)

In other words, here we have a similar argument to that which I have just referred to in the case of Brazil—an argument based on the idea of an organized international community, so that the original obligation to submit to the supervision of the League organs was now to be seen as an obligation to submit to organs of the United Nations.

The same implications arise as in the case of Brazil: in other words, there was no necessity to establish new agreement or consent on the Respondent's part in the transition stage; and, in fact, there was no allegation whatever, on the part of Cuba, that there was such agreement or consent by the Respondent in the transition stage.

Next we come to India. India's attitude also underwent a change. As we indicated in the Counter-Memorial (*ibid.*, p. 277), in 1947, India submitted a draft resolution containing the following statement:

> "*Whereas* the territory of South West Africa, though not self-governing, is at present outside the control and supervision of the United Nations."

In 1948, however, India argued, in a passage which we quote in the Counter-Memorial (*ibid.*, p. 283), that Article 80 of the Charter safeguarded the rights of the people of South West Africa. It was a similar attitude to that taken by Belgium, and again the attitude was a vague and broad one, namely that the people of the Territory were entitled to have international supervision, but there was no allegation of consent on the part of the Respondent to a substitution of supervisory organs. That was a change from the attitude indicated in the draft resolution of the previous year; but in 1950, in presenting argument to this Court in a written statement in relation to the Advisory Opinion which was being sought by the United Nations, India again reverted very explicitly to its first attitude. It stated:

> ". . . Article 6 of the Mandate and the first portion of Article 7 of the Mandate have become incapable of being complied with . . . The

result is that the mandatory is not obliged to submit to an annual report under Article 6 . . ." (*Ibid.*, p. 71.)

In the case of Uruguay, the view it expressed in 1947 is given in **II**, p. 281, and reads:

". . . impossible to conceive of a mandate continuing, even only in spirit, now that the body which granted it, the League of Nations, has ceased to exist".

In other words, there is a clear attitude that the Mandate itself had lapsed.

In 1948, however, Mr. President, we find a change of attitude when the representative of Uruguay relied on Article 80 of the Charter and argued that the United Nations had taken the place of the League as the "co-ordinating centre" of the "civilized and organized international collectivity", with the result that it was—

". . . through the organization [the United Nations] that the Union of South Africa should fulfil its obligations towards the international community and give an account of its administration". (*Ibid.*, p. 285.)

Again, Mr. President, here is an attitude corresponding with that of Brazil and to the later attitude of Cuba, with the same implication that it was not necessary to establish fresh consent, at the transition stage, on the part of the mandatory, and no attempt, in fact, to establish or allege that there was any such consent.

As we analysed the position in the pleadings, particularly in the Counter-Memorial, Mr. President, only these five States at any time in the relevant period, 1947-1949, expressed views in conflict with Respondent's contention about supervision, but in three of the cases they were inconsistent in their statements and in *all* the cases there was no allegation of consent to a substitution on the Respondent's part, in or after the transition stage. That is very important, because even those States which arrived at the result which accords with that which the Applicants are contending for, did not do so on the basis which the Applicants now acknowledge to be a necessary one, namely to establish such a new consent or agreement in or after the transition stage. This is very significant, Mr. President, because it means that, while the Applicants contend for a general consensus or agreement or understanding on that point—i.e., that the United Nations would have supervisory jurisdiction, the actual position is that of all these States which it is suggested were participants in that general agreement or understanding, not a single one of those which expressed its views on the situation, lent any colour of support to that contention—not a single one of them appears to have been aware of this suggested general understanding.

In the light of the oral review which I have given, the cases of China and the Philippines may perhaps be said to be more borderline than we indicated before. Perhaps one may have to add these two to those five States and say that the total list, therefore, is seven States, of which five made inconsistent statements. But as I contended, in truth, our classification of those two States, China and the Philippines, Mr. President, still stands, because their general attitude was as we contend for—and it was only in the manner of dealing with the specific report of 1947 that they took a different line from that of the other States.

In the result, as I say, not a single State supported the Applicants'

present contention that there was such a consent on the Respondent's part during or after the transition stage, and the importance of this conclusion is self-evident.

Now, Mr. President, may I refer to the reaction which our summary in the pleadings, to which I have just referred, elicited from the Applicants. The first aspect thereof we find in the argument of my learned friend, Mr. Gross. He quoted from the statement made by the United States of America to the Court in 1950, and he then said: "there was confusion among the Member States of the United Nations over the years 1947 to 1949 as to Respondent's position in connection with the Mandate." He quoted from the 1950 statement by the United States of America, to the effect that "a minority of the Assembly took the position that the Mandate had already expired". (P. 209, *supra.*)

He quoted further *(ibid.)*: "South Africa at the sessions of the General Assembly in 1946-1947 by no means embraced the minority view but firmly supported the view of the majority."

From this, then, my learned friend, Mr. Gross, argued that there was confusion and he said the following:

> ". . . as the actual history of the period makes clear, the issue as to which Members of the United Nations were confused and at odds was not as between international supervision over the mandated territory and no supervision. The issue drawn, rather, was that between supervision under the Mandate or supervision under the trusteeship system. It was hesitancy and confusion, reflected in numerous statements made and often shifting within the same delegation—it was hesitancy and confusion as between these two alternatives (supervision under the mandates system or supervision under the trusteeship system)." (P. 210, *supra.*)

Mr. President, the review which I have just given, in my submission, very clearly shows that this analysis is not true. Firstly, it is a complete *non sequitur* to say that because certain States differed on the question whether the Mandate was in force, there was therefore confusion in regard to supervision. I have indicated, Mr. President, how those two things were not related, in fact, in the minds of the States which spoke on the subject, namely how they themselves differentiated between those two questions. Secondly, Mr. President, to say that there was confusion between the two alternatives of supervision under the mandates system, and supervision under the trusteeship system is to advance a proposition which is, in my submission, entirely inconsistent with the record and in conflict with the record. It is true that States were divided on the question whether the Mandate was in force. Some of the States held that it was in force; others held the contrary view. But, as I have already indicated, an analysis of the statements made by the members of the Trusteeship Council, shows that at least five members of the Council were of the opinion that the Mandate had lapsed. I may also refer the Court to our Rejoinder, V, pages 63-66, where we deal in more detail with the attitude taken up by certain States on the question whether the Mandate had lapsed or not.

It is conceded from our side, Mr. President, that the majority held the view that the Mandate was in force, and it may also be conceded, as I indicated before, that the Respondent, until 1948, acting through its government of the time, shared the views of the majority. But that does

not mean that there was any confusion at all as to whether the United Nations had supervisory powers regarding the Mandate.

Those Members who held the view that the Mandate had lapsed could, of course, not have been of the opinion that there was any supervisory authority—any obligation of accountability under the Mandate.

On the other hand, those Members who thought that the Mandate was in force, need not have been of opinion that the powers of supervision under the Mandate had passed to the United Nations; and I have demonstrated, Mr. President, that, in fact, with very few exceptions, they did not think so.

A very striking example to prove this point is the self-same one the Applicants seek to use to the opposite end, and that is the case of the representatives of the United States. I dealt this morning with what they actually said in that regard. The Applicants say, with apparent concern:

> "The Respondent, indeed, goes so far as to call into question the views of the United States itself on this matter, notwithstanding clear expression of views on the part of the United States representatives to the United Nations, including Mr. Benjamin Gerig, the representative of the United States on the Trusteeship Council in 1947, and himself a recognized authority on mandate and trusteeship affairs." (P. 210, *supra.*)

The Applicants then quote Mr. Gerig as having stated at the 15th Meeting of the Trusteeship Council in 1947 as follows: "I am among those who always have believed that the Mandate does continue in force, but there are others who do not take that view." *(Ibid.)*

But, Mr. President we find that this very same "recognized authority on mandate and trusteeship affairs", Mr. Gerig, stated at the same meeting of the Council what I read to the Court earlier this morning, namely:

> "It was said here earlier this afternoon, and I did not hear any member object, that while we all hope—my delegation as much as any delegation feels that way—that there will be a trusteeship agreement for this territory, we do not, in the absence of a trusteeship agreement, have supervisory functions over this territory. Therefore, I do not think we ought to imply that we do have supervisory functions . . ." (**II**, p. 281.)

The attitude expressed by him is so explicitly clear that one can hardly understand how Applicants can still argue, that Mr. Gerig's attitude that the Mandate was still in existence, implied a conception that there was also supervisory power on the part of the United Nations. In fact, Mr. President, Mr. Gerig himself shows that that suggestion is entirely unfounded.

Accordingly, Mr. President, there is nothing strange in the position which the Applicants state in the verbatim record:

> ". . . of the list of States cited in the United States statement as holding the view that the Mandate responsibilities continued in existence, six of the same States are listed by Respondent as holding the view that the Respondent had not remained under a duty to submit to international supervision". (Pp. 209-210, *supra.*)

There is nothing strange in that position, Mr. President. We list those six States as holding the view that Respondent did not remain under

a duty to submit to international supervision, not because of any fantasy on our part, but simply because those six States had, in fact, expressed their opinions very clearly on that point. And it is hardly necessary to say that this fact in itself disproves the Applicants' statement to the effect that in the years 1947 to 1949 there was confusion as between what they call the two alternatives of supervision under the mandates system and supervision under the trusteeship system.

What are the implications of this statement—this argument advanced by the Applicants—this analysis which they give to the events of the years 1947 to 1949? The implication is, Mr. President, that all, or at least the preponderant number of the States, Members of the United Nations, were agreed on the fact that there was international accountability—that there was a power of supervision on the part of the United Nations—but that the issue lay between the question whether that power existed under the mandates system or under the trusteeship system. That is the implication of this argument, but the analysis which I gave to the Court this morning, proves how entirely incorrect this statement is.

Take the position in the Trusteeship Council alone, where we find that nine out of the 12 members were definitely of the opinion that outside trusteeship the United Nations would have no supervisory power, and that two others appeared to agree with that opinion, subject to the qualification which I have mentioned.

Further, Mr. President, the analysis in the Counter-Memorial of the attitudes of all members who took part in the debates, also shows how completely wrong this statement of the Applicants is. It shows that out of a total membership of more than 50—it was in fact 57 in 1947—only five indicated the view that the United Nations had supervisory powers in respect of South West Africa outside of trusteeship, and that of those, three were not even consistent.

Mr. President, my learned friend, Mr. Gross, did not attempt to disprove this analysis to which I have just referred. Instead, as I have indicated, he advanced an argument on alleged confusion between these concepts but, from what I have just said to the Court, I submit that it will be perfectly clear that there is no substance in that argument at all. My learned friend, Mr. Moore, also dealt with this subject-matter, but he reacted in a different way. He did not rely on confusion, but attempted to prove that it was agreed in the Trusteeship Council that "the United Nations was the proper supervisory body", and with that object in view he cited extracts from three speeches in the Council, which we find in the verbatim record at page 160, *supra*.

I have already demonstrated, Mr. President, that this statement is wholly unsupported and, indeed, in direct conflict with the record of proceedings in the Council. It was a reference to statements of three members, isolated from their context, with no reference to the attitude of the other members of the Council, and, therefore, gives a completely wrong picture of what the general attitude in that Council was.

My learned friend, Mr. Moore, also made an attempt in another way to controvert our argument regarding the practice of States in the years 1947 to 1949. It will be recalled, Mr. President, that in our Counter-Memorial we also dealt on this point with views expressed by Members of the United Nations over that period regarding mandates other than the Mandate of South West Africa. I refer to pages 67 to 70 of the Counter-Memorial **(II)**, in which we cited passages from statements and

reports concerning Western Samoa, the former Japanese Mandated Islands, and the Mandate for Palestine.

In regard to Western Samoa there is a very pertinent statement by New Zealand, the former mandatory power. Although I do not intend to read all these passages to which I have referred, I should like to read this one by New Zealand because it is a very pertinent one, and because of the important role which New Zealand played in this regard. New Zealand apparently had difficulty in discussions in the Fourth Committee on the question of the terms of its proposed trusteeship agreement for Western Samoa, and strong pressure was exerted on it to amend the draft in some respects. Its representative then stated on 22 November 1946:

> "New Zealand, although it would be most co-operative, could not be forced to amend its draft agreement. The result of disapproval of the draft agreement by the General Assembly would be that New Zealand would carry on, as in the past, its sacred trust to lead the people of Samoa in their orderly progress towards self-government. In this *eventuality, New Zealand would have to carry on without the privilege of the supervision by the United Nations which it desired.*" (Italics added.)

I need hardly stress the significance of this statement, Mr. President, coming as early as 22 November 1946 from New Zealand, one of the mandatory powers which had made statements at the final session of the League Assembly—coming, as I say, a bare seven months after those statements were made, and making it perfectly clear that the interpretation which I, in any event, submitted was to be given to this statement made by New Zealand on that occasion, was, in fact, the interpretation intended by the New Zealand representative—namely that there was no question of submitting to supervisory authority on the part of the United Nations, outside trusteeship, after the dissolution of the League.

At page 68 **(II)** we deal with statements made by the representative of Russia, Mr. Gromyko, in the Security Council, on questions pertaining to the Japanese Mandated Islands, and particularly the question whether the Security Council was competent to decide whether Japan had violated its obligations under the mandate or not. His firm attitude was that there was no such power on the part of the Security Council, because there was no continuity, either legal or otherwise, between the mandatory system of the League of Nations and the trusteeship system laid down in the United Nations Charter.

And then there is the case of the Mandate for Palestine. We give, first, at pages 68 to 70 the extracts from the unanimous report of the eleven-nation Committee, and then at page 70 a statement of a United States representative in March 1948, when he said:

> "The United Nations does not automatically fall heir to the responsibilities either of the League of Nations or of the Mandatory Power in respect of the Palestine Mandate. The record seems to us entirely clear that the *United Nations did not take over the League of Nations Mandate system.*" (Italics added.)

Reverting to the report of the Special Committee on Palestine, we find the relevant extracts set out at pages 68-69 of **II.** I am not going to read them extensively now. I have referred to relevant portions

before and I shall only emphasize certain of the very pertinent parts of these extracts.

First, I read the extract at page 68 where it is said that after the dissolution of the League—

> "The mandatory Power, in the absence of the League and its Permanent Mandates Commission, had *no international authority to which it might submit reports and generally account* for the exercise of its responsibilities in accordance with the terms of the Mandate." (Italics added.)

I read a further extract at page 69 of the Counter-Memorial, **II**:

> "But the League of Nations and the Mandates Commission have been dissolved, *and there is now no means of discharging fully the international obligation with regard to a mandated territory other than by placing the territory under the International Trusteeship System of the United Nations.*"

Here is the most clear contemplation, Mr. President, of no supervisory power outside the international trusteeship system, that is, as from after dissolution of the League.

I read again, a further extract a few lines further:

> "*The most the mandatory could now do, therefore, in the event of the continuation of the Mandate, would be to carry out its administration, in the spirit of the Mandate, without being able to discharge its international obligations in accordance with the intent of the mandates system.* At the time of the termination of the Permanent Mandates Commission in April, 1946, the mandatory Power did, in fact, declare its intention to carry on the administration of Palestine, pending a new arrangement, in accordance with the general principles of the Mandate."(**II**, p. 69.)

Mr. President, I submit that on the basis of those citations there can be no question whatsoever as to what the general contemplation was in regard to Palestine, but my learned friend, Mr. Moore, in referring to this very same report of the United Nations Special Committee, argued as follows:

> ". . . the general understanding in 1947 was that not only was the Mandate for Palestine still in effect, but that the United Nations had the authority to supervise the administration and termination of that Mandate". (P. 161, *supra.*)

Mr. President, on analysing this contention, with reference to the record in regard to Palestine, one finds again the old, old story. One finds that the passages cited by the Applicants do support the conclusion that the Mandate was considered to be in force, despite the dissolution of the League, but one finds also that the second proposition is entirely without foundation, namely that the general understanding in 1947 was that the United Nations had authority to supervise the administration and termination of that Mandate. Again there is the old confusion of the two things—references are quoted supporting the first statement but in no way supporting the second and, indeed, very often completely in conflict with that second contention.

Mr. President, as regards the supervisory powers in respect of Palestine, which the United Nations eventually obtained, it is true that shortly before Palestine was, in fact, divided and became independent

on that basis, there was a brief period of United Nations supervision, but the very point which is emphasized by the record is this, that that supervision came about as a result of a specific arrangement, agreed to by the United Kingdom—and it was quite clearly the contemplation of all concerned that that specific arrangement was necessary in order to bring about that supervision. There was no contemplation whatsoever of a previously existing supervisory power on the part of the United Nations.

We can state the history of the events, briefly, as follows. On 2 April 1947 the United Kingdom addressed a letter to the Acting Secretary-General of the United Nations requesting that the question of Palestine be placed on the agenda of the next regular session of the General Assembly, and stating that the United Kingdom Government would submit an account of its administration of the Palestine Mandate to the General Assembly and would ask the Assembly to make recommendations, under Article 10 of the Charter, concerning the future government of Palestine. That was the gist of the request, namely that there was to be a recommendation by the General Assembly under Article 10 of the Charter concerning the future government of Palestine. We find the reference to what I have said in the United Nations Special Committee on Palestine's Report to the General Assembly, Volume I, page 1, and Volume II, page 1.

At the outset, Mr. President, the United Kingdom made it clear that it would not necessarily accept any United Nations' recommendation. That we find in the same report, Volume I, at pages 1-2.

The reason for approaching the United Nations and the attitude of the United Kingdom towards any solution that might be proposed by the United Nations were explained as follows, by a British spokesman, in a passage cited in the report, Volume I, page 2:

> "We [the United Kingdom] have tried for years to solve the problem of Palestine. Having failed so far, we now bring it to the United Nations, in the hope that it can succeed where we have not. If the United Nations can find a just solution which will be accepted by both parties, it could hardly be expected that we should not welcome such a solution. All we say . . . is that we should not have the sole responsibility for enforcing a solution which is not accepted by both parties and which we cannot reconcile with our conscience." (*G.A., O.R.*, Second Session, Suppl. 11, Vol. I, p. 2.)

It is apparent, therefore, Mr. President, that the United Kingdom did not place the matter before the United Nations in any spirit of recognition of a legal duty towards that organization, particularly a duty of accountability to the United Nations as a supervisory power. This was realized very well by the Special Committee on Palestine, as appears clearly from the passages which we quote in the Counter-Memorial and to which I have already referred this morning.

Nevertheless, Mr. President, the Applicants allege as follows:

> ". . . it seems obvious that the view of the United Nations Special Committee on Palestine was:
>
> (1) that the Mandate for Palestine was in effect notwithstanding the dissolution of the League of Nations;
>
> (2) that the United Nations had the authority to terminate the Mandate; and

(3) that the United Nations had the authority to supervise the administration of Palestine prior to the granting of independence to that territory." (P. 162, *supra*.)

Mr. President, in our submission, the second of these propositions "that the United Nations had the authority to terminate the Mandate" is shown by the record to be without foundation.

We submit, in regard to the third one, namely that the United Nations had the authority to supervise the administration of Palestine, prior to the granting of independence, that that proposition is very ingeniously worded, but that it does not in the least support the Applicants' contention regarding the issue now before the Court.

Let me deal first with the second proposition that the United Nations had authority to terminate the Mandate.

Mr. President, I was dealing with the Applicants' argument, advanced by my learned friend, Mr. Moore, that it seems obvious that the view of the United Nations Special Committee on Palestine was, in one respect, that the United Nations had the authority to terminate the Mandate. I submit in that regard, Mr. President, that, as we have shown in what I have just submitted to the Court—the extracts from the whole submission of the problem to the United Nations, and the way in which it was handled—that the function of the Special Committee was to propose a solution for the Palestine problem, and that that solution as proposed might or might not be accepted by the United Kingdom Government. The Committee's recommendations regarding the termination of the Mandate could not have been brought into effect without the consent of the United Kingdom—everybody seemed clear on that point, and, in fact, the eventual resolution of the General Assembly, to which I will refer later, took the form of recommendations to the United Kingdom and then to other Members of the United Nations.

The true position, therefore, seems to be that everybody accepted the fact that the future of Palestine fell to be resolved by agreement between the United Kingdom and the United Nations, an attitude which is, of course, entirely consistent with the terms of the resolution of the League Assembly on 18 April 1946 which contemplated further arrangements that might be agreed upon between the respective mandatory powers and the United Nations.

The Applicants also contend that it seems obvious that the view of this Committee was that the United Nations had the authority to supervise the administration of Palestine prior to the granting of independence to that territory. On that point, Mr. President, it seems quite clear, in our submission, that neither the Special Committee on Palestine nor the United Kingdom Government considered that any powers in this regard had passed to the United Nations at any stage prior to the Committee's deliberations. The recommendations of the Committee which involved United Nations supervision prior to the independence of Palestine, constituted part of their total suggested solution of the Palestine question and, as I have pointed out, that would have required the consent of the United Kingdom. Indeed, it is clear from the very tenor of the recommendations and from the terminology employed in them that the Committee contemplated the establishment of a new situation, and not the continuation of a pre-existing one. This can best be illustrated by referring to the scheme which was set out in the first four of the unanimous recommendations of the Committee.

The first of these unanimous recommendations was that "The Mandate for Palestine shall be terminated at the earliest practicable date"—that we find in the Committee's Report, Volume I, page 42 (*G.A., O.R.*, Second Session, Suppl. 11). I may say, in passing, that this was the recommendation in respect of which the Committee expressed its doubts about the question whether the Mandate was in any event still possible of execution—the remarks which we quote at page 69 of the Counter-Memorial **(II)**.

The second recommendation was: "Independence shall be granted in Palestine at the earliest practicable date."

The third one read:

> "There shall be a transitional period preceding the grant of independence in Palestine which shall be as short as possible, consistent with the achievement of the preparations and conditions essential to independence."

Fourthly, there was the recommendation that—

> "During the transitional period the authority entrusted with the task of administering Palestine and preparing it for independence shall be responsible to the United Nations." (*Ibid.*, Suppl. 11, Vol. I, p. 43.)

These second, third and fourth recommendations we find at page 41 of Volume I of the Report.

Mr. President, as I shall indicate presently, the Committee as a whole clearly did not contemplate that the interim administration would necessarily vest in the Mandatory Power; I say the Committee as a whole because their recommendations diverged in that respect. The interim arrangements involved the creation of administrative machinery which was to be, or which might be, something different from that pertaining under the Mandate. Indeed, Mr. President, the Mandate would, in terms of the Committee's recommendations, have been terminated prior to the inception of the transitional period, and the United Nations supervision in that transitional period could, therefore, not derive from the Mandate—not in the contemplation of the Committee. Supervision by the United Nations would, as part of the interim arrangements, also require to be specially created, and that the Committee recognized this seems fairly clear from its comment to the following effect—I quote from the Report, Volume I, at page 44:

> "Certain obstacles which may well confront the authority entrusted with the administration during the transitional period make it desirable that a close link be established with the United Nations." (*G.A., O.R.*, Second Sess., Suppl. 11, Vol. I, p. 44.)

We submit that the word "established" is clearly inconsistent with a view that links were already in existence. In this regard, Mr. President, a misleading impression may possibly be created by a passage in the Applicants' oral statement in the verbatim record at page 162, *supra*, which reads as follows:

> "It was further recommended by the Special Committee that during the transitional period prior to the granting of full independence to the territory of Palestine, 'the present Mandatory Power' shall 'carry on the administration of the territory of Palestine under the auspices of the United Nations . . .'."

Mr. President, the recommendation in question was supported, not by all members of the Committee, but by seven members, and one has to read the whole of the recommendation in order to see it in perspective. We get the reference in the Report at page 47 of Volume I—I read an extract from page 48:

> "During the transitional period, the present mandatory Power shall:
>
> *(a)* Carry on the administration of the territory of Palestine under the auspices of the United Nations and on such conditions and under such supervision as may be agreed upon between the United Kingdom and the United Nations, and if so desired, with the assistance of one or more Members of the United Nations." (*Ibid.*, p. 48.)

Mr. President, the suggestion of a continuation of the Mandate with a substitution of the United Nations for the League is, therefore, completely negatived by the requirement of agreement, as set out in this recommendation. Although this recommendation of these particular members envisaged that the United Kingdom would remain in control of the administration during the transition period, the supervision which it recommended was to be such as might be agreed upon between the United Kingdom and the United Nations. Three members of the Committee recommended differently: that we find in the Report, Volume I, page 59—the fact that they were three in the minority—and their actual recommendation, reading as follows, is at page 60:

> "With regard to the transitional period, responsibility for administering Palestine and preparing it for independence under the conditions herein prescribed shall be entrusted to such authority as may be decided upon by the General Assembly." (*G.A.,O.R.*, Second Sess., Suppl. 11, Vol. I, p. 60.)

In the ultimate result, Mr. President, as the Court would know, the majority recommendation on this point was not accepted by the United Nations. There was what was called a Plan of Partition with Economic Union, which was annexed to the United Nations resolution 181 (II) of 29 November 1947, and which was recommended for adoption by member States. In this Plan it was proposed that interim administration should be placed in the hands of a United Nations Commission. We find that in Part I B of the Plan, on page 133 of the resolutions of the second session of the United Nations. We find, further, in the same source (Part I B) that this Commission would progressively take over the administration of the Territory as the armed forces of the former Mandatory were withdrawn.

Now, Mr. President, the Commission was, in turn, required to hand over its powers progressively to the Provisional Councils of Government to be established by it in each of the two new States. That is also mentioned in Part I B of the Plan, at pages 133-134 of the work to which I have referred.

The Applicants refer to the following provision in this Plan (verbatim record at p. 163, *supra*): "The mandatory power shall not take any action to prevent, obstruct or delay the implementation by the Commission of the measures recommended by the General Assembly." The Applicants proceed to say, on the same page of that record, that this "makes clear the understanding of the General Assembly that the United Nations

had extensive powers of supervision over the administration of the Mandated Territory of Palestine".

Mr. President, in my submission one could hardly imagine a more flagrant *non sequitur*. The powers of the United Nations Commission, and its relationship with the Mandatory, were matters which were to be brought about in pursuance of the Plan, and that Plan could be adopted and given legal effect to only with the consent of the Mandatory. How it can, therefore, be said to involve acknowledgment of prior supervisory power by the United Nations, I do not understand. It is the Plan that provides that the mandatory power shall not prevent or obstruct the implementation of the measures by the Commission, and it is only upon acceptance of that Plan—by the agreement on the part of the Mandatory—that that provision is to come into effect.

The whole of resolution 181 (II) of 29 November 1947, to which the Plan is attached, makes abundantly clear the need for consent thereto by the former mandatory power. The resolution commences with the following paragraph:

> "*The General Assembly*,
>
> *Having met* in special session at the request of the mandatory Power to constitute and instruct a special committee to prepare for the consideration of the question of the future government of Palestine at the second regular session;"

That is the first paragraph of the preamble. Its first operative paragraph, read as follows, Mr. President—

> "*Recommends* to the United Kingdom, as the mandatory Power for Palestine, and to all other Members of the United Nations the adoption and implementation, with regard to the future government of Palestine, of the Plan of Partition with Economic Union set out below." (*G.A., O.R.*, Second Sess., Resolutions, res. 181 **(II)**, p. 131.)

"Recommends to the United Kingdom" is the first operative part of the first operative paragraph.

Mr. President, there is no substance, in our submission, in this suggestion that the history of this Plan in regard to Palestine shows any contemplation, on the part of the Committee or on the part of the United Kingdom, of any supervisory power of the United Nations prior to the coming into effect of these special provisions which were to be arrived at by special agreement.

I have referred to the statement made by the representative of the United States in the Security Council in 1948, to the effect that the United Nations did not take over the League of Nations mandates system, and, therefore, the responsibilities either of the League of Nations or of the mandatory power in respect of the Palestine Mandate. I have also mentioned, Mr. President, the fact that no reports were, in fact, submitted by the United Kingdom to the United Nations in respect of its administration of that territory, although the authority of the United Kingdom over Palestine continued until May 1948—in other words, for more than two years after the dissolution of the League.

It is accordingly clear, Mr. President, that although the United Nations, in Applicants' words, "felt itself competent to supervise the administration of Palestine prior to the granting of independence to that territory", the authority in fact exercised by it was by special arrangement, and not by virtue of any general power of supervision which had

passed from the League to the United Nations, or which had come about by substitution of the United Nations for the League as supervisory organ in respect of mandates.

I can now, Mr. President, proceed to consider Mr. Moore's attempt to meet our argument advanced in the Counter-Memorial, **II**, at page 141, that between the years 1947-1949, 25 Members of the United Nations, in participating in United Nations debates, maintained quite clearly that, outside trusteeship, mandatory powers had no obligation to account for their administration of the said territories to the United Nations.

Mr. Moore attempted to meet this argument by dealing with the actual attitudes taken by certain of the States concerned. He did not content himself with a general submission of confusion. He said that the names of six nations included in Respondent's list should be deleted from it, namely Czechoslovakia, Guatemala, Iran, Peru, Sweden and Yugoslavia. The reason why he said that they should be deleted is that they were added to Respondent's list merely as signatories to the report of the United Nations Special Committee on Palestine. He said in this regard, in the verbatim report at page 165, *supra*,

> "... the Palestine report shows that the United Nations not only considered the Mandate for Palestine to be in full force and effect at that time, but also recommended that the United Nations exercise comprehensive supervisory authority over the administration of that mandate prior to its termination".

The fallacy in this contention, Mr. President, is, of course, patent. The fact that the Special Committee on Palestine recommended that supervisory powers be exercised by virtue of special arrangements to be concluded with the United Kingdom, does not do away with the fact that the States in question were clearly of opinion, as they expressed in the report of the Committee, that the supervisory powers of the League over mandates did not pass to the United Nations, and that the United Nations would have no supervisory powers except by special agreement, such as, for instance, a trusteeship agreement, or an agreement of the nature that was being recommended in that report regarding Palestine.

Mr. President, the argument adduced why these signatories to the report of the Special Committee on Palestine should be deleted from the list of our 25 States, which clearly intimated a concept of that kind, is, therefore, unjustified. The passages in the report with which they identified themselves are clear and completely unambiguous on this question, and the mere fact that they then went ahead and joined in recommendations for a special provision, providing for supervision, does not support my learned friend's argument, it militates against it.

My learned friend, Mr. Moore, argues further that three other States —Cuba, India and Uruguay—should be deleted from the Respondent's list. That contention we find in the verbatim record at page 165, *supra*.

We have already explained, Mr. President, that the attitudes adopted by Cuba, by India and by Uruguay were not consistent, that at one stage they did adopt the attitudes which would include them on our list of 25 States which expressed that opinion; then again on another occasion they expressed other views. That they did, on the occasions to which we refer, express the views which we attribute to them, is not contested in any way by the Applicants and this stands very clearly on record.

My learned friend, Mr. Moore, says further that the United States, in

its written statement before this Court in 1950, made clear its viewpoint that international accountability had survived: that we find in the verbatim record at page 165, *supra*. For that reason it is contended that the United States, too, is to be taken out of the list of 25 States.

Mr. President, I need hardly repeat what I stated before, viz., that the United States, over the relevant period 1947 to 1949, before this Court was called upon to give its opinion, clearly expressed the opposite view to that contended for by my learned friend, namely that the United Nations had no supervisory powers in respect of the Mandate outside trusteeship. I referred more than once this morning to Mr. Gerig's statement in 1947: I need not do so again.

Why the United States contended otherwise before this Court in 1950 I suppose the United States alone would know. Its argument then, I may point out, with respect, was not founded on, as the Applicants called it, a viewpoint that international accountability had survived. It was rather, Mr. President, with the greatest respect, pure, special pleading, of the very same kind that we find in the arguments of the Applicants now being addressed to the Court. It was an *ex post facto* effort to achieve a desired result by taking together various bits and pieces—some out of context, some of it wrongly interpreted—and then building on that the conclusion which it was desired to achieve. This is the interpretation which one must put on the argument presented by the United States in 1950, if one reads it fairly, with reference to the full analysis of the record and of the facts which are now before the Court.

The conclusion stated by the United States in 1950 in its written pleading before the Court makes this perfectly clear.

> "It is concluded, on the basis of Article 80 of the Charter, on the basis of General Assembly resolution XIV-I (I) of 12 February 1946, on the basis of the Union's conduct in pledging itself to submit reports and in reporting, and on the basis of the Assembly's subsequent action, that the United Nations has assumed the exercise of the League of Nations function in regard to reporting on the mandated Territory of South West Africa." (*I.C.J. Pleadings 1950*, p. 111.)

We see, Mr. President, all these things added together on the basis of Article 80. In that regard the attitude expressed on behalf of the United States of America in this argument was as follows:

> "Thus it would seem, in view of the importance of reporting under the mandates system, that this function is preserved by Article 80 of the Charter—'the conservatory clause'." (*I.C.J. Pleadings 1950*, pp. 107-108.)

This was one factor relied on: another factor relied on was the General Assembly resolution XIV of 12 February 1946. That resolution, the Court will recall, I dealt with. It provided for the assumption of various powers and functions of the League of Nations by the United Nations, containing differing provisions for different types of functions. Apparently this was merely a general reference to show a contemplation that there might be an assumption of functions, but on the basis, of course, that the necessary arrangements were to be made as there contemplated.

And then we find that the United States submitted that there were apparently such special arrangements, because the next factor it relied

upon, was the Union's conduct in pledging itself to submit reports and in reporting.

Mr. President, I have addressed a full argument to the Court on the facts relating to the Union's conduct. I need not repeat that argument. I submit that if one reads what the United States submitted in 1950, in regard to that sphere of the case, one has to conclude that the presentation was incomplete—that it wrongly assessed various elements in the picture, and that it came to a wrong conclusion. It was, therefore, not a matter of a ready-made view of the kind which we had earlier, of the kind which we had from Mr. Gerig in the debates, where a clear, factual contemplation was expressed to the effect that there had been no agreement —no consent to a substitution of supervisory organs—and that there was no supervisory power on the part of the United Nations outside of the trusteeship system.

The last part of the United States conclusion refers to the basis of the Assembly's subsequent action. We have already referred to some of those resolutions: I shall deal with certain of the others in the rest of my argument and point out that they do not in any way support the contention.

Then, Mr. President, my learned friend, Mr. Moore, contended that China and the Philippine Republic should also come off the list, because, it was submitted, they had made statements reflecting their view that the United Nations had supervisory authority over the Mandate: that we find in the argument in the verbatim record at page 165, *supra*.

I have already shown this morning that it is at least questionable whether they ever intimated that they considered that the United Nations had such supervisory authority in general, outside of trusteeship. I submitted that their general view was to the contrary but that they made a special exception as regards the particular report of 1947. But even if some of their statements can be construed otherwise than as I have now submitted, they also on other occasions expressed themselves decidedly in favour of the contention we are advancing, and in favour of the proposition under which we grouped them with the others in the total of 25.

So, Mr. President, in none of the cases referred to by my learned friend, Mr. Moore, was any sound reason adduced by him why any of those States should be taken off the list.

But let us assume that we take away what might be called the borderline cases, those about which there may be some argument—those which contradicted themselves in the debates prior to the 1950 Opinion. We find that only five are affected—Cuba, India, Uruguay, China and the Philippines. That, Mr. President, still leaves 20—and perhaps one should also include Mexico, on the basis of the analysis I gave the Court yesterday, Mexico not having been included in our 25 before. It would still leave us with, say, 20 or 21 States, including all the ex-mandatory powers, except Belgium, as well as the United States and the Soviet Union—two of the leading founder Members of the United Nations. It would include also nine of the 12 members of the Trusteeship Council specially concerned with this problem.

Even if, Mr. President, I were to give to the Applicants—as I do not have to do, as there is no reason why I should—the United States, and the six States of which they said that they merely signed the Palestine report and for that reason should not be included in my list of 25, that

would still leave 13—or 14 if we count Mexico—13 States which are completely untouched by any argument which the Applicants have attempted to adduce on this point. And those 13 would still include all the ex-mandatories, except Belgium.

Mr. President, even to this extent to which the Applicants want to take their process of deleting States from my list of 25 on that optimum basis to which they can take their argument—how can they contend that there was a general understanding, including the mandatories in general and the Respondent in particular, to the effect that the United Nations would have supervisory powers—a general understanding which they would have to establish as a matter of law in order to lay a basis for their general submission on this point.

The attempt which was made to detract from this analysis which we have put before the Court, has, therefore, really served to emphasize the unassailability of the argument. We can argue about a few borderline cases—argue whether the number should be 25 or 26 or 21—but there cannot be an argument to reduce it substantially below that. Even on the suggestions made—unfounded suggestions—of reducing the number still further, we still find included in the list this hard core of the very States whose obligations were, in essence, those of accountability—the States which would have to show their agreement, by conduct, to a substitution of supervisory organs and to supervision by a new supervisory organ. Not a single one of the views expressed by those States during those years could in any way be assailed by the argument which has been adduced.

The Applicants conclude their argument, Mr. President, on this aspect, by saying:

> "The most decisive fact remains, Mr. President, that while there was disagreement among several Members of the United Nations with regard to the existence of the Mandate and the obligations of international accountability, the view of the United Nations as a whole, expressed through its resolutions on the subject, demonstrated its understanding that the Mandate remained in full force and effect, and that the United Nations had supervisory authority over the Territory. This is reinforced by the United Nations treatment of the Palestine Mandate." (Pp. 165-166, *supra*.)

So here there is reliance placed, Mr. President, on the view of the United Nations, as a whole, expressed through its resolutions on the subject. The contention, of course, carries an assumption of a factual nature as to what that view was. I shall deal with that assumption in a moment and show that it is an entirely fallacious and unsound one.

Before doing that I should first like to examine this proposition as a matter of law. Let us assume for the moment that the factual assumption were true and that we were dealing with a concept of a view of the United Nations, as a whole, expressed through its resolutions—in other words, a view expressed by a majority—ordinary or two-thirds, or whatever the required majority might be—that is being relied upon. How, I ask, Mr. President, could the approach to the matter on that basis assist the Applicants when it is necessary for them to address their argument to a question of international obligation on the part of the Mandatory Power—to address themselves to the question whether there was an agreement, or consent, on the part of the Mandatory Power to the

obligation which it is sought to be imposed upon it? How could, as a matter of law, the majority decisions of anybody, or any organ, have any relevance on a subject of that kind?

But, Mr. President, the matter does not rest there. The factual premise as to the view the United Nations took as a whole and which it expressed through its resolutions, is a totally wrong one. That will be seen if we look at the effect of and the surrounding circumstances pertaining to the particular resolutions relied upon by the Applicants in support of this contention.

The resolutions were the following: General Assembly resolution 65 (I) of 14 December 1946; General Assembly resolution 141 (II) of 1 November 1947; General Assembly resolution 227 (III) of 26 November 1948; and General Assembly resolution 337 (IV) of 6 December 1949. The fact that these resolutions are the ones relied upon appears, Mr. President, from the verbatim record at page 165, *supra*, where the Applicants refer to these resolutions and then say:

> "The last resolution confirmed the first three; the 1946 resolution 'affirmed' the competence of the Assembly, and the 1947 and 1948 resolutions 'exercised' this competence."

So the first resolution of 1946, number 65 (I), is said to have "affirmed" the competence, and the others to have "exercised" this competence.

Now, Mr. President, I have already dealt with resolution 65 (I). It was the one adopted by the Assembly in response to the proposal regarding incorporation submitted by South Africa in 1946. We have already indicated, Mr. President, that this resolution was concerned purely with the question of modification of the status of South West Africa. It had nothing whatever to do with the question of supervision of administration in that Territory. We have also shown, Mr. President, how the Applicants seek to mis-apply, in this regard, expressions which were used by the Court in 1950 with regard to modification of status of the Territory and apply them to the question of exercise of supervisory jurisdiction, so I need say no more about that resolution. I have dealt with it fully. There is nothing whatsoever in the resolution itself which indicates any view in regard to the concept of supervisory power.

It becomes necessary to deal next with the second resolution relied upon by the Applicants, namely 141 (II) of 1 November 1947. It will be recalled, Mr. President, that the General Assembly in this resolution urged the Government of the Union of South Africa to propose a trusteeship agreement for South West Africa and, at the same time, conferred authority on the Trusteeship Council, in the following terms:

> "... the Trusteeship Council in the meantime to examine the report on South West Africa recently submitted by the Government of the Union of South Africa and to submit its observations thereon to the General Assembly". (*G.A., O.R.*, Second Sess., Resolutions, resolution 141 (II), 1 November 1947, p. 48.)

If one looks at its wording, and its context, this reference, Mr. President, is, in our submission, a perfectly neutral one as far as present contentions are concerned. It does not by its wording signify that the Trusteeship Council was to exercise a function of supervision. It merely says that the Council was to examine the report and submit its observations thereon to the General Assembly. There is certainly no express—no explicit contemplation, of a supervisory power in that regard. The ques-

tion arises whether one could say that any contemplation of a supervisory power arises by inference, from this wording used and from the circumstances in which it was used. If we therefore, have to decide the question, whether such an inference is justified, we must obviously look at all the relevant circumstances. We must look at the events which preceded the submission of the report by the Respondent; at the nature of the report itself, and at the views of the United Nations as expressed through its Members regarding the purpose and the effect of the report. These are matters which I have dealt with in my argument for other purposes and I need not go into any detail in regard to them. I merely point out the bare threads as far as they are relevant to the present point under discussion.

It will be recalled, Mr. President, that by 1 November 1947, which was the date of this resolution, we had already these facts: firstly, General Smuts had in 1946 indicated the limited nature and purpose of the information which would be submitted, as being in accordance with Article 73 *(e)* of the Charter; secondly, Mr. Lawrence had in September 1947 given his further explanation emphasizing the voluntary nature of the transmission of information and Respondent's view that the United Nations had no supervisory powers in regard to South West Africa; thirdly there was also the fact of the limited nature of the information which was, in fact, supplied in the report, which I have dealt with before; fourthly, there was the fact that on the very day on which the resolution in question was adopted, namely on 1 November 1947, and before the adoption of the resolution, Mr. Lawrence made his further statement in which he again emphasized that the reports were rendered on the basis that the United Nations had no supervisory jurisdiction; and fifthly, there was the other fact, Mr. President, that not one of the Members of the United Nations then voiced any objection or view to the contrary, then or at any time during the debates in 1947.

We find further that the resolution itself, in its preamble, recognized the very nature and purpose of the report. I have read the preamble to the Court before. I do not need to do so again. The concluding words, if the Court will recall, were:

> "... and that the Union Government has undertaken to submit reports on its administration for the information of the United Nations". (*G.A., O.R.*, Second Sess., Resolutions, resolution 141 (II), 1 November 1947, p. 48.)

The review which we have given, Mr. President, of the attitudes of all States during the period 1947-1949, shows that the Members of the United Nations perfectly understood Respondent's attitude regarding lack of supervisory powers and functions on the part of the United Nations. We pointed out that even when, as from the end of 1948 until 1949, there were some States which began to question the statement that outside trusteeship there could be no supervisory power on the part of the United Nations, there were very few of them and they then found a basis which did not relate to any consent on the part of the Respondent in the transitional stage.

Especially pertinent, Mr. President, in this review which we gave, were the views expressed in the Trusteeship Council itself, that very body to which the report was submitted for examination.

The Court will also recall that Respondent declined an invitation of

the Council to have its representative present at the discussion of the report.

So, Mr. President, taking all those factors together, surely there can be only one conclusion as to the view taken by United Nations Members in general, in so far as it is relevant to the issue now before the Court, and that view was that the resolution did not envisage the exercise of United Nations supervision of administration of South West Africa, in the sense contemplated in Article 6 of the Mandate.

That is, indeed, the only inference one can draw—and there is no semblance of justification for suggesting that a contrary inference is to be drawn—that in adopting this resolution the intention of the majority—or whatever number may be accepted for that purpose—was that a power of supervision, in the sense contemplated in the Mandate, was to be exercised by the United Nations.

The Applicants, of course, referred to the fact that the Court in 1950, in its majority opinion, expressed a contrary view on this particular point—contrary to the submission I am now making to the Court. That is, of course, so—the Court did express that contrary view. We shall deal at a later stage with the subject of the Court's Opinion, as a whole, and I do not intend to deal with any detailed aspect of it now. I merely wish to say that, in this respect also, we respectfully contend that that was one of the aspects of the Opinion of the Court which was affected by the unfortunate circumstance that it did not have all the relevant facts before it, and that that is a circumstance which also requires reconsideration in the light of the full facts which are now before the Court. Those facts, in my submission, can only lead to the conclusion in this regard which I have just stated to the Court.

The later resolutions, referred to by the Applicants and also in the Court's Opinion, take the matter no further. They both refer back to resolution 141 (II), which is the one we have just discussed. The third resolution on the list, No. 227 (III) of 26 November 1948, merely recommended that Respondent "continue to supply annually information on its administration of the territory", and "request[ed] the Trusteeship Council to continue to examine such information and to submit its observation thereon to the General Assembly". (P. 164, *supra.*)

So, Mr. President, these resolutions take the matter no further. They still deal with the same concept of annual information on the administration of the territory and contain a request to the trusteeship Council to continue to examine such information and submit its observations thereon.

The fourth resolution on the list relied upon—No. 337 (IV) of 6 December 1949—contained certain passages which I should like to read to the Court, in so far as they are relevant—I am not going to read all of it. The first preamble:

> "Whereas the General Assembly noted, in resolution 141 (II) of 1 November 1947, that the Government of the Union of South Africa had undertaken to submit reports on its administration of the Territory of South West Africa for the information of the United Nations"—

still retaining the concept of an undertaking to submit reports for the information of the United Nations.

The third preamble noted the fact that "no further reports would be forwarded".

Then I skip the last paragraph of the preamble and we come to the operative portion of the resolution, which reads—

"The Assembly,

1. Expresses *regret* that the Government of the Union of South Africa has withdrawn its previous undertaking, referred to in resolution 141 (II) of 1 November 1947, to submit reports on its administration of the Territory of South West Africa for the information of the United Nations; [Again, a retention of that concept—the correct appreciation of what purpose the reports were to serve, what the nature of the reports were—referred to in the previous undertaking of the Union of South Africa.]

2. *Reiterates* in their entirety [the earlier resolutions on the subject to which I have referred].

3. *Invites* the Government of the Union of South Africa to resume the submission of such reports to the General Assembly and to comply with the decisions of the General Assembly contained in the resolutions enumerated in the preceding paragraph." (*G.A., O.R.*, Fourth Session, 6 December 1949, p. 44.)

So, Mr. President, the very wording of this resolution itself refutes the Applicants' contention. I have stressed the aspects before the United Nations in the preamble and in the first operative portion. In this last operative paragraph the invitation to the Government of the Union is "to resume the submission of such reports"—"such reports" again being reports on the administration of the Territory for the information of the United Nations.

Nothing is said anywhere, Mr. President, regarding an obligation to submit reports and to account to the United Nations.

This tone of the resolution stands in contrast to the last part of it—the very last part—in which Respondent was invited "to comply with the decisions of the General Assembly contained in the resolutions enumerated in the previous paragraph". Those decisions, as the Court knows, referred to the General Assembly's recommendations regarding the submission of a trusteeship agreement. So, there, the Respondent is invited to comply with those decisions. The request is for something specifically to be done—the submission of a trusteeship agreement which would involve supervision, of course. There is no invitation to the Government of the Union of South Africa to submit to any supervision outside trusteeship, or to acknowledge an obligation to submit to any such obligation.

It is also significant, Mr. President, that the original draft resolution, in its first operative paragraph, read as follows: "Express regret that the Government of the Union of South Africa has repudiated its previous assurance . . . to submit reports." (*G.A., O.R.*, Fourth Session, 269th Plenary Meeting, 6 December 1949, p. 535.)

This wording was objected to by the Respondent, and it was in that connection that the United Kingdom representative had earlier stated in the Fourth Committee, with reference to the original wording of this draft resolution:

"It could not be said that the Government of the Union of South Africa had repudiated its previous assurance since it had complete liberty to decide whether or not to transmit information." (**II**, p. 286.)

In the end, Mr. President, the wording of the paragraph was altered to read as in the resolution, namely "withdrawn its previous undertaking", and that itself is a significant indication of the understanding and the contemplation of the States in the United Nations which voted for this resolution—how they saw the situation. They saw it correctly, in our submission, as a situation in which something had been done voluntarily—limited information had been given for the information of the United Nations. There had been no undertaking or acknowledgment, explicitly or implicitly, of any duty of accountability, or any supervisory power on the part of the United Nations Organization, and there was no such contemplation in the resolution as a whole.

Therefore, Mr. President, I need not elucidate further. It suffices to say that the tenor and purport of these resolutions in no way support the Applicants' contention of an understanding on the part of the United Nations that obligations of international accountability under the Mandate were owed to the United Nations. Therefore, the factual basis for the Applicants' contention in regard to these resolutions—also falls away. Indeed, we submit that the resolutions, read in their proper context, and in the light of the views of the organs of the United Nations, as expressed by their Members, prove the very opposite of the Applicants' contention. It proves the understanding which, we submit, was a completely general one.

Therefore, Mr. President, in conclusion of this part of the argument, it is hardly necessary to say that there is in fact nothing in the Applicants' argument to substantiate the conclusions stated by Mr. Moore at the end of his address, when he said as follows:

> "Hence, the actions of the League Assembly, of the United Nations, and relevant statements and actions of the Respondent, combine to support the conclusion that the Mandate and all of the League, and that the United Nations replaced the League as the supervisory organ over the Mandate." (*P. 166, supra.*)

We submit there is nothing to substantiate that conclusion. On the contrary, it has been shown that the statements and actions of the Respondent were understood by all the Members of the United Nations who expressed themselves on the subject, as being exactly what we say those statements and actions amounted to. There was no misunderstanding. There was, in fact, no submission on the part of the Respondent to United Nations supervisory power. There was a clear understanding on the part of the United Nations Members concerned that there was no such submission.

Mr. President, this brings me to the end of this part of the argument dealing with the United Nations history after the termination of the Mandate. I know it is possibly early for an adjournment but I had to adapt myself rather suddenly to the new situation resulting from Mr. Muller's illness. I wonder whether it might be convenient for the Court to consider adjourning now, as I am passing to an entirely different subject.

[Public hearing of 9 April 1965]

Mr. President, it remains for me to deal with certain arguments of the Applicants regarding Article 6 of the Mandate—arguments which

were not covered in the review which I completed yesterday morning.

The first of these is the contention that so long as Respondent continues to administer the Territory on the basis of rights conferred by the Mandate, Respondent by that very fact is manifesting a continuing consent to international supervision. Those words, from "so long as" to "supervision", I have quoted from the very contention advanced by the Applicants. Mr. President, this contention also had an earlier version as advanced in the pleadings, particularly in the Reply of the Applicants, and we dealt with this earlier version of it in the Rejoinder, V, at pages 71 and following. It is not my intention to repeat what is stated there, or to deal again with the earlier version; I shall deal with the argument as it now appears to be advanced in the oral argument.

For the reasons which we have given, Mr. President, the Respondent submits that no agreement was reached, and that no consent was given, regarding transfer of supervisory functions to the United Nations or substitution of supervisory organs, whichever way one wishes to put that proposition. But the Applicants attempt to find, through the medium of this argument now under consideration, a further basis for arriving at the conclusion that such consent was in fact given. The argument in the form in which it is now advanced is set out in the verbatim record at page 205, *supra*, and its elements, Mr. President, can be summarized as follows.

Firstly, on the authority of the 1950 Opinion, the Applicants state that the Mandate did not involve a cession of territory or a transfer of sovereignty to Respondent; Respondent was to exercise an international function of administration on behalf of the League. The next step in the argument is that this is equivalent to saying that—

> "... so long as Respondent continues to administer the Territory on the basis of rights conferred by the Mandate, Respondent, by that very fact, is manifesting a continuing consent to international supervision".

The next step, in the Applicants' words, is—

> "... inasmuch as there is in existence an international organ, to wit, the United Nations, which is qualified to exercise supervision over the Mandate, it must be presumed that Respondent's retention of rights over the Territory is consistent with no conclusion other than that it is manifesting a continuing consent to submit to the supervisory authority of the United Nations" (p. 205, *supra*).

The fourth step in the reasoning, and I quote again from the address by my learned friend, is: "Respondent's disclaimer of any such intention imports into the proceedings a legally irrelevant consideration ..." *(Ibid.)*

So, Mr. President, these are the propositions, and they require to be analysed and dealt with on their merits. I wish to point out first of all in regard to the second of the propositions that it is so worded that the fact which is said to manifest consent to international supervision is administration of the Territory "on the basis of rights conferred by the Mandate". That is important. That is said to be this fact which manifests consent to international supervision; it is administration of the Territory "on the basis of rights conferred by the Mandate". That makes it clear immediately that the argument is based on the premise that the Mandate exists. In other words, Mr. President, there is first to be a finding that

the Mandate exists before this argument begins to operate at all. This was indeed made clear by the Applicants, Mr. President, when replying to a criticism which we offered in our Rejoinder (V, at p. 73), of a similar statement in what I have called the earlier version of this same argument as advanced in the Reply. In their answer now, in the oral address, to our criticism as offered there, they say, and I quote from the verbatim record at page 200, *supra*:

> "With respect to the first asserted fatal defect, that an additional premise is necessary that the Mandate is still in existence, the Applicants accept, as the law of the case, that the Mandate is still in existence."

And I quote a further statement appearing at page 202, *supra*, of the same record: "The Applicants, of course, presuppose that the Mandate *applies to the Territory*; that is their major premise." So that part of it is clear—is common cause. But, in truth, Mr. President, that premise is on analysis not enough for this argument. There is implicit in it a further premise, and, that is, that the Mandate which survived contained, as a part thereof, an obligation of "international accountability". That premise is to be read into it also, otherwise the argument does not begin to operate. That is indeed what the Applicants contend. They say that Respondent's obligation under the Mandate, as initially conceived, was one of "international accountability"—it was not an obligation to report and account to a specific body only, it was a more general one of "international accountability"—and that it was therefore capable of existence independently of a specific supervisory organ. Their further argument on that aspect of the case is this: that on dissolution of the League the existence of that obligation was not affected, and that, consequently, although the League fell away—although the supervisory organs fell away—the Mandate could remain in existence with, as part of itself, an obligation of international accountability. The only problem with the Applicants' approach was to make this existing but dormant obligation operative again as opposed to mere existence in a dormant state: to achieve that end, a substitution of supervisory organ was necessary, and for that purpose the consent of the Mandatory was required.

That is the basis upon which the Applicants advance this further contention, and the argument seems, on analysis, to amount to this: that, if we accept, firstly, the existence of the Mandate, secondly, as part thereof an obligation of international accountability, and, thirdly, the existence of a new international organ capable of performing supervisory functions, if asked to do so, then, under those circumstances, the Applicants contend that continued administration of the Territory amounts to proof—and, what is more, conclusive and irrebuttable proof—of consent to a substitution of a supervisory organ. That appears to be the effect of this argument.

Before dealing with the merits of Applicants' argument, Mr. President, I wish to say something else about this premise with which I have just dealt—about the fact that it rests indispensably on the basis of the Applicants' "international accountability" contention—the contention that the Mandate itself, in its original form, is to be construed by a process either of interpretation or of implication as containing such an obligation of international accountability. On that basic question, of course, the Parties' contentions are in direct conflict with one another.

Let us analyse the question whether the obligation was one relating to the specific body, or of the more general nature contended for by the Applicants.

If the obligation related to a specific body only, it would follow that, on the dissolution of the League, the obligation of accountability would lapse in the absence of other agreements. Consequently the further result would be either that the Mandate itself would lapse, or that it would exist without an obligation of international accountability.

On either of these premises, namely either that the Mandate has lapsed, or that the Mandate exists without an obligation of international accountability, there would be no reason whatsoever, Mr. President, to presume that continued administration of the Territory would involve a consent to submit to supervision by a new supervisory organ, because the circumstances in which this continued administration would take place, would amount either to a position where the Mandate itself would no longer exist, or to one where, if it existed, it would not require the Mandatory to report and account to a supervisory organ. Therefore, there could be no implication whatsoever, and no argument, tending to establish such an implication from the mere fact of administration of the Territory under such circumstances.

I stress this, Mr. President, because it becomes clear that, if the Respondent's contention as to the interpretation to be given to and the effect of Article 6 of the Mandate as it was originally prescribed, is to be accepted, this argument of the Applicants falls away for that reason alone and need not be further considered.

However, that is not the only basis upon which I shall meet this argument. For present purposes, let us assume the correctness of the premise upon which the Applicants advance this argument and then test its merits on that basis.

Mr. President, I have to point out, first, that our answer and the contention of the Applicants conflict in a fundamental respect. It is this, that the question of whether Respondent consented to such substitution or replacement of a supervisory organ is a question of fact and not of law. It is a question such as any question of consent would be, viz., a question of fact, and in order to establish whether, in fact, such a consent was given, or was not given, it is necessary to have regard to all the relevant evidence on that question and not merely to some facts isolated from their context and with disregard for other relevant facts. It is at this very point, in our submission, that the Applicants' argument breaks down.

The Applicants attempt to establish the existence of the alleged consent on Respondent's part by isolating one fact, namely the administration of the Territory, from all other circumstances. They do so, of course against the background of the existence of this new organ which they say was capable of exercising the function and on the premise, which I mentioned before, that there was an obligation of accountability still existing in the Mandate itself, but the only fact which they now isolate, in order to see whether there was consent to a substitution of this new organ, is that of the administration of the Territory. Mr. President, the Applicants say, firstly, in purported justification of this process of reasoning on their part, that what Respondent said at various stages as to its intention, in regard to the basis upon which it continued to administer the Territory, that—and I use their words—is a "legally irrelevant consideration". The Respondent's disclaimer of an intention to

consent to a substitution of supervisory organs, the Applicants say, is legally irrelevant. They say that the subjective attitudes of persons who, from time to time, constitute Respondent's Government is, in any event, incapable of factual demonstration, one way or the other. Those aspects in the reasoning, we get in the verbatim record at page 205, *supra*.

Mr. President, let us analyse that. The question is one of consent, i.e., whether there was consent to a particular proposition. The consent is sought to be inferred from conduct, the conduct being, in this case, administration of the Territory. The person concerned makes it perfectly clear, by what he says, in what sense he views the continued administration of the Territory. He makes it perfectly clear that he does not consent to any substitution of supervisory organs or acknowledge any supervisory power on the part of any organization. However, my learned friend says these are "legally irrelevant considerations", i.e., for some reason of law they are not to be taken into account, in this particular case. He gives as a further reason that, from a factual point of view, it is impossible to establish the subjective attitudes of persons who may from time to time constitute Respondent's Government.

Mr. President, in our submission, that is totally unfounded. A state of mind of a person, or of a corporation, or of a group of persons, or of a body, is a question of fact. It can be established by the same processes as any other question of fact. It can be established by all relevant evidence and such evidence may be of two kinds. It may be evidence which emanates from the person, or corporation, or body, or representative thereof—statements made at relevant times—which throw a light on the question of probable intent. Such statements may be explicitly directed to intent and may be made by somebody representing the corporation, or by an individual, when his intent is relevant, by giving evidence in a court of law and saying that "my intent at the time was so and so and so . . .". Those are all possible ways. Of course, the court would have to weigh the credibility of such evidence. Very often there is such evidence and the court has to consider, in the light of all the circumstances, whether it will accept that evidence or reject it, as a matter of credibility or acceptability. That does not, however, make the evidence, if accepted, a "legally irrelevant consideration".

In order to test whether statements of intent, or statements relating to intent, can indeed be accepted at their face value, the court also tests them in the light of surrounding circumstances and makes inferences or deductions from the surrounding circumstances as to what the intent really was. Very often that is the only type of evidence available to the court. The court may have no expressions of the person concerned, either in evidence or at a prior stage—no expressions of mind—which indicate what his intentions were but the court has to infer from the totality of evidence, and from surrounding circumstances, whether certain conduct on his part was, in fact, intended to convey a certain intent, or a certain consent or not.

Again the proposition applies—the ordinary proposition of logic—that if a party were to make a positive averment that conduct amounted to a manifestation of a certain intent, or consent, that would have to be established by a process of necessary inference from all the facts. The inference would have to be consistent with all the proved facts, and it would have to exclude all other reasonable inferences.

Mr. President, the important fact is that there can never be any

justification for picking out a part of the relevant evidence—such a part as appears to bear out a particular conclusion—and then discarding and disregarding all the facts which point to the contrary conclusion. That could never be justified in any process of law, or logic, of which I am aware.

Moreover, Mr. President, we are dealing here with a concept of a consent to an obligation, or a consent to a modification of an obligation which, in principle, amounts to the same thing—the basic principle being that that obligation, whether it be a new one or a modified one, cannot be regarded as being vested in, or being imposed upon, the party concerned, except with that party's consent.

Now, how is that kind of obligation, such a consensual obligation, created? It is not created merely by a process of a person having in his mind a certain intent. It can only be created by that intent—that state of mind—being conveyed to the other person, or persons, who have a legal interest, or a potential legal interest, in the situation—the other contracting party, the other legally interested party, as the case might be.

If an estate agent offers me a certain property for £10,000 and I like the property, and I decide I should like to buy it for £10,000, and that is my intent, that still does not create a contract, or an obligation, on my part to buy, to pay the price and take delivery of the property. It is only when I convey that intent in writing, or in speech, or in conduct, to the party who made the offer to me, that there can be created a *vinculum juris* of the necessary kind.

Therefore, Mr. President, it becomes the more surprising to find a submission to the effect that actual statements by the party upon whom it is sought to visit this obligation, are to be regarded as irrelevant considerations—legally irrelevant. All one looks at is a particular element of conduct on the part of the party but whatever he says about it; is regarded as irrelevant.

On analysis, Mr. President, this contention appears to be unsound because, if the Respondent Government had said expressly "I regard the United Nations as substituted for the League of Nations as a supervisory body" and proceeded to administer the Territory on that basis, I take it, my learned friend would not contend that that is a legally irrelevant consideration. It would be perfectly relevant. It would indicate explicitly and expressly that what he is now contending for was indicated by conduct.

However, Mr. President, his contention amounts to this, that if the South African Government had said explicitly: "We consider that the Mandate exists but without accountability to anybody—to any international organ or body and we therefore proceed to administer the Territory on that basis"—that, my learned friend then says, is an irrelevant consideration.

Equally irrelevant, on the basis of his contention, would be a statement to the effect that the Union Government considers that the Mandate has lapsed; that it considers that it has a title to administer the former mandated territory on some ground falling outside the Mandate itself—for instance, a prior occupation or conquest, and that the Union Government then says that it will, therefore, continue to administer the Territory on that basis—on the basis of the Mandate having lapsed—on the basis of another title which it claims to the Territory, but subject to the general policy—as a moral obligation and not a legal one—of acting in the spirit of the

Mandate, but without accounting to any international body in that regard.

Suppose the Union Government had made an explicit statement of that kind, it would, on my learned friend's submission, appear that that also would have to be regarded as legally irrelevant.

What it amounts to then, Mr. President, seems to be this, namely that my learned friend contends that the Union Government, the Respondent Government, is to be treated as if it had agreed or consented to something to which it might expressly have said that it did not agree or consent. This would, therefore, be something in the nature of a preclusion; so that what is taken into account here is not the actual intent, or the evidence bearing on the question of actual intent, but a proposition to which the Union Government must be deemed to have consented for some legal reason, although it did not, in fact, consent thereto. That seems to be the nature of this proposition.

The only principles I know of, Mr. President, which could justify a proposition of that kind, would be a proposition of estoppel, or preclusion, the principles applying to a case of estoppel or preclusion. I shall deal with those in a moment in order to see to what extent they apply here. But outside of those principles I know of none whatsoever justifying a proposition that a party must be taken, or must be deemed, or must be presumed conclusively, to have consented to any proposition to which it has, in fact, not consented.

My learned friend's contention amounts to this: suppose somebody, without my consent and without any right or title to do so takes occupation of my house while it is standing empty. I go to that person and say to him: "You have no right to be here but I am willing to sell the house to you for £10,000, or to rent it to you at £80 a month", and the man turns round to me and says: "I am not willing to buy this property. I am not going to buy it. I am not willing to hire it from you. I am not willing to pay any rent, but I am going to stay in occupation because I claim a right to be here." Surely, Mr. President, on ordinary principles of law, I can then go to court, if the man has no title, and ask for his ejection, but I can never ask for the purchase sum of £10,000 as if he had consented to purchase the property. I can never claim £80 a month rent from him. I may claim something equivalent by way of damages for illegal occupation of my property, but I can never claim the amounts which I offered to him as contract sums if he were to agree to them. I have my remedy. I have to take action, not for enforcement of a suggested consensual arrangement of contract, but to have the particular person treated as a trespasser and to have him ejected from my property: that is the nature of my remedy.

But this is not the nature of the remedy which is being sought here by the Applicants. The Applicants' case is not that the Mandate no longer exists, or that the only basis of title which the Respondent Government could have in respect of South West Africa would be a mandate which involves accountability to the United Nations, and that, in view of the fact that the South African Government is not willing to acknowledge accountability to the United Nations, the Mandate must be regarded as repudiated—as terminated—and that the Union Government must therefore, be regarded as having no title to the Territory, and that the Court must declare accordingly. That is not the case, not the type of case brought by the Applicants.

The Applicants' case is that the Mandate is in existence; that the

Mandate contains as part thereof an obligation of accountability; that, in order to make that obligation of accountability one to the United Nations, consent was required on the part of the Union Government, and that the Union Government, irrespective of many relevant facts on record, must be taken to have given such consent. That is the type of case brought. And that makes it so important to consider all the relevant facts: firstly, to see whether, in fact, such consent was given, and, secondly, if, in fact, no such consent was given, whether any principle of estoppel, or preclusion, or something similar, could operate to bring about a result on the basis that there had been consent although, in fact, there was none.

Mr. President, the inquiry, therefore, falls into the two parts: an inquiry into actual consent and an inquiry into the possible application of a principle of estoppel or preclusion.

As to the first part—the question of actual consent—the whole of the review which I gave yesterday and on the preceding days is our answer thereto. The examination of the relevant facts made it perfectly clear that there was never, on the part of the Respondent, any attitude which could reasonably be construed as involving a submission to a substitution of supervisory organs, as involving any consent to such a substitution, or a submission to supervisory powers or functions on the part of the United Nations. It becomes perfectly clear that, if all the factors are taken into account—all the legally relevant factors—that was the attitude of the Respondent throughout, and that that was also the attitude as it was understood by the other States concerned—by the other parties with legal interests.

Therefore, Mr. President, the facts do not in any way support a conclusion that such consent was, in fact, given. The Respondent did continue to administer the Territory, but it continued to administer it on a basis, made clear from the start, which did not involve any obligation of international accountability—i.e., of course, from the dissolution of the League. In particular, it involved no obligation of accountability to the United Nations.

Mr. President, on the question of the principles of preclusion or estoppel, they are, as I have said, the only basis in law which I know of, on which a subjective attitude may indeed, in my learned friend's words, be said to be "a legally irrelevant consideration"—the only basis on which it might be possible to say that, whatever the subjective attitudes of a person might have been, his conduct was such as to preclude him from denying consent to a contract or obligation. In such cases the law has regard particularly to the conduct of a person, that is, not only to what he does but, of course, also to what he says; it has regard to the impression which his actions and his statements create in the minds of other persons, and, in particular circumstances, it gives effect to the impression which has been created, rather than to what might have operated subjectively in the person's mind without it becoming manifest through his actions or words. That is the basis upon which there may sometimes be a preclusion or an estoppel, but not on the basis, suggested by my learned friend, namely that all evidence bearing on the question of the impression made by a person, bearing on the question of what he manifests to the outside world in regard to his intent, or in regard to the proposition of consent in a particular case, is to be disregarded, and that only one element in this picture is to be looked at.

That method of reasoning, Mr. President, is the very antithesis of the underlying principles of estoppel—the doctrine of estoppel or preclusion.

We deal in the Rejoinder, V, pages 76 to 78, with the principles of estoppel or preclusion, and we refer there to authority both in municipal systems and in international law. I need not deal fully, Mr. President, with the review which is set out there. It has not been challenged in any way and I need merely summarize; on the basis of the authority there discussed we submitted that the following are the essential elements for the invocation of the doctrine of estoppel or preclusion. And I emphasize that all of these elements must apply: if any one of them is absent then the doctrine cannot apply.

The first requirement is an attitude clearly and unambiguously expressed, or manifested by conduct, by the party whom it is sought to preclude. The attitude must have been conveyed in a clear and an unambiguous manner, either by words, or by action, or by a combination of the two, but the important point is that it must have been a clear and unambiguous manifestation. It must have been capable of interpretation in only one way, because that supplies the basis upon which it may be said that a party is going to be misled, or has been misled.

The second requirement is the creation, as the result of such an attitude, of "a change in the relative positions of the parties, worsening that of the one, or improving that of the other, or both". These words are taken from the opinion of Sir Gerald Fitzmaurice in the *Temple* case, which we cite at page 76 of the Rejoinder (V). In other words, this clearly and unambiguously expressed or manifested attitude must have resulted in a change in the position of others. Acting upon the faith of that manifestation the others must have changed their position relative to the party making this statement, or manifesting this intent, and it must have involved a worsening of the position of the one or an improvement of that of the other, or the like.

Thirdly, Mr. President, the party whom it is sought to preclude, must, make a claim in the relevant proceedings, which is manifestly contrary to the attitude which he had previously adopted or conveyed.

Those are the three elements, and, as I have said, all three must apply in order to render the doctrine applicable. But, as we shall show, Mr. President, not one of these requirements is satisfied in the present case. It is not only a matter of only one or the other not being applicable; none of them applies because the facts are so fundamentally opposed to any suggestion of a possibility of applying a doctrine of this kind.

The first inquiry is whether there was such a clearly and unambiguously displayed attitude to the effect that the Respondent would render account to the United Nations. That is the relevant consideration in the present case.

Mr. President, as in the enquiry regarding actual consent, regard must naturally also be had to all the relevant facts. It would, again, not be permissible to divorce one isolated fact—in this case, administration of the Territory—from all the other relevant facts—relevant in the sense that they throw light on the manner in which a manifestation of attitude is to be interpreted. A consideration of all the relevant facts, as we set them out in the Rejoinder, V, pages 79-81, shows that Respondent, in fact, did not make such a representation, and that it was never understood to have made such a representation. The review which we give in the Rejoinder, on the pages mentioned, covers very much the same field

as was covered by the review, which I completed yesterday. The oral review has been a fuller one than the one we give in the Rejoinder (V). I ask the Court, with respect and with submission, to have regard to the oral review as we have given it here—that, I submit, makes it perfectly clear, whether one looks at it from the point of actual intent—actual consent—or from the point of view of a representation of actual intent or consent, the review of the facts makes it clear that such a representation was never made and that such a representation was never understood to have been made.

This last factor, Mr. President, i.e., how Respondent's conduct was, in fact, interpreted by the other interested parties, by itself also negatives any suggestion that the relative positions of the Respondent and the other States were changed as a result of Respondent's conduct. There was no situation whereby the other States said: "Now, inasmuch as we understand that the South African Government is going to administer this Territory with accountability to the United Nations, we, therefore, now take up an attitude which we would not otherwise have adopted." The whole proposition simply does not apply because, in fact, the States concerned never understood that Respondent took up such an attitude.

Finally, Mr. President, since the Respondent did not, in fact, make the representation alleged by the Applicants, there can be no question now of present conduct being inconsistent with such a representation. We contend now, as the South African Government said all along, that there was no obligation of accountability to the United Nations, and that there was no submission to the United Nations as a supervisory organization.

In the result, Mr. President, none of the requirements of an estoppel or a preclusion has been established, and, I submit that this argument, adduced on behalf of the Applicants, is entirely without substance.

I proceed with another of the arguments which I have not fully dealt with yet, and that is an argument resting on a suggested relationship between Article 6 of the Mandate and Article 7, paragraph 1, of the Mandate.

I have dealt, in general, Mr. President, with the distinction in concept between the two subjects dealt with in Articles 6 and 7 (1)—the concept, on the one hand, of supervision, of submitting to regular supervision by an international organization; and the concept, on the other hand, of approaching an international organization with a view to agreement upon a change in the status of a particular territory. And I dealt with the importance of that distinction in so far as the interpretation of the relevant acts and statements of the Respondent and other States in the United Nations is concerned.

But, Mr. President, there are certain other aspects of the argument regarding this suggested relationship between Article 6 and Article 7, as raised by the Applicants, which I have not met yet and I propose to do so now.

They use the argument of this suggested relationship as a contention against our submission that Article 6 has lapsed—that the obligation of accountability has lapsed. The argument first raised in the verbatim record, at pages 127 to 128, *supra*, is to the effect that if Article 6 has lapsed, Article 7, paragraph 1, must also have lapsed. The Applicants then contend that the consequences would be, firstly, that the Mandate would be frozen in perpetuity, or, alternatively, that the Respondent

would be entitled unilaterally to modify the Mandate. Those are the only consequences, the Applicants say, which would flow from a lapse of Article 7, paragraph 1, of the Mandate, and they contend that those consequences are so intolerable as to "confirm the essential nature of the retention of international supervision as a legal conclusion". (P. 128, *supra*.)

The question was developed at somewhat greater length, Mr. President, in a subsequent part of the argument, which we find in the verbatim record at pages 215, *supra*, and following. The relevant conclusion for present purposes is stated in much the same way at page 219 of that record as I have just put to the Court. I need not read it: the effect is as I have put it, namely that the consequences of a lapse of Article 7, paragraph 1, are so startling that, as a result, one must conclude that it could not have happened. Consequently, one must conclude that Article 6 could not have lapsed. Those startling consequences are that the only two alternatives would be a perpetual freezing of the Mandate, or that the Respondent would be entitled to modify the Mandate unilaterally.

Mr. President, our attitude can be stated quite simply. We agree entirely that the same type of reasoning which leads to the conclusion that Article 6 has lapsed could also lead to the conclusion that Article 7, paragraph 1, has lapsed. In Article 6 there is a reference to the specific supervisory organ which is, in our contention, a necessary element in that definition of the whole obligation. In Article 7, paragraph 1, provision is made for amendment or modification of the terms of the Mandate, with the consent of the Council of the League. As soon as the Council of the League falls away, that particular provision becomes inoperative, unless an agreement is made to substitute some other organ, or some other agency, in the place of the Council, and our submission is that there was no agreement which substituted any other person or body in the place of the Council.

But, Mr. President, before becoming alarmed about the consequences of such a situation, as the Applicants do in their argument, it is necessary to consider first what function was fulfilled by Article 7, paragraph 1, in the Mandate. Let us get that in proper perspective first, and then see whether these consequences are indeed so alarming, or are indeed of the nature depicted by the Applicants' argument.

The function of Article 7, paragraph 1, was simply to provide machinery of a useful and practical nature whereby the terms of the Mandate could be modified with binding legal consequences. It was a useful procedure involving the consent, on the one hand, of the mandatory and, on the other hand, of a body of limited composition, the Council of the League.

It does not follow, Mr. President, that, without such provision, modification would have been impossible in law. It certainly does not follow if one tests the position in the time of the League. Many treaties or international agreements, like contracts in municipal law, contain no specific provision for amendment, but there are, nevertheless, processes of law whereby amendment or modification is possible—agreement of all the interested parties—all the parties to a contract—all the parties to a treaty or convention. That is one of the ordinary and basic manners in which, as a general legal proposition, it is possible to alter relationships created by agreement or by treaty, or by convention. And the same

would have applied in the mandate system. Modification would certainly have been possible, just as in the case of any other treaty or convention or status, or any other international relationship, although the procedure might have been a more cumbersome one. It would have been necessary to obtain the consent, or the recognition, of all the interested parties, and in this instance that would probably have included all the Members of the League. Thus, if it had not been for this machinery, the consent of all the Members of the League (as the other interested parties or bodies having legal interests) would have had to be obtained for a modification of the terms, and that, of course, as I have said, would have been more cumbersome—more difficult—than obtaining the consent of the Council, as such. May I refer the Court, in this regard, to the dissenting opinion of Judge McNair in the 1950 Opinion at page 162. On this very point, where the learned judge put it as follows, after referring to the contents of Article 7, paragraph 1—

> "The effect of this paragraph is that thereby the Members of the League, as the States interested in the Mandate, empowered the Council of the League on their behalf to consent to any modification of the Mandate which the Council might consider to be appropriate."

Whether, with respect, it is correct to put it exactly in that form, that is, that there was a power given by the Members of the League to the Council, to act on their behalf, or whether one should construe the initial processes in a different way, does not matter for the moment for my purposes. The approach of Sir Arnold McNair is, in essence, the one which I submit to be correct—that is, as I have submitted to the Court, what we have here is merely a facilitated procedure for doing something which could have been achieved by a more cumbersome process in accordance with ordinary principles of law.

So, Mr. President, it follows, in my submission, that the Applicants are wrong about the consequences which they assign to the lapse of Article 7, paragraph 1, through the lapse of the authorized machinery. The more cumbersome machinery inherent in ordinary principles would still apply: in other words, the consent or the recognition of all who have legal interests in the matter, would have to be obtained.

If one were to regard the relationship as being a treaty relationship, it would mean getting the consent of all the parties to the treaty. In this case, the lapse of the organ which could give consent in terms of Article 7 (1), occurred as part of the disappearance of the League itself. It may be, Mr. President (we know that there were differences of opinion in relation to the matter in the proceedings on the preliminary objections) that after the disappearance of the League, the Mandate was still to be seen as a treaty relationship, or that it was no longer to be seen as a treaty relationship. In the first event, as I have said—that is, if it was still to be seen as a treaty relationship—all the interested parties, who would probably be all the Members of the League, would have had to give their consent. In the latter event, i.e., that it was no longer to be seen as a treaty relationship, but as a continuing institution involving special status for the Territory the same position would, in substance, have applied.

There are recognized international processes whereby a change of status of a territory can occur in such a way as to be legally recognized. The basic principles involved are those of agreement or recognition, as

between the parties concerned. And, therefore, Mr. President, there is no reason whatsoever to suggest, as the Applicants do, that the Mandate could exist only in a frozen, or immutable state, or, alternatively, that it would have been subject to unilateral modification. Ordinary legal principles would still apply, whether it was to be regarded as being a treaty or as surviving as an institution only, involving a special status for the Territory—or whether it was to be seen as a combination of the two, involving elements of a treaty and, also, elements of a continuing institution involving a special status for the Territory.

Under all those circumstances it is possible, in principle, to get an alteration of the existing legal situation through the ordinary processes of obtaining the consent or recognition of the parties that have interests in the situation. That being the legal situation, it is not true to say either that the Mandate would remain in a frozen or immutable state, or, alternatively, that it would have been subject to unilateral modification.

The processes by which such international agreement or recognition could be obtained, as I pointed out before, could take one of two forms, or a combination of the two: it could take the form of obtaining the individual consent or recognition of the various interested States; alternatively, the practical procedure could be to lay the matter before an international organization, such as the United Nations, which represents most of the civilized States of the world. The effect of obtaining the agreement of an organization like the United Nations would, for all practical purposes, be the same as obtaining the consent of all the Members individually, and that would probably be of decisive, practical value. That is why the various instances occurred, which I mentioned to the Court earlier, when propositions involving a proposed alteration in the status of particular territories, quite independently of any concept of international supervision, were submitted to the United Nations, and when agreements were arrived at which had the desired practical effect.

That process of submitting a matter to the United Nations for a purpose of this kind does not, therefore, necessarily carry with it the implication, of the technical construction, that the United Nations is to be regarded as having been substituted for the Council of the League for the purposes of, and in terms of, Article 7 (1) of the Mandate.

In this regard, the Applicants still rely on statements and actions by representatives of the Respondent as constituting acknowledgment, firstly, that Respondent was not entitled to modify the status of the Territory unilaterally, and, secondly, that the United Nations General Assembly had replaced the Council of the League as the body entitled, in terms of Article 7 (1), to consent to the modification of the terms of the Mandate. Those are their contentions, and, Mr. President, I submit that they are, at any rate as far as the second proposition is concerned, entirely without substance. As regards the first proposition, namely that Respondent is not entitled to modify the status of the Territory unilaterally, we have already dealt with the question whether the relevant statements and conduct, relied upon by the Applicants, indicated any contemplation that the Mandate remained in existence. To the extent to which they did show such a contemplation—and we admit that some of them did—they would, of course, also imply an acknowledgment that Respondent was, indeed, not entitled to modify the status of the Territory unilaterally.

As soon as there is an implication that the Mandate *is* in existence, involving a certain status for the Territory, I accept entirely that it implies recognition and acknowledgment that Respondent is not entitled, as a matter of law, to modify the status of the Territory unilaterally. But, also, on the basis of the view, put forward by the South African Government from 1948 onwards, that the Mandate has lapsed, the Government has always indicated its policy to be that the Territory is being administered in the spirit of the Mandate and that, in accordance with that general approach or policy, it has expressed its intention *not* to modify the status of the Territory unilaterally—in other words, without general approval by the world community. That is, in fact, the declared policy of the South African Government, even on the basis that the Mandate in law no longer exists. So, on that part of the Applicants' argument, we have no material quarrel with them.

Our quarrel is with the second proposition, namely that in the statements and actions on which they rely, there was an acknowledgment that the United Nations General Assembly replaced the Council of the League as the body entitled in terms of Article 7 (1) to consent to the modification of the terms of the Mandate.

All the statements and the conduct in question on which the Applicants rely for that proposition, Mr. President, relate to the proposal concerning incorporation in 1946. For the reasons I have given, Mr. President, they in no way imply the technical construction of a substitution of the General Assembly for the League Council for purposes of continued application of Article 7 (1). The procedure was adopted as a practical one to bring about a certain result. It was one which was employed by other States quite independently of a question of mandate, and, therefore, one which carried no further significance than just that. There was no implication, either expressed or implicit, to the effect that there would be a substitution of the General Assembly, technically, in the provisions of Article 7 (1) of the Mandate.

On this point, Mr. President, it is significant to see how the Court treated this subject in 1950. In the majority opinion the Court based its finding on the conclusion that there was a substitution for purposes of Article 7 (1). It based that finding mainly on the conclusions which it had already reached regarding the substitution of United Nations supervisory organs for those of the League, for purposes of Article 6. That was the basic finding, that there had been a substitution for purposes of Article 6. Arguing from that basis, it was quite easy to find also that there was an intent to have a substitution for purposes of Article 7 (1). After a conclusion had been reached on the strength of these considerations, the Court said that the conclusion was strengthened by the action taken by the General Assembly and the attitude adopted by the Union of South Africa.

In contrast, we find Sir Arnold McNair's treatment of the subject in his separate opinion. The Court will recall that he found that Article 6 of the Mandate had lapsed and that there was no substitution of a supervisory organ. On a similar reasoning he found that Article 7, paragraph 1, had also lapsed, and that there had been no substitution of a supervisory organ; and it was on that basis that Sir Arnold McNair had to deal with the question: where does the competence now lie to modify the status of South West Africa? He deals with that question at pages 162-163, and the answer which he gives accords in all material respects with what I

have been submitting to the Court now. At page 162 of the opinion the learned judge stated:

> "What then is the effect of the disappearance of the League and the ensuing impossibility of obtaining the consent of its Council? In my opinion, the effect is that the first paragraph of Article 7 of the Mandate has now lapsed. But this event in no way alters the quality or amount of the Mandatory's title or enlarges its power to modify the terms of the Mandate, because the international obligations affecting the Territory (except those which, as I have stated, have already lapsed) and the international status of the Territory continue to exist. Moreover, the Charter provides one method by which the international status of the Territory can lawfully be modified by the Mandatory, namely, by negotiating with the United Nations and placing it under a trusteeship agreement, as described in Chapters XII and XIII of the Charter."

Significantly, Mr. President, he says: "the Charter provides one method by which the international status of the territory can lawfully be modified." That is the method of agreement between the Mandatory and the United Nations. The particular example given there was by "... placing it under a trusteeship agreement", but of course, the last Assembly resolution of the League contemplated more generally all arrangements that might be agreed upon between the mandatory powers and the United Nations, involving all kinds of alternatives—an alternative, for instance, as was asked for—as was contended for—by the South African delegation in 1946, namely one of incorporation of the territory; and, also, an alternative such as was, in fact, achieved in the case of Palestine.

So, Mr. President, it follows that the lapse of Article 7 (1) certainly does not have the disastrous consequences contended for by the Applicants. It is significant in this regard to note the light in which the General Assembly itself viewed the submission to it of the matter in 1946. In resolution 65 (I) of 14 December 1946 (64th Plenary Meeting) one of the paragraphs of the preamble reads as follows:

> *"The General Assembly,*
>
> . . . . . .
>
> *Noting with satisfaction* that the Union of South Africa, by presenting this matter to the United Nations, recognizes the interest and concern of the United Nations in the matter of the future status of territories now held under mandate;
>
> . . . . . .
>
> *Is unable to accede* to the incorporation of the territory of South West Africa in the Union of South Africa; . . ."

The Court will note, Mr. President, that the highest at which the matter was put by the General Assembly, was that Respondent's conduct constituted a recognition of the "interest and concern" of the United Nations. It did not manifest a contemplation that there was an acknowledgment that the United Nations had succeeded to the functions or the powers of the League Council in terms of Article 7 (1) of the Mandate.

Mr. President, in regard to the Court's finding in 1950 that the United Nations had succeeded to the powers previously exercised by the League in terms of Article 7 (1), Respondent contended that—

> "... an essential link in the Court's reasoning was its previous

finding that 'powers of supervision in respect of the administration of the Mandates' were vested in the General Assembly of the United Nations. Respondent has submitted that this finding was incorrect. If Respondent's submission in this regard is sound, it would follow that the said Advisory Opinion would no longer be acceptable authority for the proposition—'that it is the United Nations whose consent is now required for any modification of the terms of the Mandate'." (**IV**, p. 135.)

The conclusion, Mr. President, we submit is incontestable. Agreement with the United Nations would be one of the ways in which there could be a modification of the terms of the Mandate, that is, if one concedes that the Mandate exists. But it would be only one of the ways, as was said by Sir Arnold McNair; there are alternative methods by which a same result can be achieved, i.e., without there being unilateral modification on the part of the Respondent.

Mr. President, I have just read a passage from the Counter-Memorial in which the Respondent stated explicitly that on its contention the particular finding in the Advisory Opinion also could not stand, namely that it is the United Nations whose consent is now required for any modification in terms of the Mandate, and I explained the sense in which the Respondent makes its submission in that regard—the United Nations could provide a method for modification, but that would not be the only method. This conclusion, I submit, Mr. President, is an incontestable one, but my learned friends do not attempt to answer it on its merits—they merely try to discredit it by referring to what they term the consequences of it. They say in the verbatim record at page 222, *supra*, that Respondent's submission—

". . . leads to a *reductio ad absurdum*, that is to say, a conclusion that if the alleged 'new facts' had been known to the Court in 1950, the Court would have held that Respondent does, after all, have competence to modify, and thereby destroy, the international status of the Territory".

Mr. President, the Court will see that the only consequence here assigned to our submission is that the Respondent would have, after all, "competence to modify, and thereby destroy, the international status". The earlier alternative to which the Applicants' learned Agent himself had referred, namely that the Mandate could remain in a frozen condition —that is not even mentioned here any more, and of course, Mr. President, no mention whatsoever is made of the possibility of an alteration of status by the ordinary processes of international agreement and recognition. Therefore this alarming picture which the Applicants purport to paint in regard to the consequences of the submission that Article 7, paragraph 1, of the Mandate is now inoperative—this part of their contention is entirely without any substance.

For the reasons with which we have dealt we submit that the interrelationship between Articles 6 and 7 (1) of the Mandate was a functional one during the existence of the League, but it was not of such an inherently essential nature that the falling away of Article 6 would have the results contended for by the Applicants. The inoperability and the consequent lapse of provisions of the Mandate such as Article 6 and Article 7, paragraph 1, which were dependent for their operation on organs of the League—that was a consequence of the disappearance of

the League which was deliberately foreseen and intended by the interested parties. They deliberately preferred to make no further provision about matters of that kind in the circumstances as they obtained, and one, therefore, has to accept the legal consequences of that deliberate decision. The consequences in the case of Article 7 (1) are by no means as alarming as suggested by the Applicants; the position is still that modification can be obtained by the ordinary processes of international consent and recognition, including the possible procedures through obtaining the consent of the United Nations.

Mr. President, I come to deal with another argument very briefly—a suggestion by the Applicants' Agent that there is an analogy between the *cy-près* doctrine and the contention which he is advancing to this Court in regard to the interpretation of Article 6 of the Mandate. The relevant passage is in the verbatim record at page 189, *supra*. It reads as follows:

> "Notwithstanding Respondent's formal objection to the doctrine of *cy-près*, and recognizing that the beneficiaries have remained the same, nonetheless the beneficiaries themselves have no right under the Mandate to seek judicial or administrative recourse. The concept underlying the *cy-près* doctrine, accordingly, may be thought to be analogous to the situation here, that is, a new surrogate, or representative of the beneficiary, is essential, inasmuch as without such representative the beneficiary, which has no 'existence' in law, has no right to seek protection, as inhabitants."

Mr. President, it will be seen that this suggestion that the *cy-près* doctrine can have some application in this case is a very tentative one, and it is, therefore, not necessary for me to deal at any length or exhaustively with the topic. Members of the Court may recall that during the Oral Proceedings on the Preliminary Objections we had occasion to consider the authorities in regard to the *cy-près* doctrine, and for the reasons there set out we submitted that the circumstances of the present case are not analogous at all to those justifying invocation of this doctrine. The Court will find the references in the Oral Proceedings of 1962 at pages 118-120 **(VII)**.

Basically, Mr. President, in our submission the analogy itself is a false one. Under the *cy-près* doctrine a court may under certain circumstances direct that where a beneficiary under a trust cannot be ascertained or has ceased to exist, the trust assets may be employed for the benefit of another beneficiary of the same kind as the original one. One finds this especially in charitable bequests, where there is an intent to benefit charity, and for that purpose a specific institution is mentioned. The particular institution falls away and the court applies the bequest for the benefit of another similar institution. The point I make at the moment is that the doctrine is applied, where there has been a lapse of the beneficiary mentioned, to prevent a complete lapse of that kind. In the present case there is no question of the lapse of a beneficiary under a trust, as the Applicants indeed recognize in the passage which they have quoted. The analogy which they suggest is that the doctrine should be applied, not to the case of a lapse or disappearance of the beneficiary, but to the lapse or disappearance of the supervisory organ. But, Mr. President, on analysis they do not contend that the court can substitute a new supervisory organ in the same way as the court would be able to substitute a new beneficiary under the application of the *cy-près* doctrine—they do

not go so far. Such a contention would indeed, Mr. President, raise insuperable difficulties—difficulties of principle which are not involved in the application of the *cy-près* doctrine by municipal courts; the principle, for instance, that an obligation cannot be imposed upon a party who has not consented to that obligation. There cannot be a modification of an obligation not consented to by the party itself. That type of problem does not arise in the application of the *cy-près* doctrine at all; it does arise here. The Applicants, therefore, do not go so far as to say that the court itself could effect such a substitution on the analogy contended for. Their argument rather seems to be this, Mr. President: that the same type of interpretation which gives rise to the application of the *cy-près* doctrine is to be applied here in the interpretation of Article 6 of the Mandate.

As we pointed out in the review to which I referred before, Mr. President, before the *cy-près* doctrine can be applied in municipal institutions where it does apply, there is to be a finding by the court that the donor in the particular case was motivated by an over-riding charitable intent transcending the mode of its operation. We give the authorities on that point in the Oral Proceedings at pages 118-119 **(VII)**. In other words, the court, in such cases where it is said that the *cy-près* is to be applied, has to satisfy itself first of all on this question of the intent of the donor. It has to decide on ordinary principles of interpretation: did the donor have a general over-riding charitable intent, and was this particular institution mentioned by the donor, therefore, just a means of giving effect to that intent, or was the intent of the donor indeed inseverably connected with a particular institution, so as to apply to that institution and to no other?

In the former event there is scope for the application of the doctrine; in the latter there is no scope for its application and the courts do not then apply it. That appears very clearly from the authorities which we cite in the part of the Oral Proceedings of 1962 to which I have referred.

So by analogy with the facts of the present case, Mr. President, it would be necessary to find, first, on ordinary principles of interpretation, that there was an over-riding intent on the part of the founders of the mandates system to create international supervision, as distinct from supervision by specific organs. It brings us back to that same basic conflict between the Applicants and ourselves as to the manner in which Article 6 is to be interpreted and what effect is to be given to it in law.

So the doctrine cannot assist the Applicants. The doctrine would have been applicable only if that issue, which is a straightforward issue of interpretation and application, were first resolved in the Applicants' favour; then there would, in the analogous circumstances in municipal systems, have been a basis for the application of a *cy-près* doctrine. However, Mr. President, the doctrine itself cannot assist the Applicants in the interpretation for which they contend. The reverse really applies. Such an interpretation must be justified on ordinary principles before there can be any application of such a doctrine. Therefore, the reference to the *cy-près* doctrine does not, in any way, assist the Applicants.

Now, Mr. President, I proceed to consider the 1950 Opinion and the 1962 Judgment of the Court in their effect on the issues regarding Article 6 of the Mandate.

The Applicants in their Memorials, Mr. President, sought to give some effect, similar to that of *res judicata*, to the 1950 Opinion. In the Oral Proceedings on the Preliminary Objections **(VII)**, at pages 21-24, the

Respondent dealt with this submission very fully in an exposition which was, for convenience, repeated in the Counter-Memorial. We find it in the Counter-Memorial **(II)**, pages 98-102. In the Counter-Memorial we gave consideration also to the effect of an earlier judgment on preliminary objections—what effect that has on the same issues as they arise later in the same case. That is dealt with in the same volume at pages 102-103. Our contention was as follows:

> "Findings made in a judgment on preliminary objections would naturally carry great weight where the subject-matter of the findings are in issue on the merits. Nevertheless the Court would always entertain arguments directed towards persuading it to depart from its previous judgment, and would come to a different conclusion where sound reasons exist therefore."

Mr. President, although this contention was stated more particularly with respect to a previous judgment on preliminary objections, the words in issue also reflect our contention in regard to the weight which should be given to an earlier advisory opinion. We stress that in the ordinary course great weight as a precedent and an authority would be given to such findings, in preliminary objections, opinions or judgments, and in an advisory opinion, but there may be certain circumstances in which the Court may find itself compelled to depart from the conclusions arrived at.

Faced, Mr. President, with these fully motivated statements of Respondent's submission, the Applicants did not, whether in the Oral Proceedings on the Preliminary Objections, or in the Reply, or in the Oral Proceedings on the Merits here, seek to support the attitude adopted by them in the Memorials—the attitude, that is, of giving to the pronouncements in an advisory opinion a similar effect to that of *res judicata*.

In the Reply, the Applicants adopted a new attitude, but it was a completely inconsistent one. They conceded, on the one hand, and I refer to the Reply **(IV)** at page 522, Respondent's privilege to reassert in a contentious proceeding submissions contrary to the findings in the previous Advisory Opinion and Judgment on the Preliminary Objections. There they made the concession that Respondent has the privilege to reassert its previous submission, even though its terms were contrary to the Opinion and the Judgment.

On the other hand, they contended in the Reply **(IV)**, at page 552, that the matters decided in these proceedings are to be regarded as *res judicata*.

In our Rejoinder, **V**, pages 15-16, we pointed out this inconsistency, but the Applicants have still not clarified their attitude in the present oral proceedings. They have not indicated which of those two attitudes they actually adopt. We assume, Mr. President, that they do not adopt a definite attitude on *res judicata*, in view of the concession which they made in the Reply, and the fact that they have presented no argument either in the Reply or in these proceedings to support the contention of *res judicata*. We shall, therefore, assume that they do not advance such a contention and I shall not address myself to any such proposition. We shall limit ourselves to submitting that that contention would be untenable for the reasons and on the strength of the authority set out and discussed in the relevant part of the Counter-Memorial.

So on that basis, that the Court will be prepared to reconsider the matter in order to see whether there is sound reason for departing from

conclusions previously arrived at in either of these instances, on that basis I proceed to discuss the previous Advisory Opinion and the Judgment on the Preliminary Objections in regard to their content.

Before I make any submissions at all on the question whether any of these conclusions are to be followed or not to be followed by the Court in the present case, it may be convenient to examine first of all what were the findings and the implications relevant to the issues at present before the Court.

In regard to the 1950 Opinion this presents no difficulty. The Court held, in express terms:

> "... that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted ..." (*I.C.J. Reports 1950*, p. 143.)

It is quite clear, Mr. President, that the submission which we advanced to the Court on the question of Article 6—the question of supervisory jurisdiction—furnishing of reports and petitions—is directly contrary to the finding of the Court in the 1950 Opinion. For the reasons, which I shall advance presently, the Respondent will, with the greatest respect, ask this Court not to follow the 1950 Opinion in that particular respect.

The 1962 Judgment and opinions, Mr. President, are in an entirely different position. In the Preliminary Objections proceedings the continued existence of Article 6 was not a matter which necessarily required a decision *per se*. It was raised by the Parties as being a relevant consideration upon which the Court could come to conclusions on the issues regarding jurisdiction, depending on particular views which the Court might take on certain aspects of the matter.

For that reason there was full argument on the question whether there was succession of the United Nations to the League's functions in respect of Article 6. It was certainly fully argued from our side and the Applicants also stated their contentions in the Observations and in the oral argument to the extent of relying on the reasoning of the Court in 1950 in that regard, and the issues were fully brought out before the Court in the arguments. But the relevance, as I have said, of that issue, would depend on the views which the Court, or Members of the Court, might take on other issues and other questions in those Preliminary Objections proceedings.

In the result, all the Members of the Court did not make express findings in regard to the issues of the existence of Article 6. Some did, some did not. On the basis of an analysis of the Judgment and the separate opinions, we submitted in our Counter-Memorial, **II**, page 153, as follows:

> "... four Members of the Court (Judges Bustamante, Spender, Fitzmaurice and van Wyk) expressed a clear view that Article 6 had lapsed on dissolution of the League. The other eleven Judges did not deal expressly with this point; but the findings or reasoning of seven of them are to a greater or lesser extent inconsistent with any survival of the Mandatory's procedural obligations. They are Judges Alfaro, Badawi, Moreno Quintana, Wellington Koo, Koretsky,

> Jessup and Mbanefo. In respect of the remaining four Judges (*i.e.*, President Winiarski and Judges Basdevant, Spiropoulos and Morelli) no indications are in this regard afforded by their Opinions."

That was the analysis we gave, Mr. President, and the conclusion we arrived at after analysis, in our pleadings.

Mr. President, the Applicants, without joining issue with us on this analysis of the Judgment and of the opinions, nevertheless state in their Reply that the Judgment provides support for their contentions. We find that stated in the Reply **(IV)** at pages 522-524, 539 and 552. We passed comment in the Rejoinder on this attitude on the part of the Applicants of ignoring our expositions—our analyses—but simply stating that the Judgment provided support for their contentions. The Applicants' reaction, we have now heard in these Oral Proceedings, and here they stated as follows in the verbatim record at page 172, *supra*:

> ". . . the Court's reasons and conclusions in both the 1950 Opinion and the 1962 Judgment speak for themselves, and do not require analysis or exposition by the Applicants in this respect".

They proceeded to state this, however:

> "It is submitted that the Respondent's analyses of both the 1950 Opinion and the 1962 Judgment are irreconcilable with their clear intendment and actual purport."

Nevertheless, Mr. President, the Applicants now, for the first time, devote some attention to attempts to show that the reasoning of the 1962 Judgment supports their contention. We find those attempts made in the argument orally presented to the Court. But it will be noted that they limit their contentions to the Judgment, and also those which I have just read to the Court. They do not deal with Respondent's contentions regarding the effect of the various separate opinions and it would appear on the whole, therefore, Mr. President, that they do not contest our interpretation and analysis of those opinions. They have not stated their attitude clearly in that regard. If this does not accord with their attitude then I should like to hear what their attitude really is, but for the time being it would appear that they do not contest our analyses of the opinions themselves.

In this oral address I shall, therefore, also limit myself to an examination of the Judgment, with a few exceptions. There are one or two matters to which I shall draw attention in regard to the separate opinions. But before doing that, Mr. President, I want to emphasize that the four judges who in their separate opinions expressed any definite view regarding the continued existence, or otherwise, of Article 6, all four stated that, in their opinion, Article 6 had lapsed. There was no explicit statement or finding by any of the other judges to the contrary.

The same view as was expressly stated by the four judges in question, Mr. President, can be derived, though not expressly, but nevertheless, in our submission, implicitly, from the opinions of Judges Jessup and Sir Louis Mbanefo. We deal with an analysis of their opinions in the Counter-Memorial, **II**, at pages 161 to 163. Those submissions, as I have said, have not been contested thus far by the Applicants and I should like to hear what their attitude is.

It is in this respect that I want to depart slightly and refer to one or two salient features in those opinions which are not fully set out in the Counter-Memorial, and which I should like to stress as they appear to be

relevant in the light of the oral argument which has now been presented to the Court from both sides.

I should like to refer first to the opinion of Judge Jessup, at pages 413 to 414 of the record of the 1962 Judgment and opinions. In the particular passage the honourable Judge draws a distinction between the type of problem which arose in regard to Article 7 and that which arose in regard to Article 6 on dissolution of the League. We contended, as the Court will recall, in regard to Article 7, that there were similar problems to those which arose in regard to Article 6—problems which arose from the fact that the competence to invoke the jurisdiction of a court was expressly conferred on another Member of the League of Nations, and membership of the League of Nations ceased on dissolution of the League. We referred also to the problems that arose in regard to the fact that the court mentioned was the Permanent Court and not the present Court.

In the passages to which I wish to refer the honourable Judge Jessup draws a distinction between the type of difficulty which arose in regard to Article 7 and that which arose in regard to Article 6:

> "Did Article 7 become inoperable? In contrast to Article 6, where the organ—namely the Council of the League—disappeared, in Article 7 a new organ had been substituted for the old by the operation of Article 37 of the Statute of the Court to which of course the Mandatory was a party. That transformation took place on the birth of the United Nations, and there can be no doubt that Article 7 provided for reference to this Court during that period from the birth of the United Nations to the death of the League.
>
> On the dissolution of the League it is true there were no longer States which were 'Members of the League', but did this fact frustrate performance? It has been shown that the disappearance of the quality of Member did not make Article 5 inoperable and the case is even stronger here since under Article 7 the Mandatory is not the actor, is not the operator, so to speak. In so far as concerns the administration or operation of the Mandate, the disappearance of the Council of the League might be said to create a measure of frustration in regard to the required acts of the Mandatory in filing reports. In regard to Article 7, however, the new Court was available. In contrast to the United Nations system it will be recalled that the Permanent Court was not a part or organ of the League and the winding up of the Court was separate from the dissolution of the League. For the successful operation of the Mandate during the life of the League, the quality of being a Member of the League was not necessary to the operation of Article 7; as already shown there were quite other reasons for referring to the Members." (*I.C.J. Reports 1962*, pp. 413-414.)

The line of reasoning appears to be this, that there were difficulties of frustration arising from the disappearance of the organ referred to in Article 6, namely the Council of the League, that for the reasons advanced in the opinion, with which I need not deal at the moment, the same type of mechanical difficulty did not arise in regard to membership of the League and in regard to the question of a substitution of court. Those were provided for in a manner not applicable to the case of the difficulty which arose under Article 6.

In the case of the opinion of Sir Louis Mbanefo I wish to refer the Court to a passage cited in the Counter-Memorial, **II**, at page 162. This

was a finding in regard to the question of the compromissory clause of Article 7:

> "Although the League was dissolved, the Mandate still continues and the rights and obligations embodied in it became, as it were, maintained at the level at which they were on the dissolution of the League. It is on this ground that the Respondent can justify its right to continue to administer the territory and those States who were Members of the League at the time of its dissolution the right to continue to invoke the compromissory clause of Article 7. The right to invoke Article 7 remained vested in those States who were Members of the League at the time of its dissolution, and continues notwithstanding the termination of the League's functions."

Mr. President, we point out that that reasoning that the rights and obligations embodied in the Mandate became, as it were, maintained at the level at which they were on the dissolution of the League could, by way of contrast, never be applicable to the case of the problem which arose under Article 6. That problem could not be overcome by the process of maintaining rights and obligations at a certain level. The problem could only be overcome by new arrangements involving, as the Applicants themselves admit, new consent on the part of the mandatory to a substitution of supervisory organs—a substitution which would involve a completely different composition of organs and completely different processes of supervisory machinery from those which had been applicable during the time of the League. Therefore, this approach would not be applicable to the problems raised by Article 6.

I proceed now, Mr. President, to deal with our contentions regarding the Judgment. They were set out in the Counter-Memorial, **II**, pages 156-161.

The first contention we advance is that the Court's finding regarding the form in which Article 7, paragraph 2, of the Mandate (the compromissory clause) was said to have survived the dissolution of the League, was inconsistent with any finding of a substitution of supervisory organs. It will be recalled, Mr. President, that the Applicants' main contention, with a view to overcoming the difficulty of a reference in the compromissory clause to another Member of the League of Nations, was a contention of succession—they advanced two contentions in the alternative. The main argument was one of succession—that a succession occurred whereby the United Nations and its Members had succeeded to the rights previously exercised in respect of mandates by the League and its Members. The two went together—rights and powers of the Organization, competence of the Members.

In the alternative, the Applicants advanced a contention of a carry-over, in terms of which the rights of States which were Members of the League at its dissolution remained, under Article 7 (2), even after such dissolution.

It was apparent, Mr. President, that if this succession argument were accepted it would have been of equal application to both Article 6 and Article 7, for the reasons I have mentioned. They, indeed, were advanced in that form—that it was because of a succession in regard to the powers of the Organization that the succession also occurred in regard to the competence of the Members of the Organization.

On the other hand, in regard to this alternative argument—the carry-

over argument—not only would that be inapplicable to any concept of a transfer of supervisory powers to the United Nations, it would in fact be inconsistent therewith.

The Court will recall that the Court in 1962 did not follow or adopt the Applicants' succession contention—not a single Member of the Court adopted that contention for the purpose of overcoming the difficulties pertaining in Article 7, paragraph 2. Instead the Court, in its Judgment, applied, in effect, the carry-over argument. The express finding of the Court was stated as follows, in the *I.C.J. Reports 1962*, at page 338:

> "Those States who were Members of the League at the time of its dissolution continue to have the right to invoke the compulsory jurisdiction of the Court, as they had the right to do before the dissolution of the League."

I shall deal later with the reasoning by which the Court arrived at this result. At present I am only concerned with the effect of this finding.

As we have stated, Mr. President, the finding by its very nature cannot support the Applicants' contention. It is, indeed, as a matter of logic, diametrically opposed to the Applicants' present contention of a succession regarding supervisory powers, or a substitution of supervisory organs, in whichever way they prefer to put it. The finding of the maintenance by States, in their private capacities, of rights which they previously held in their capacities as Members of the League, provides at the lowest, no support for a contention that the rights of the League organs passed over to the organs of the United Nations. The two things are unrelated, putting them at the lowest. The mere fact that the Court finds here that the States which were previously Members of the League could continue, because they had been Members of the League, to exercise certain rights, and not because of present membership of the United Nations, makes it clear that the Court's finding was not based on any concept of a succession nature and it, therefore, provides, at the lowest, no support for the contention of a succession nature, or substitution of supervisory organs, as advanced by the Applicants. But when we go further, Mr. President, and when we have regard to the basis of the Court's finding, on the one hand, and, on the other hand, the basis of the Applicants' argument, it becomes clear that these two propositions—the finding of the Court and the Applicants' present contention—are really irreconcilable.

The Court held, firstly, on the basis of an interpretation of the Mandate documents and in conjunction therewith on the basis of an agreement said to have been agreed in the years 1945-1946, that the competence to institute proceedings remained vested in States which were Members of the League, as at the time of its dissolution.

The Applicants contend, on the basis of an interpretation of the same mandate documents, and on the basis of an agreement said to have been reached in the same years (1945-1946) among the same parties, and evidenced by the same material as that relied upon by the Court, that the League's supervisory functions are now, pursuant to a substitution, to be exercised by the United Nations.

If one tries to reconcile these two propositions, Mr. President, one finds this anomalous result—that the authors of the League and the parties in 1945 or 1946 intended to split up two methods which are said to constitute forms of protection of the sacred trust. After dissolution of

the League (if we follow this attempted reconciliation) judicial protection would remain in the hands of a static number of States—a number of States which were Members of the League as at a particular date. That number of States might not, and, as we know, they, in fact, do not, coincide at all with the States that are Members of the Organization which is now said to exercise the administrative supervision. In other words, the group of States that can invoke jurisdiction of the Court—that one form of protection—that is a group which is distinct from the group of States which comprise the Organization that is to exercise the administrative supervision.

This, Mr. President, on the basis of the reasoning of the Court in 1962, would constitute a material modification of the whole purpose of the Mandate, because the Court held in 1962 that the compromissory clause was intended, in the ultimate analysis, to impose on the mandatory the will of the authority exercising administrative supervision. That was one of the basic findings of the Court, namely that the purpose of the compromissory clause was to make it possible that the *will* of the Organization exercising the administrative function could be imposed upon the mandatory. Judicial supervision and administrative supervision, therefore, had to go hand-in-hand, for that purpose. And now we find, if we try to reconcile the two attitudes—*the finding of the Court in 1962 about* competence to invoke the jurisdiction of the Court, and the present contention of the Applicants about the administrative supervision—that those two things are separated.

A splitting up of the functions in the way which would follow the Applicants' argument, would consequently run directly counter to the Court's Judgment in 1962, for it would mean that the interconnection found by the Court between Articles 6 and 7 did not exist, or would be immaterial. It would also impute, Mr. President, absolute irrationality to the parties to the alleged agreement in 1945 and 1946—an irrational agreement which would have to be inferred by necessary implication from the facts. We discussed this topic fully in the Counter-Memorial, **II**, pages 156-158, and I have not heard any reply from the Applicants in this regard.

We submit, therefore, Mr. President, that, for these reasons, the mere anomaly which would result, as a matter of effect, from trying to reconcile the Applicants' contention with the Court's finding, indicates the extent to which this contention is now in conflict with the finding of the Court—that is as regards its effect. Nevertheless, without dealing with this question at all, the Applicants still assert that the Judgment supports them. But before dealing with that, I should like to pass on to the reasoning whereby the Court reached its conclusion, and I submit that that is as equally inconsistent with the Applicants' contention as is the effect of the conclusion at which the Court arrived. It will be recalled, Mr. President, that three factors were relied upon specifically by the Court for its finding that competence to invoke the compromissory clause remained vested in States which were Members of the League at the time of its dissolution. The three factors were:

1. The essentiality of the judicial protection of the sacred trust. (*I.C.J. Reports 1962*, pp. 336-337.)
2. The reliability of judicial protection. (*Ibid.*, pp. 337-338.)
3. The conclusion of an agreement in 1946 to maintain the rights of

the Members of the League notwithstanding the dissolution of the League itself: (*Ibid.*, pp. 338-342.)

Mr. President, I should like to refer to the implications of each of these findings. The essentiality relied upon by the Court arose from the circumstances that under the League of Nations unanimity was required for Council resolutions. The Court held that right of recourse to the Court was granted in order to enforce the will of the Council against a recalcitrant Mandatory. The Mandatory, so it was argued, could block the effective taking of Council resolutions and the effective execution thereof, because of the principle of unanimity, and it was therefore necessary, in order to make this whole process of control over the Mandatory an effective one, that there had to be recourse to judicial process whereby the will of the Council could then be enforced upon the Mandatory. This line of reasoning, as we have shown, entirely negatives any prospect that the parties in 1945 or in 1946 would have intended to split up the two types of supervision held to have had an inter-connected purpose.

The reasoning regarding reliability we find in the *I.C.J. Reports 1962*, at pages 337-338. It reads, *inter alia*, as follows:

> "... besides the essentiality of judicial protection for the sacred trust ... the right to implead the Mandatory Power before the Permanent Court was specially and expressly conferred on the Members of the League, evidently also because it was the most reliable procedure of ensuring protection by the Court, whatever might happen to or arise from the machinery of administrative supervision."

That is the concept of reliability as stated by the Court. Now I should like to refer to the first few words, "besides the essentiality of judicial protection for the sacred trust". Those words indicate, Mr. President, that this concept of reliability was a factor which the Court invoked in addition to the argument of essentiality. It was an argument which stood independently of the argument of essentiality; it was not a mere restatement or an example of application of the principle of essentiality. I mention that particularly because of a form one of the arguments took which has been advanced by my learned friends, and I shall revert to its significance later. Secondly, I wish to stress the last words in this passage, "whatever might happen to or arise from the machinery of administrative supervision". The passage therefore shows that the reliability of judicial protection was important inasmuch as circumstances might arise in which something "might happen to or arise from the machinery of administrative supervision". The Court considered, therefore, that whatever might happen to that machinery, the judicial protection would still stand.

Mr. President, the significance of this idea in the Court's reasoning becomes apparent if regard is had to the factor that reliability, as stated by the Court, was advanced as a concept standing independently of essentiality. It follows that judicial protection was not conceived to be reliable because it could cope only with the situation of frustration where the Mandatory could not agree to unanimous resolutions of the Council. That was a factor relied upon by the Court for saying that it was essential in the mandates system to have judicial protection in addition to the administrative supervision. But when it comes to reliability, the view of the Court was that judicial protection could operate in circumstances

where, for reasons other than lack of co-operation on the part of the Mandatory, the "machinery of administrative supervision" could not function properly, or could not function at all. It follows, therefore, if we look at this concept of operating where that machinery could not function, that it was not in the circumstances of a frustration in the procedure itself. It pre-supposes, Mr. President, that something else must have happened, that for some reason the whole machinery of administrative supervision could fail, and the judicial protection could still stand.

In its context the import of the Court's reasoning in the passage is, consequently, unmistakeable. It is that judicial protection was designed to be effective even in circumstances where the machinery of administrative supervision lapsed, or became inoperative. And the reference to, and the emphasis upon, the applicability of the feature of reliability, demonstrates that the Court considered that this quality of reliability was relevant to the present circumstances, that is, that the machinery of administrative supervision had indeed, in the Court's view, broken down. The Court gave this weight to the factor of reliability of the judicial protection as a reason for coming to the conclusion that the judicial protection was intended to survive. It gave that weight to the consideration with reference to the facts of this particular case; it gave that weight, therefore, in our submission, with reference to an actual contemplation that something had happened to the machinery for administrative supervision—that that might indeed, in the Court's view, have broken down.

The Applicants apparently did not realize that the Court's reliance on reliability of judicial protection constituted a separate line of reasoning. They apparently interpreted that as being merely part of the statement of the Court's concept of the essentiality of judicial protection, and they consequently contended as follows, in the verbatim record at page 178, *supra*:

> "The history of the dispute now before the Court, Mr. President, in which the normal security for the protection of the rights of the inhabitants has been frustrated by virtue of Respondent's failure and refusal to discharge its obligation to submit to international supervision, even while retaining rights under the Mandate, underscores the significance of the Court's description of the right to implead the mandatory before the Court as (what the Court described as) 'the most reliable procedure of ensuring protection by the Court whatever might happen to or arise from the machinery of administrative supervision."

The Court will see that in this passage the Applicants attempt to equate the first ground upon which the Court relied, the essentiality, with the second ground, the reliability. In our submission this equation is quite unjustified, because the Court itself distinguished between the two.

At this point it may be convenient, Mr. President, to refer to another argument advanced by the Applicants, which is rendered as follows at page 124, *supra*, of the verbatim record, but which also appears elsewhere. It reads at page 124:

> "It is submitted that, in view of the relationship between Articles 6 and 7, it is thus implicit in this honourable Court's holding and in views expressed by the learned judges that if, and since, Article 7

has been held by the Court to be in effect it would seem that Article 6, by reason, logic and practical necessity, should also be concluded to have remained in effect."

We find references to the same line of argument also in the verbatim record at page 178, *supra*, and at pages 187-188, *supra*. From what I have just said, Mr. President, it will be evident that this argument ignores the Court's reasoning regarding the reliability of judicial protection. The reasoning of the Court on this question of reliability of judicial protection postulates and stresses as one of the features of the so-called judicial protection, that it could continue to operate even where the machinery of administrative supervision was for one reason or another out of action, a consideration which runs directly counter to the Applicants' suggestion that, if the judicial protection survived, the administrative protection must therefore, also have survived. On that point there is a very clear conflict of reasoning between the Applicants and the Court in 1962.

On the Court's reasoning, there would not appear to be any reason or logic for supposing that a finding that Article 7 has survived necessarily involves a finding that Article 6 has survived, particularly not in view of the basic difference in the form in which Article 6 is said to have survived by the Applicants, as compared with the form in which the Court held that Article 7 has survived.

The third ground, Mr. President, relied upon by the Court for coming to its conclusion regarding the compromissory clause, was an agreement among all Members of the League of Nations in 1946, and in regard to this agreement I have already pointed out that its content is irreconcilable with the Applicants' present contentions. When I say content, I mean its effect in keeping the competence to invoke the Court's jurisdiction vested in a static group of States which were Members of the League at the time of its dissolution, and in not finding that that competence was vested in Members of the United Nations.

But, Mr. President, when we pass over to the reasoning of the Court in support of this finding of an agreement, and explanatory of the finding, then we find that that even more clearly negatives any result such as is contended for by the Applicants. The object of the agreement, as found by the Court, was as stated in the Judgment at page 338:

"... to continue the different Mandates as far as it was practically feasible or operable with reference to the obligations of the Mandatory Powers and therefore to maintain the rights of the Members of the League, notwithstanding dissolution of the League itself".

The Judgment then proceeds to state at page 339 that discussions were held "to find ways and means of meeting the difficulties and making up for the imperfections as far as was practicable". Later, at page 342, the agreement is said "to maintain the *status quo* as far as possible in regard to the Mandates". A very significant passage appears at page 341:

"It is clear from the foregoing account that there was a unanimous agreement among all the Member States present at the Assembly meeting that the Mandates should be continued to be exercised in accordance with the obligations therein defined although the dissolution of the League, in the words of the representative of South Africa at the meeting, 'will necessarily preclude complete compliance with the letter of the Mandate', i.e. notwithstanding the

fact that some organs of the League like the Council and the Permanent Mandates Commission would be missing. In other words the common understanding of the Member States in the Assembly —including the Mandatory Powers—in passing the said resolution, was to continue the Mandates, however imperfect the whole system would be after the League's dissolution, and as much as it would be operable, until other arrangements were agreed upon by the Mandatory Powers with the United Nations concerning their respective Mandates."

I emphasize these words, Mr. President: "however imperfect the whole system would be after the League's dissolution, and as much as it would be operable." Clearly, they impute a contemplation that, despite this agreement, despite what it provided for, there would still be some aspects in which the whole system would be imperfect after the League's dissolution. There would still be parts of it which would not be operable because the agreement applied only to "as much as it would be operable".

We discussed these aspects in the Counter-Memorial, **II**, pp. 157-159, and we concluded, Mr. President, that the reasoning was entirely inconsistent with any contention that the same agreement could have effected a transfer of supervisory functions to the United Nations. We stressed these very two elements which I have mentioned, namely the imperfection, and the "as much as it would be operable". In this last passage which I quoted, the imperfection and the incompleteness, if I may call it that, are related directly to the disappearance of the organs exercising administrative supervision. If there *had been an agreement*, and if the Court contemplated that there had been an agreement whereby supervision had been transferred to the United Nations, or whereby the United Nations had been substituted as a supervisory organ, then, surely, the imperfection would have been cured—it would no longer have been necessary to speak of a system which would operate imperfectly, or of as much of it as would be operable. It seems clear, therefore, Mr. President, that the Court did not regard that such a transfer or a substitution of organs was effected by the agreement which it found to have been concluded.

The Applicants in their oral statement to this Court skate very lightly over this argument. They say:

> "The Court's references to feasibility or operability corresponded to the objective realities of the situation caused by the demise of the League, to wit, the necessity to substitute the existing supervisory organs with others, and specifically, the substitution of the United Nations for the League. That such substitution was both practically feasible and operable is beyond dispute, inasmuch as the United Nations, then in existence, had:
>
> 'another international organ performing similar, though not identical, supervisory functions . . . [and was] legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory . . . (*I.C.J. Reports 1950*, pp. 136, 137.)'
>
> Accordingly, the United Nations was in a condition and in a position to replace the League of Nations both from a feasible and operable standpoint." (P. 215, *supra*.)

And on the same page the Applicants' Agent continued:

> "The Court's qualifications, such as the phrase 'however imperfect the whole system would be', or 'as much as it would be operable', referred, in the Applicants' respectful submission, to the obvious fact—which the Court noted in the sentence preceding the quoted language—that '. . . some organs of the League like the Council and the Permanent Mandates Commission would be missing'. As the Court also noted, this fact necessarily precluded 'complete compliance with the letter of the Mandate'."

Mr. President, I submit that these two quotations from my learned friend's argument exactly establish our contention. If it is accepted that the United Nations could provide a complete and adequate substitute for the League regarding supervision in respect of mandates, then these qualifications employed by the Court can be explained only on the basis that it did not consider that supervision would pass to the United Nations; otherwise the qualifications contemplated by the Court would not have applied at all—they would not make sense in the Court's reasoning. This is the point which is not met by the Applicants. The very fact that there was this other organ that would be competent to undertake supervision, if asked to do so, if satisfactory arrangements could be made in that regard, makes it clear that the Court could not have contemplated that that organ had been substituted, by agreement or otherwise. Otherwise the Court could not possibly have spoken of the incompleteness of the system to operate under this agreement.

The furthest the Applicants go in attempting to meet this difficulty and in attempting to reconcile the Court's reasoning with their argument, is to assert, without argument:

> ". . . that the same considerations, and full parity of reasoning [as that employed by the Court regarding Article 7 (2)], applies to interpretation of Article 6 and Article 7, paragraph 1, in respect of the matter under discussion". (P. 215, *supra*.)

As has been shown, Mr. President, this is a bold statement, but completely unsubstantiated, and it is quite untenable.

In considering the reasoning of the Court, we have dealt with the element of incompleteness, or imperfection which, as the Court stressed, would inhere in the Mandate after dissolution of the League, despite this agreement, which the Court found. But a further aspect of the reasoning of the Court, which is, in our submission, inconsistent with the Applicants' argument, and closely related, is its statement that the purpose of the agreement in April 1946 was, in the Court's view, not to create new rights, but merely to "maintain the *status quo*" or "maintain the rights of Members of the League"—*maintain* the rights of Members of the League—*maintain* the *status quo*.

Now, Mr. President, an agreement of this content could conceivably be said to apply so as to serve to perpetuate in favour of States, in their individual capacities, the competence to invoke the compromissory clause—a competence which had been previously vested in them in their capacities as Members of the League. But, Mr. President, it could obviously *not* have the effect of providing a new body to exercise administrative supervision. Particularly, Mr. President, that could not apply where the purpose of this agreement, as the Court saw it, was to cater only for the interim period until other arrangements were agreed upon

with the United Nations. The Court knew of resolution XIV of the United Nations General Assembly, in regard to a transfer or an assumption of political powers by the United Nations. The Court knew that the United Nations had reserved to its own organs the right to decide in each particular case whether it *wanted* to assume such political functions, on due application being made by a party, and on a decision then being given by the United Nations. Therefore, the Court knew that special arrangements of that kind, involving a decision of the United Nations itself, would be required in order to effect a substitution of supervisory organs, or a transfer of powers in that regard. Therefore, Mr. President, the Court, seeing this agreement as an arrangement involving only the Members of the League at its final session, and involving a mere maintenance of a status quo, could never have conceived that that agreement would have included this positive new arrangement, which would have been necessary in order to effect a substitution of supervisory organs.

[Public hearing of 12 April 1965]

Mr. President and honourable Members, in order to resume from where we left off on Friday afternoon I have to recapitulate very briefly the gist of what was contained in the last few minutes' argument that afternoon.

I dealt, Mr. President, with the 1962 Judgment of this Court on the Preliminary Objections which had been filed by the Respondent in these proceedings—preliminary objections on the question of the jurisdiction of this Court. I dealt with that Judgment in so far as it is relevant to the issue now under consideration, namely the lapse, or otherwise, of Respondent's obligation of accountability under Article 6 of the Mandate. I dealt, Mr. President, with the part of the Judgment which sets out a finding of an agreement in April 1946 between all Members of the League in terms of which the compromissory clause in Article 7, paragraph 2, of the Mandate was kept alive, notwithstanding the dissolution of the League. I dealt with certain aspects of the reasoning of the Court in regard to that agreement. I pointed out that that reasoning was, in major respects, in conflict with any contemplation on the part of the Court, or of the parties to that agreement, that there had been, or would be, a substitution of supervisory organs in respect of administrative supervision over the Mandate. I consequently pointed out that the reasoning of the Court in that respect was also directly in conflict with the contentions of the Applicants now addressed to the Court in regard to such a suggested substitution of supervisory organs.

I demonstrated this point of conflict, Mr. President, with particular reference to two elements in the reasoning. The first element was that which attributed an incompleteness and an imperfection to the system which was to operate in pursuance of this agreement. I pointed out that the Court contemplated, and apparently considered, that the parties to this agreement in April 1946 contemplated that, after the dissolution of the League, the whole system would work and operate incompletely and with imperfections, that is as much of it as might be operable. I submitted that the only factor to which this incomplete operation could refer, on analysis, would be that of supervision and accountability. If one presupposes that there was a substitution of supervisory organs, or if the agreement had provided for a substitution of supervisory organs, there

would have been no imperfection—no incompleteness whatsoever—in the operation of that agreement and of the whole system, as visualized by the Court.

The second element of importance in that regard was the fact that the effect and the purpose of the agreement, as described by the Court, was not to create new rights, or new obligations, or new arrangements, and, in particular, arrangements between the United Nations and the respective mandatory powers. As the Court itself said, at page 342 of the Judgment, the contemplation was that such arrangements would be "agreed between the United Nations and the respective mandatory powers". The purpose of the agreement which the Court found to have been entered into was, on the contrary, merely—

> "... to maintain the *status quo* as far as possible in regard to the Mandates pending other arrangements agreed between the United Nations and the respective Mandatory Powers ...". (*I.C.J. Reports 1962*, p. 342.)

Consequently, Mr. President, a substitution of the General Assembly of the United Nations for the Council of the League as the supervisory authority in respect of mandates, would have been *par excellence* an arrangement that would have had to be agreed between the United Nations and the respective mandatories. It was not something which was contemplated by the Court as having been provided for in this agreement, which was merely intended to maintain the *status quo*. It follows, amongst other things, Mr. President, from resolution XIV of the General Assembly of the United Nations, of February 1946—from the part dealing with political powers and functions, namely part III, 1 *(c)*—that the United Nations had reserved to itself, and to its own organs, the right of deciding in each particular instance whether it would, or would not, agree to a new arrangement about functions of a political nature, which would include the case of Mandates.

The Court was aware of that in 1962, and the League Assembly was aware of it in 1946. Consequently, Mr. President, the description of the purpose of the agreement as being limited to maintenance of the status quo for the interim period and also, in the words of the Court, to "maintain the rights of Members of the League" for that period, shows that the agreement, in the Court's contemplation, did not provide for a substitution of supervisory organs. That was the stage to which we came at the adjournment on Friday.

Now we find that, despite these very clear indications afforded by the Court's own reasoning, the Applicants contend to the contrary. *Apropos* of this very finding in the Judgment, namely that the agreement was to maintain the "*status quo* as far as possible", they state in the verbatim record at page 216, *supra*:

> "The maintenance of the *status quo* as far as possible must have included the substitution of the United Nations for the League ..."

Mr. President, in this submission the Applicants, consequently, not only ignore the words "as far as possible", which relate to the imperfection with which I dealt earlier, but also suggest that the maintenance of the status quo could be equated with the creation of entirely new arrangements, involving the need of co-operation of another party in order to bring it about, the other party being the United Nations itself, as I have

pointed out. Mr. President, this, in my submission, is an entirely untenable construction of the 1962 Judgment.

It is further to be noted that the Applicants, in regard to this submission of theirs, refer only to the status quo formulation by the Court. The Applicants ignore other formulations which the Court used as being synonomous with that formulation, such as, for instance, "maintain the rights of Members of the League". A phrase like that would, in our submission, be even less capable of supporting the strange construction which is placed upon the Judgment by the Applicants. The concept of maintaining the rights of the Members of the League could surely not be equated with the creation of a new relationship pertaining to supervision of the mandatory administration by the United Nations Organization. I was not aware of the fact that the rights of Members of the League, which were being maintained, could in any way include anything pertaining to supervision by the United Nations. Surely, if their rights were to be seen as relating to anything in that direction, there would have had to be a new arrangement and not merely a maintenance of the status quo or a maintenance of existing rights of Members of the League.

Those then, Mr. President, are the reasons why, in our submission, the 1962 Judgment is inconsistent with the Applicants' contentions. The Applicants' answers thereto are, for the reasons we have given, untenable, in our submission, and I should like to refer, further, to one or two other arguments raised by the Applicants in this regard.

On the first day of his argument (18 March 1965), Mr. Gross, my learned friend, for the Applicants, stated according to the verbatim record, at page 131, *supra*, that:

> "The Court in 1962 did not expressly hold that the United Nations General Assembly has replaced the League Council as the supervisory organ, inasmuch as that issue did not arise directly and pertinently for explicit decision in that form. However, the Court's holding, . . . 'that the Mandate as a whole is still in force', coupled with its finding that 'all important facts were stated or referred to in the proceedings before the Court in 1950' renders it clear beyond doubt, in the Applicants' respectful submission, that the Court in 1962, at the minimum, reaffirmed the *rationale* of the 1950 Advisory Opinion in respect of the survival of Article 6 . . ."

The Court will have observed that this submission relies on two elements, namely firstly, the Court's statement, that the Mandate, as a whole, was still in force, and, secondly, the Court's statement that all important facts were stated, or referred to, in the proceedings before the Court in 1950. I want to deal with these two elements in inverse order.

It will be noted, Mr. President, that the passage concerning "all important facts", was not in its context a reference to the question whether administrative supervision under the Mandate did or did not survive the League. It was in the context purely a reference to the question whether judicial protection, as it was called by the Court, survived the League. That we find very clearly expressed at page 334 of the 1962 Judgment, where it is put as follows:

> "The unanimous holding of the Court in 1950 on the survival and continuing effect of Article 7 of the Mandate, continues to reflect the Court's opinion today. Nothing has since occurred which would warrant the Court reconsidering it. All important facts were stated

or referred to in the proceedings before the Court in 1950." (*I.C.J. Reports 1962*, p. 334.)

It will consequently be clear, Mr. President, that this sentence relied upon by the Applicants in terms referred only to Article 7, and not to Article 6. It may, of course, be possible that the Court, in making this statement, also had in mind the Respondent's contention regarding new facts in relation to Article 6. But even if it did, Mr. President, it could hardly have failed to distinguish between the two situations in that regard—on the one hand, the situation in regard to Article 6, in respect of which certain facts were indeed not stated or referred to in the 1950 proceedings, and, on the other, the situation in regard to Article 7, in respect of which the position was different.

Reverting, however, Mr. President, to the first point in this argument of the Applicants, namely the statement that the Mandate as a whole is still in force, I again must point out that regard should be had to the context in which this expression was used. One finds the statement itself at page 335 of the Judgment, and it is very significant to note where it occurs. It occurs at the end of a portion of the Judgment running over three pages, that is, from page 332 and to page 335, and concluding with this very sentence:

> "The validity of Article 7, in the Court's view, was not affected by the dissolution of the League, just as the Mandate as a whole is still in force for the reasons stated above." (*I.C.J. Reports 1962*, p. 335.)

That concluded the consideration the Court gave to the Respondent's first objection to jurisdiction as it was then advanced to the Court.

The Court had, for the purpose of considering the first and the second objections, to draw a distinction between two propositions which we advanced at the time. The first proposition was that the Mandate as a whole, including Article 7 thereof, had ceased to be a treaty or convention in force; and the second was that Article 7 itself had ceased to be a treaty or convention, or was, at any rate, not applicable to the circumstances of this case. I refer the Court to the Oral Proceedings in 1962 to indicate exactly what terminology was used in that regard in the argument, and I submit that the simple explanation of this passage in the Court's reasoning is that it followed that terminology.

At pages 29 to 30 of the Oral Proceedings **(VII)** of 1962 I referred to the first two objections to jurisdiction raised at the time, and I stated their broad effect as follows:

> "The first concerns the proposition that as a result of the dissolution of the League the Mandate Agreement, as a whole, including Article 7, has ceased to be a treaty or convention in force within the meaning of Article 37 of the Statute of the Court. The second one concerns the proposition that the Applicants are unable to bring themselves within the expression 'another Member of the League of Nations' for purposes of Article 7 of the Mandate Agreement. I wish to point out at this stage that there are, in effect, three alternative contentions wrapped up in these First and Second Objections."

And after dealing with other aspects of the matter I reverted to these three propositions and stated them as follows:

> 1. ". . . consequently, our first contention is . . . that on dissolution of the League the whole Mandate Agreement—and thus

including Article 7 thereof—ceases to be a treaty or convention in force within the meaning of Article 37 of the Statute of the Court". (**VII**, p. 31.)

2. "... even if the Mandate could, in other respects, be said to be still in force as a treaty or convention within the meaning of Article 37 of the Statute, Article 7 of the Mandate itself ceased to be so in force". (*Ibid.*, p. 32.)

The third contention was as then stated merely an alternative way of putting the same argument and read—

3. "... that even if the Mandate, including Article 7 thereof, could be said to be 'a treaty or convention in force', neither of the Applicants is qualified to invoke it as 'another Member of the League of Nations' within the meaning thereof". *(Ibid.)*

Mr. President, in that context it becomes perfectly clear that what the Court dealt with in this portion of its Judgment, running from page 332 to page 335, was the first two of those contentions, advanced on behalf of the Respondent at the time. And in the very next portion of the Judgment, at page 335, the Court went on to the third of the propositions, stated by it as follows:

"The Second Objection of the Respondent consists mainly of an argument which has been advanced in support of the First Objection. It centres on the term 'another Member of the League of Nations' in Article 7 ..."

Commencing this portion of the Judgment, at page 332, the Court stated as follows:

"Since the Mandate in question had the character of a treaty or convention at its start, the next relevant question to consider is whether this treaty or convention, with respect to the Mandate as a whole including Article 7 thereof, or with respect to Article 7 itself, is still in force."

These, then, are the questions to which the Court addressed itself in this portion of its Judgment, and it stated its conclusion, as follows:

"The validity of Article 7, in the Court's view, was not affected by the dissolution of the League, just as the Mandate as a whole is still in force for the reasons stated above." (*I.C.J. Reports 1962*, p. 335.)

In that context, Mr. President, it becomes perfectly clear that the sentence in the Court's conclusion relied upon by the Applicants, signified no more than that the Court rejected both the second and the first of the contentions which we advanced at the time in respect of the jurisdiction issue.

This is the obvious reading of the Court's words, and it is fortified further, Mr. President, by the fact that the last sentence ends with the words "for the reasons stated above". If we analyse what went before—the prior reasoning—we find no attention whatsoever to the question whether Article 6 was still in force, or problems which arose in regard to Article 6 as a result of the disappearance of the supervisory organs of the League. No attention whatsoever was given to these questions. On the contrary, the reasoning and the wording of the Judgment would appear to make it perfectly clear that the Court intentionally avoided dealing with those questions, because it found it unnecessary to

come to, or to state, a conclusion in that regard, at that particular stage.

This is particularly evident, Mr. President, from a passage of the Judgment to which we refer at pages 159 to 160 of our Counter-Memorial (II). We refer there to a passage at pages 333 and 334 in the Judgment of 1962, containing a quotation from the 1950 Advisory Opinion, and we draw attention to the fact that in this quotation from the 1950 Advisory Opinion, certain passages in that Opinion were omitted, and that those omitted passages in every case referred to the United Nations and the possibility of transfer of functions to the United Nations, or a substitution of the United Nations as supervisory organ. The passage, as quoted by the Court in 1962, reads as follows:

> "The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision . . ." (*I.C.J. Reports 1962*, p. 333.)

I break off the quotation here, for a moment, to point out that that was the place where the Court omitted certain words. If we refer to the 1950 Opinion, at page 136, we find that those words were the following:

> "The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System." (*I.C.J. Reports 1950*, p. 136.)

That portion, Mr. President, we find was omitted in 1962. I proceed with the 1962 quotation:

> "It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist." (*I.C.J. Reports 1962*, pp. 333-334.)

That is the end of the quotation and it indicates that words were again omitted, and the omitted words, which we find at page 136 of the 1950 Opinion, were these: "when the United Nations has another international organ performing similar, though not identical, supervisory functions."

It becomes perfectly clear, Mr. President, that in this portion of the Judgment, running from page 332 to page 335, the Court deliberately omitted reference to the question whether there was a substitution of supervisory organs. What the Court did deal with in its reasons, was the question whether the Mandate as a whole, that is, the concept of the whole institution, as opposed to only Article 7 thereof, could any longer be said to be a treaty or convention in force, as we contended, or whether the opposite was true. That was the question to which the Court gave consideration, and it came to a conclusion that our contention in that regard was to be rejected.

Of course, the phrase "the Mandate as a whole" fitted perfectly into our statement of what I might call a negative, or a negative result—our statement that the Mandate as a whole had ceased to be a treaty or convention in force. As soon as one converts that into a positive, then the use of the phrase "the Mandate as a whole" creates difficulty, but in the context it appears quite clearly that the Court had in mind no more

than the phrase which we used in that regard, namely "the Mandate in other respects than Article 7".

So, Mr. President, in our submission, the sentence did not, and was not intended to, answer independent problems or questions regarding other specific provisions of the Mandate, and particularly not in regard to Article 6, and the Applicants' repeated reliance on this phrase, isolated from its context is, therefore, in our submission, clearly not justified.

Now, Mr. President, before leaving the 1962 Judgment, there is one factor in it to which I should like to revert, and which, on analysis, shows, quite independently from the arguments I have adduced so far, that a contemplation of a substitution of United Nations supervisory organs for those of the League would be entirely in conflict with the Court's reasoning in that Judgment. The analysis in this regard, Mr. President, turns on the factor of essentiality in regard to which the Court indicated that, in its view, it played a very important part in retaining the element of judicial protection after dissolution of the League. The factor was apparently seen by the Court as one which operated in the minds of the authors of the mandates system and in those of the parties to the agreement of April 1946. That the Court saw the matter in that light appears to be evident from an expression it used at page 342 of the Judgment. It said there "To deny the existence of the agreement it has been said that Article 7 was not an essential provision of the Mandate instrument for the protection of the sacred trust of civilization". I repeat, Mr. President, "To deny the existence of the agreement"—that is, the agreement of April 1946—"it has been said that Article 7 was not an essential provision of the Mandate instrument". The Court, therefore, considered this factor of essentiality to be something which operated in both the ways I have indicated—both in 1920 and in 1946. And the concept, as stated by the Court, was apparently that in case of failure of administrative supervision, for any reason, judicial protection of the sacred trust would be essential. That is the sense in which the Court spoke of essentiality of judicial protection in circumstances in which there might be a failure of administrative supervision. And the Court stated that the authors of the mandates system would have contemplated that such a failure could come about because of the unanimity rule in the administrative procedures of the League system—because the mandatory, on their view of that unanimity rule could make use of it, so as to create a position of deadlock, thus making it impossible for the Council to impose its will as supervisory authority on the mandatory.

But, Mr. President, it seems evident, when we consider the aforesaid contemplation as of the year 1946 (April 1946, immediately before the dissolution of the League), that that particular form of failure of administrative machinery could no longer have played any part in the contemplation of those who were dealing with the situation. It could no longer have played a part, either as a factor emanating from the original contemplation of the founders of the League system, or as one inducing the agreement in April 1946. This factor is evident, Mr. President, from the Court's own reasoning at page 342. The Court there, after referring to our argument that Article 7 was not considered essential for protection of the sacred trust, proceeded to state the following:

> "If therefore Article 7 were not an essential tool in the sense indicated, the claim of jurisdiction would fall to the ground. In support of this argument attention has been called to the fact that

three of the four 'C' Mandates, when brought under the trusteeship provisions of the Charter of the United Nations, did not contain in the respective Trusteeship Agreements any comparable clause and that these three were the Trusteeship Agreements for the territories previously held under Mandate by Japan, Australia and New Zealand. The point is drawn that what was essential the moment before was no longer essential the moment after, and yet the principles under the Mandates system corresponded to those under the Trusteeship system. [So far, if I may break the quotation for a moment, the Court was stating the effect and the implications of our argument. The Court proceeds then to answer that argument as follows:] This argument apparently overlooks one important difference in the structure and working of the two systems and loses its whole point when it is noted that under Article 18 of the Charter of the United Nations, 'Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting', whereas the unanimity rule prevailed in the Council and the Assembly of the League of Nations under the Covenant. Thus legally valid decisions can be taken by the General Assembly of the United Nations and the Trusteeship Council under Chapter XIII of the Charter without the concurrence of the trustee State, and the necessity for invoking the Permanent Court for judicial protection which prevailed under the Mandates system is dispensed with under the Charter." (*I.C.J. Reports 1962*, p. 342.)

We find, then, Mr. President, that the necessity for the particular form of judicial protection which existed under the mandates system, was, in the Court's contemplation, dispensed with under the Charter.

The implications of this reasoning on the part of the Court are twofold.

Firstly, Mr. President, the implication is that, given administrative supervisory machinery which does not carry within itself a prospect of a deadlock, which could stultify itself, there is no necessity for judicial protection. That is obviously the first element in this contemplation.

The second element in it is, obviously, that the supervision by the United Nations General Assembly, as provided for in the Charter, was, in fact, a system of supervision carrying within itself no possibility of such deadlock or breakdown.

These two elements are, therefore, inherent in the Court's reasoning, and it follows, Mr. President, as a further factor which is inherent in that reasoning, that if there was a contemplation in April 1946 that mandates not converted into trusteeship would come under the system of administrative supervision provided for in the Charter of the United Nations, the particular need which existed in the mandates system for judicial protection would fall away. There would therefore, in the Court's own contemplation, no longer be any need for such a system—the necessity, as it appeared in the time of the League, would in the Court's *own* contemplation, be dispensed with under those circumstances.

But, Mr. President, one finds on reading the Judgment of the Court as a whole, that this concept of the necessity for—of essentiality of—judicial protection did, in the Court's view, play a part in maintaining judicial protection after the dissolution of the League. And the question then arises, how can that be fitted into the reasoning of the Court to which I have just referred? I submit that the answer is a perfectly plain one. The answer is that the Court *did* contemplate that there would be no

transfer of supervisory powers to the United Nations—that there would be no substitution of supervisory institutions—and that, for that very reason, there would be no administrative supervision in respect of mandates. And it was in that circumstance, then, that the Court saw a continuing necessity for essentiality of—judicial protection. That was the only form of protection that could remain, because the other form, which had obtained in the time of the League, was, as was indicated in the Court's own contemplation, one which would not obtain if there were administrative supervision under the Charter. The necessity would, then, still arise from the fact of failure of administrative supervision, but the failure would not consist in a prospective deadlock in administrative machinery. It would consist in the fact that the only administrative supervision provided for had lapsed completely because of the lapse of the supervisory organs.

This, Mr. President, in our submission, confirms unmistakably that the contemplation of substitution of the United Nations General Assembly, as administrative supervisory organ, would not be consonant with the Court's reasoning in 1962, but directly in conflict with it. We submit that the conclusion is an inescapable one—the necessity for, or the essentiality of, judicial protection, as seen by the Court, could exist only to cope with failure of administrative supervisory machinery. That failure could, in the Court's contemplation, occur only in one of two circumstances—i.e., either because of a prospective deadlock in the machinery, or because of a total failure—a non-existence—of supervisory machinery. There is no alternative—no further alternative—because the Court's own view was that if there is machinery in which there is no prospect of a deadlock, there is no necessity for judicial protection. Therefore, Mr. President, if there had been a contemplation of substitution of the United Nations as supervisory organ, there could have been no prospect of a deadlock, and the only sense in which the Court could, therefore, have contemplated any continued necessity for judicial protection would have been on the basis of complete failure of administrative supervision; in other words, a contemplation that there would be no substitution of supervisory organs.

In sum, Mr. President, I may, therefore, state the effect of our review of the 1962 Judgment and opinions as follows:

The Court, and the Members of the Court, were faced with various difficulties raised in argument—difficulties militating against a finding that judicial protection had survived the dissolution of the League. In answering the argument raising those difficulties, and in holding that judicial protection did survive, the Court employed reasoning which was, in its effect, dead against any contemplation that administrative supervision survived, or that provision had been made for a substitution of supervisory organs in that regard.

We noted on Friday, Mr. President, that there were similar features also in the separate opinions of Judges Jessup and Sir Louis Mbanefo. We, also, noted, Mr. President, the incongruity which would arise from the conclusion of the Court, as distinct from reasoning, if, on the one hand, it were to be found as the Court found at the time, that there was to be continued judicial protection exercised by a static group of States, namely those which had been Members of the League at the time of its dissolution, and if, on the other hand, the Court were now to find, as the Applicants contend, that the other form of supervision, namely admin-

istrative supervision, was to be exercised by the United Nations as an organization, despite the fact that the Court indicated that the two concepts—administrative supervision and judicial protection—were intended to reinforce each other.

Apart from the five judges who participated in the judgment of the Court and the separate opinions of Judges Jessup and Sir Louis Mbanefo, making a total of seven out of the eight judges who constituted the majority on the findings on the preliminary objections—there was the opinion of Judge Bustamante, the eighth member of the majority on that occasion, and, as I pointed out before, he specifically found that there was no succession of supervisory powers from the League to the United Nations Organization. I pointed out that three of the seven judges who gave minority opinions, came to the specific conclusion that there was no such succession in regard to administrative supervision—no substitution of a supervisory organ—and those three judges were the honourable President, Sir Gerald Fitzmaurice, and the honourable Judge van Wyk. The other four members of the Court who gave opinions in the minority did not find it necessary to express any views on this aspect of the matter.

That was the analysis which we gave of the situation as it appears from the 1962 Judgment and opinions—the analysis which we gave on the pleadings, and we submit that, after this oral argument, the analysis stands in every respect.

I now proceed, Mr. President, to deal with the 1950 Opinion in so far as it is relevant to the question now under consideration. That Opinion, as we noted before, is direct authority for the contention now advanced by the Applicants, and it, therefore, stands directly in the way of acceptance of our contentions. That is a situation we must face squarely, and we do so, Mr. President, with respect and with submission. The question is, what weight should the Court attach in these present proceedings to the previous Advisory Opinion? We have made reference to the principles applicable in cases where a matter, pronounced upon in an advisory opinion, arises for subsequent adjudication in contentious proceedings, and, as we noted there, although an advisory opinion is to be accorded great weight in such cases, as an expression of the view of an eminent tribunal, its existence does not, as a matter of principle, prevent this Court from coming to a different conclusion, should justice demand it.

Our submission in this particular case, advanced with the greatest respect for the Court and, particularly, for the remaining members of the Court who participated in the 1950 proceedings, is that there *do* exist reasons—*special* reasons—why this Court should depart from the conclusion arrived at in 1950 on this particular aspect of the matter. We gave some of these reasons earlier in our argument when we indicated, Mr. President, the various attitudes which had been taken up by the Applicants in earlier stages of these proceedings, and when we pointed out that the Applicants are, in fact, no longer prepared to defend the reasoning of the Court, as originally interpreted by them. Consequently, we now have this strange position that the Applicants which, firstly, contended in their Memorials that the 1950 Opinion should be automatically followed by the Court in these proceedings, secondly, stated in the Oral Proceedings in 1962, that the Opinion was clear, sound, and meant what it said, and, thirdly, still contend in their Reply, although in conflict with another passage also in the Reply, that the 1950 Opinion is to be regarded as *res judicata*, have now changed their interpretation of the Opinion and,

in addition, now suggest, as if by way of a concession, that the reasoning of the Court, as interpreted by them, was fallacious. Indeed, Mr. President, in these Oral Proceedings also the Applicants still quote quite lavishly from the 1950 Opinion, and request reaffirmation thereof.

This attitude which the Applicants now take up, in asking, in effect, for reaffirmation of the Opinion as regards its conclusion, but in differing from what they themselves describe as important aspects of its reasoning, would, by itself, in our submission, justify a complete re-opening and re-appraisal of the whole matter. But, Mr. President, it does not end there; it goes much further, as can be seen immediately when it is appreciated *why* the Applicants are now forced to depart from the 1950 Opinion in certain respects, and from their earlier interpretations of that Opinion. The reason is *not*, as we shall show, that the reasoning of the Court, if properly interpreted, was wrong in the respects now suggested by the Applicants. On the contrary, we say that if the reasons of the Court given in 1950 are given their intended weight and effect, they are quite comprehensible and are quite logical as far as they go—and as far as the material on which they rested, enabled them to go at the time. In truth, the Applicants' dilemma on this issue arises, Mr. President, because initially they interpreted the Opinion wrongly. They interpreted the Opinion in a manner which attributed to the judges a line of reasoning which was clearly illogical and untenable, and which could not have been intended by the judges in the sense contended for by them. And the reason why the Applicants were compelled to attribute an illogical and untenable line of reasoning to the Court, was because they *would* not, and *could* not concede that the Court came to its conclusion on the basis of a finding of fact, the finding of fact being that of a general implied agreement in 1945-1946 to transfer the League's supervisory functions, in respect of mandates, to the United Nations. The reason why the Applicants could not concede that *this* was indeed the basis upon which the Court's Opinion rested is evident and very significant, because a finding of fact by a court must necessarily be based on the evidence which is before that court. A court is not presumed to know all the facts as it is presumed to know the law, and, therefore, if there is not presented to a court *all* the facts which may have a bearing on a particular question, the court decides or makes a factual finding, on limited facts. If the same matter subsequently comes before the court in circumstances where there is no *res judicata*, and the court is presented with more extensive evidence which illustrates other aspects of the facts, and demonstrates that the conclusion which the court had come to on the previous occasion cannot stand, the court, in effect, makes a new determination on a new problem. It does not come to a conclusion that it erred on the previous occasion. It comes to a conclusion on the facts which are now presented to it, such conclusion is different from that to which it came on the more limited facts presented to it on the previous occasion. This is a situation which very frequently arises in the practice of courts when the same issue of fact may arise between different parties in subsequent proceedings where there is no question of *res judicata*. In such cases the court may, on a proper review of the full facts, come to the conclusion that the previous finding cannot stand—not because the court erred on the facts as previously presented to it, but because new facts show up the situation in an entirely different light, which the court takes into account in its finding of fact. The recognition of that principle, Mr. President, is inherent

in all provisions which exist in municipal legal systems for a re-opening of proceedings, e.g., where a court, either in a criminal or a civil case, may already have made a determination of fact, or convicted a person of having committed a certain crime, or, found that A is liable to B in the sum of £10,000 damages, or whatever the case might be. There are, of course, rules which circumscribe and restrict the opportunities of litigants to continue endlessly to re-open proceedings before the same court, but, in a fit case, where the rules and circumstances permit, the very same court is very often called upon to deal with the question whether new evidence could place a new perspective on a matter on which the court has already pronounced judgment and whether the matter ought, therefore, to be re-opened for that purpose.

The technical rules which apply in municipal systems, do not apply in this particular instance, where the Court has given an Advisory Opinion and where, subsequently, the matter arises again in the course of contentious proceedings. The true analogy with municipal systems would rather be the case where the same question of fact has arisen in subsequent proceedings between different parties, so that there is no operation of any consideration of *res judicata*. That would be the proper analogy, but I refer to those examples which *can* occur in municipal systems, and which *do* very regularly occur, which recognize the fact that when a court has made a finding of fact on evidence presented to it in a particular case, then such finding is one which could, quite competently and properly, be disturbed or over-ruled by the same court in later proceedings when the full facts are presented to it.

This situation, Mr. President, the Applicants could not admit. They could not admit that the Opinion of the Court in 1950 really rested on a finding of fact, and, therefore, in order to minimize the significance of the new facts, as the Applicants call them, they were constrained to interpret the 1950 Opinion as if it were based on considerations purely of law. In order to do this they were compelled to attribute to the Court, reasoning which was so patently untenable that they were themselves eventually forced in these proceedings to dissociate themselves from it. They were forced, Mr. President, to dissociate themselves from those earlier interpretations which they gave to the Opinion, firstly, by judgments and opinions which have been given by this Court and its members since the commencement of these proceedings; and they were also forced to do it, Mr. President—and I do not say it in any immodest way—by the demonstration in our pleadings of the untenability of certain views which they had taken and which they ascribed to the Court, or which they described as being the basis underlying the reasoning of the Court.

Mr. President, I shall later refer in more detail to some of these aspects, but at this stage I am concerned only to emphasize that it appears to be common cause between the Parties that the 1950 Opinion is not correct as it stands. That seems to be common cause. The Applicants contend that the reasoning of the Court was faulty in material respects, but that the conclusion was nevertheless correct. The Respondent, on the other hand, does not attribute to the Court any lack of logic, but it merely says that there was a lack of correct information, for which lack the Court was, of course, not responsible—and that, for that reason, the Court came to a conclusion on the facts which, on fuller consideration of the facts bearing on the issue, can no longer stand.

It will be apparent, therefore, Mr. President, that the dispute between

the Parties regarding the 1950 Opinion falls basically under two headings. The first one is, what is the correct interpretation of the reasoning of the Court? And the second is, to what extent is such reasoning vitiated either by the defects in logic attributed to the Court by the Applicants, or by the lack of presentation of relevant facts which is reverted to by the Respondent? We will consider these questions in turn.

I deal, first, with the question of the correct interpretation of the reasoning of the Court. Mr. President, we have been through this before, and I do not, therefore, intend to deal with every inch of the way again. I would like to concentrate on some of the salient features. We give a review in the Counter-Memorial, **II**, at pages 141-146, of what we conceive to be the correct interpretation of the 1950 Opinion, and we can very briefly summarize it. Firstly, the Court's reasoning commences at page 136 by recognizing "... the fact that the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were neither expressly transferred to the United Nations nor expressly assumed by that Organization". In other words, the Court gives recognition to the fact that there was no express arrangement bringing about such a transfer or such a substitution of supervisory organs. But then follow, in the Court's words, and I quote, "[n]evertheless, ... seem to be decisive reasons" for coming to the conclusion that there was such an arrangement.

Now, Mr. President, this introduction to the Court's discussion of the subject—the emphasis on the lack of an express transfer—and an express assumption of supervisory functions—together with the indication that that lack was not decisive in itself—immediately suggest that the subsequent reasoning would rest on tacit intent, on the tacit transfer, or tacit assumption of supervisory functions. That is the natural and prima facie indication given by this introductory portion of the reasoning itself. And indeed, Mr. President, when one proceeds to analyse the reasoning itself, one finds that that is exactly what that reasoning does indicate, that is, that it does rest on concepts of tacit intent—a tacit transfer of functions, or a tacit assumption thereof by a substituted supervisory organ.

The four "decisive reasons", as the Court called them, then follow. We group them for convenience under four headings; they could be called either "four reasons" or, perhaps more fittingly, "four groups of reasons". The first one comes under what the Court later refers to as "general considerations". They read as follows, Mr. President:

> "The obligation incumbent upon a Mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this System they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision." (*I.C.J. Reports 1950*, p. 136.)

May I interrupt here for a moment. I emphasize that this supervision —this obligation to submit reports—was regarded as important in the sense that it assisted in the "effective performance of the sacred trust of civilization": that it was considered by the authors of the Covenant that effective performance required that the administration should be subject to international supervision. It was, therefore, required for a particular purpose, viz., for effective performance. Then the passage proceeds:

> "The authors of the Charter had in mind the same necessity when they organized an international Trusteeship System. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System." *(Ibid.)*

There was "necessity", if I may break again, Mr. President, to bring about effective performance of the sacred trust.

The passage continues—

> "It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations had another international organ performing similar, though not identical, supervisory functions."

Mr. President, immediately after stating these general considerations, the Court proceeded to say that they were "confirmed" by certain other factors—"confirmed" was the Court's own word. I shall deal later with those other factors. For the moment I merely want to point out that the word "confirmed" clearly cannot be read as signifying that the general considerations were considered to be conclusive by themselves, because, Mr. President, if those general considerations were by themselves considered to be conclusive by the Court as to why there was to be supervision over mandates by the United Nations Organization, then, indeed, Mr. President, the only description of such reasoning of the Court, one could give, would be that of judicial legislation. But, in fact, it would be quite unfair to attribute any intent of that kind to the Court, or any description of that kind to its reasoning. It is perfectly clear that the Court intended nothing of that kind. I am merely pointing out, for the moment, that the Court could never have intended to convey that it was brought to its conclusion by these considerations. If that had been the intention, Mr. President, then these considerations would have had to be interpreted as meaning, in effect, that because international supervision is desirable, the Court holds, therefore, that it must exist; and that because the United Nations has an organ performing supervisory functions under a trusteeship system which are similar to, though not identical with, the supervision previously exercised by the League organs in respect of mandates, the Court, therefore, now holds that the mandatory, which was previously obliged to submit to League supervision, must now be obliged to submit in respect of its mandate to the supervision of the United Nations organ. One cannot, in my submission, Mr. President, attribute such views to the Court.

To put it in another way: if this were the correct construction of the 1950 Opinion, the Court would have held that, after the dissolution of the League, supervisory functions passed to the United Nations without any fresh consent on the Respondent's part, because those general considerations do not in any way, either expressly or implicitly, refer to any concept of fresh consent on the Respondent's part. And it seems evident, Mr. President—the Applicants themselves admit it now, at the stage to which we have now come in these proceedings—that it would clearly be untenable to suggest that that conclusion could be reached independently of fresh consent on the Respondent's part. The Applicants themselves admit that, even though it is only for the limited purpose of saying that a substitution of supervisory organ, and an obligation of international accountability with the United Nations as supervisory authority, could only have been brought about on the basis of fresh con-

sent on the Respondent's part. And we cannot, with respect, attribute to the Court any contemplation to the contrary in 1950. The more reasonable construction of the Opinion, in our submission, is, therefore, that which we have always given to it. It is a construction that the various reasons given by the Court, or the various groups of reasons given by it, are interrelated; that these general considerations were merely the introductory portion of the Court's reasoning which constituted background circumstances against which certain acts were, in the Court's view, to be appraised; and that the Court then proceeded from the general considerations to appraise those particular acts. Read in this light the general considerations were, in our submission, not intended to intimate anything more than that the importance of supervision by some international organization, particularly as regards effective operation of the system, was a factor which might have been expected to exert an influence on the minds of the States concerned with the foundation of the United Nations and with the liquidation of the League, particularly since there was a new organization in existence which performed supervisory functions. In other words, Mr. President, these factors were relied upon as indicating a general likelihood or a general probability, that the States concerned would have been inclined to agree to a substitution of the United Nations for the League as the supervisory organ. But the general considerations, in our submission, did no more. That is, in the context—in the circumstances—the only reasonable construction, in our submission, that can be given to those general considerations.

They were, therefore, features tending to support an inference of tacit agreement relating to the transfer of supervisory functions to the United Nations, or the substitution of supervisory organs, whichever way one prefers to put it.

That, then, brings one to the second stage in the Court's reasoning which, the Court said, "confirmed" the general considerations. That stage in the reasoning referred to Article 80, paragraph 1, of the Charter, and it said that the general considerations were confirmed by the clause "as interpreted above"—I wish to emphasize the words "as interpreted above". Those words relate back to an earlier passage in the Opinion, Mr. President, at pages 133-134 of the *I.C.J. Reports*, and that passage reads as follows:

> "It is true that this provision [in other words, Article 80, paragraph 1] only says that nothing in Chapter XII shall be construed to alter the rights of States or peoples or the terms of existing international instruments. But—as far as mandated territories are concerned, to which paragraph 2 of this article refers—this provision presupposes that the rights of States and peoples shall not lapse automatically on the dissolution of the League of Nations."

The important word here, Mr. President, is "presupposes". The Court in this earlier passage at pages 133-134, therefore, drew a distinction between what the article says—the article only says that nothing in the chapter shall be construed to bring about certain alterations—and what was "presupposed". And the term presupposition and the whole concept which it denotes therefore relates, in our submission, to the underlying contemplation or a tacit intent on the part of the parties who agreed to Article 80, paragraph 1, of the Charter.

That is further confirmed by the next sentence in this earlier passage (p. 134), which reads as follows:

> "It obviously was the intention to safeguard the rights of States and peoples under all circumstances and in all respects, until each territory should be placed under the Trusteeship System."

Here the important word is the "intention"—again an intention not related to what the article says, but to what was quite obviously regarded by the Court as being a tacit, underlying intent.

And, Mr. President, if we then proceed to the later passage, which refers back to this earlier one—that is at pages 136-137—we find that the Court continues along the same line of reasoning that—

> "The purpose must have been to provide a real protection for those rights; but no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ."

Here the important word which I want to stress is the "purpose".

We, therefore, have, when we take these passages together—a presupposition, an obvious intent and a purpose—none of which relates to what the article says, but all of which relate to what, in the opinion of the Court, must have been in the minds of the persons who agreed to that article. In other words, Mr. President, the Court, by the use of these expressions, clearly indicated that it was reasoning towards the finding of a tacit intent on the part of the interested parties, the interested parties in that instance being the authors of the Charter.

This analysis is further confirmed by the element of effective safeguarding to which the Court referred, because the element of effective safeguarding would be a factor of probability on this same line of reasoning—a factor which would strengthen the probability that the parties concerned would have had this intention—this tacit intent—which is ascribed to them by a process of implication by the Court.

It is submitted, Mr. President, that this construction of the Court's reference to Article 80, paragraph 1, is the only reasonable one. Even then one may, with respect, raise questions as to the factual weight which the Court assigned to what it regarded as a presupposition underlying the Article—that is another matter, and that is a matter of fact to be weighed in the light of all relevant facts which may have a bearing upon the question. But, Mr. President, one would certainly not ascribe to the Court, as a matter of law, the illogical construction of the Article itself which the Applicants in the earlier stages of this case attributed to the Court, and of which the following is a typical example—we get it from the Preliminary Objections proceedings, where the Applicants stated as follows:

> "As I have pointed out, the Court, in its Opinion, has three times prior to this point cited Article 80, paragraph 1, as having been designed to conserve all rights of peoples of Mandated territories to international supervision and judicial protection." (**VII**, p. 321.)

Mr. President, I read, just before the adjournment, a contention advanced by the Applicants in the 1962 Oral Proceedings, at page 321 (**VII**), in which they assigned to the Court the view that Article 80, paragraph 1, had been designed "to conserve all rights of peoples of mandated territories to international supervision and judicial protection". Our

submission is that, if the Court held this, the Court must clearly have been wrong, as the Applicants themselves now concede, amongst others in a passage of the verbatim record at pages 225-226, *supra*.

We quoted that passage, Mr. President, from the Applicants' argument, on 31 March 1965 (p. 302, *supra*) but, unfortunately, in that verbatim record the quotation was not put in quotation marks and to clear up any misunderstanding, it might be as well to repeat that that passage was something said by the Applicants' Agent and not by us. And it read as follows:

> "It may be repeated, Mr. President, with respect, that the Applicants do not contend that any positive legal consequences was brought about by Article 80, paragraph 1. The language of the Court just quoted from the 1950 Opinion might, with respect, imply a different view." (P. 226, *supra*.)

In our submission, for the reasons we have already given, no interpretation as contended for by the Applicants was, in fact, given by the Court to Article 80. The Court relied only on what it considered to be tacit, underlying presuppositions, or intentions, on the part of the parties who agreed to that article.

Then we come, Mr. President, to the third stage in the Court's reasoning in 1950—the third of the decisive reasons, or groups of reasons, on which the Court relied. That we find at page 137 and it concerned the last League Assembly resolution regarding mandates. The Court found that in this resolution the Assembly "gave expression to a corresponding view", that is, a view corresponding with that held by the authors of the Charter in agreeing on Article 80, paragraph 1. So where the Court was, in the discussion of Article 80, paragraph 1, dealing with a question of a tacit, underlying intent on the part of the authors of the Charter, the Court is here speaking of a "corresponding view" on the part of the Members of the League at its last assembly.

The Court then set out the contents of the third and the fourth paragraphs of the League resolution and it concluded, at page 137, that:

> "This resolution presupposes that the supervisory functions exercised by the League would be taken over by the United Nations." (*I.C.J. Reports 1950*, p. 137.)

Mr. President, again the word "presupposes" appears. This is, therefore, very clearly a reference not to what was said in the resolution—not an interpretation of the resolution itself—but to a tacit intent which the Court found to be underlying that resolution. That is made clear not only by the use of the word "presupposes" but also by the fact that the resolution itself, in the very clear wording which it uses, nowhere makes any mention at all of any transfer, or taking over, of supervisory functions, as the Court was fully aware in 1950.

This then, Mr. President—this third stage in the reasoning—concluded the Court's reasoning in so far as it sought to build a bridge, as I might call it, between the League of Nations as an organization and the United Nations as an organization.

The fourth and final stage in the reasoning was concerned only with the matter of internal arrangement within the United Nations itself. That stage of the reasoning was to the effect that the General Assembly of the United Nations was rendered competent by Article 10 of the Charter to exercise such supervision and to receive and examine reports for that

purpose. It seems evident, Mr. President, that that was concerned merely with the determination within the United Nations of an organ which would be competent to undertake this supervision. Of course, this would have no relevance to the enquiry unless there was an obligation to submit to United Nations' supervision. That is indeed made clear, Mr. President, by the very function of Article 10 itself in the whole structure of the Charter, and by the wording of Article 10. The function of Article 10, where it occurs, is very clearly to indicate the functions of the Assembly as distinct from other organs of the United Nations. The wording of the Article is to this effect:

> "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, . . ."

I end the quote there—that is as far as it is relevant.

In other words, a matter must first be within the scope of the Charter, or it must relate to the powers and functions of an organ provided for in the Charter, before it becomes a function of the General Assembly to discuss it and to make recommendations in regard thereto under Article 10.

That prior question—whether it was a matter brought within the functions or the powers of the United Nations the Court evidently sought to answer with its reasoning over the first three stages, which I have dealt with.

The Court also, in the discussion of this aspect of its reasoning, made a statement to which I referred at an earlier stage of my argument, and that is the statement that:

> "This competence was in fact exercised by the General Assembly in resolution 141 (II) of 1 November 1947, and in resolution 227 (III) of 26 November 1948, confirmed by resolution 337 (IV) of 6 December 1949."

I pointed out, Mr. President, that the Court at the beginning of its reasoning on this part of the case, at page 136, indicated that the functions of the League, with regard to mandated territories, were not "expressly assumed" by the United Nations Organization.

In other words, this finding here, at page 137, could not have involved a contemplation that there was an express assumption of functions of supervision by the United Nations by means of these resolutions. Quite clearly, regard being had to their content, with which I dealt before, that could not have been a contemplation on the part of the Court.

The Court's only contemplation could have been that, having regard to the circumstances, the resolutions, in their context, were to be interpreted as tacitly manifesting an intent to have and to exercise United Nations supervision in respect of mandates.

I have indicated before, Mr. President, that on a full review, as I have now given, of the relevant circumstances surrounding these resolutions —the attitudes of the States as manifested at the time of these resolutions in the Trusteeship Council itself, and so forth—all the factors with which I dealt in this full review indicate very clearly, in our submission, that that inference cannot stand. As I also indicated, respectfully, this is one of the instances in which the further facts now placed before the Court, and which were not before the Court in 1950, are of major assistance and bring about a change in the conclusion to be arrived at.

So, Mr. President, to summarize: On the question of the proper interpretation of the Court's reasoning in 1950, we submit that the Court was arguing from what it considered to be probabilities inherent in objective features referred to by it in the first stage of its reasoning, i.e., the general considerations relating to the probable intent on the part of the authors of the Charter and the Members of the League at the time of its dissolution.

The Court proceeded, Mr. President, from these general considerations —these general indications of probability—to Article 80, paragraph 1, which it regarded as bearing upon a probable, underlying intent on the part of the Members of the United Nations.

It argued further, in the third stage of its reasoning, that there existed a corresponding, underlying intent on the part of the Members of the League of Nations, at the time of its dissolution.

From all these factors together, the Court drew an inference of a general tacit agreement on the part of the authors of the Charter, and on the part of the remaining Members of the League, to the effect that mandatories would be obliged, pending trusteeship or other agreements, to submit to United Nations supervision under the mandates. That we submit to be the only reasonable and proper construction which can be placed on this reasoning of the Court.

What other possibilities are there, Mr. President? The Applicants have suggested some and we submit that none of them can stand. We have really dealt with them all but I can just, by summarizing and putting them in their proper perspective, briefly say what they were.

Firstly, in their Observations and Oral Proceedings on the Preliminary Objections the Applicants contended that the 1950 Opinion was based on the application of some principle of succession whereby the functions of the League and the rights of its Members passed to the United Nations and its Members, without any fresh consent on the part of the Respondent in the period of transition, 1945-1946. We dealt with this in our argument contained in the verbatim record at pages 290-295, *supra*. The Applicants, Mr. President, at that stage, that is in the Observations and the Oral Proceedings on the Preliminary Objections, particularly the Oral Proceedings, denied that the Court's reasoning was based on any agreement. They, in fact, said this:

> "... none of the decisive reasons underlying the Opinion of 1950 rests on a premise of 'tacit consent', whether on the part of the Respondent, the League of Nations, or the United Nations". (**VII**, p. 299.)

The Applicants now contend that consent on Respondent's part, although only to a substitution of supervisory organs, is an essential element in their case, and thus they suggest that the Court, on their former interpretation of the Court's Opinion, must have been wrong in this respect. But, in truth, Mr. President, it is so clear that Respondent's consent to any substitution of supervisory organs would have been required, that it is quite unreasonable to suppose that the Court would have adopted a line of reasoning not based on such consent, and we, therefore, find that the Applicants themselves have also now adapted their argument in regard to interpretation of the Court's Opinion of 1950 so as to bring that interpretation into closer correspondence with their own submission. They now attribute to the Court also a contemplation

in 1950 that the element of consent, on Respondent's part, which the Applicants now find necessary, was indeed a necessary element. That we find in the verbatim record at pages 314 to 318, *supra*.

Secondly, Mr. President, the Applicants, as I pointed out in the Oral Proceedings on the Preliminary Objections, contended that substantial weight was given by the Court to Article 80, paragraph 1, of the Charter, as preserving rights under the Mandate. And as we have noted, Applicants still impute this line of reasoning to the Court although they are now more tentative about it, but the Applicants themselves suggest that it is not correct and they dissociate themselves from it.

The net result, Mr. President, of all this, is that it now appears to be common cause that the Court based its finding, at least in an essential part of its reasoning, on consent on Respondent's part in the years 1945 and 1946—consent, that is, to a transfer of supervisory powers or a substitution of supervisory organs. That now seems to be common cause, and I again emphasize, that that finding is a finding of fact on which this Court might well now, on the strength of a fuller presentation of evidence, come to a different conclusion.

That brings us, Mr. President, to the so-called new facts. I do not want to deal with them at any length, I only wish to emphasize their significance.

We referred in our pleadings, commencing with the Preliminary Objections, to three sets of facts, which were not before the Court in 1950 and which bear materially on this question of consent in the years 1945 to 1946. In their chronological sequence the three were the following: The first one concerned the proposals regarding a temporary Trusteeship Committee in the deliberations of the Preparatory Commission and its Sub-Committees, which temporary Trusteeship Committee was—

> ". . . to advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the mandates system". (**II**, p. 40.)

It will be recalled, Mr. President, that these proposals lapsed upon the rejection of the suggestion of a temporary trusteeship committee, without any other provision having been made regarding a possible transfer to, or assumption by, the United Nations of any functions under the mandates system. This, Mr. President, makes it quite clear, in our submission, that there was, on the part of the United Nations, a deliberate refrainment from dealing with the question of mandates, and from providing for any machinery for, or, anything bearing upon, a transfer of functions outside of trusteeship.

In combination with the other relevant factors in the situation, Mr. President, this brings an element of certainty which was not there before—an element of certainty which is dead against the presupposition of tacit intent ascribed by the Court in 1950 to the authors of the Charter. With knowledge of the fact that there was this proposal for an express provision, which proposal was then not accepted, and deliberately not accepted, Mr. President, it then becomes clear that there was no longer any scope for a finding of the tacit intent to the same effect as that found by the Court in 1950.

The next fact, Mr. President, concerns the original Chinese proposal at the last session of the League Assembly. This again refutes, in our

submission, any suggestion of implied consent on the part of the Members of the League present at that final session. In our Counter-Memorial, **II,** at page 146, in a footnote, we set out for purposes of comparison the wording of the Court's finding in regard to the presupposition which the Court said underlay the 1946 resolution of the League Assembly, and the wording of the relevant portion of the Chinese draft proposal. The first one, Mr. President, namely the presupposition ascribed by the Court to the final Assembly of the League, read as follows—"... the supervisory functions exercised by the League would be taken over by the United Nations". The wording of the Chinese draft proposal in this respect considered that "the League's functions of supervising mandated territories should be transferred to the United Nations". (Counter-Memorial, **II,** p. 146, footnote 6.)

In other words, Mr. President, the first Chinese proposal was designed to effect by express resolution what the Court found was, as a matter of tacit intent, underlying the actual resolution eventually passed. But as soon as one knows the facts, namely that that Chinese original proposal could not be accepted, that it had to be dropped and that it had to be superseded by a new proposal because of opposition to this very element in it, as soon as that fact is known then surely there is no longer any scope for the Court's finding of a tacit intent, or an implied consent, on that very point, on the part of the Members of the League.

Finally, Mr. President, the third element on which we rely is the attitude adopted by States, Members of the United Nations, in the crucial years 1946 to 1949, on the question whether there was any duty outside of trusteeship to submit to United Nations supervision. Mr. President, those years followed immediately upon the years of transition, 1945 to 1946, in which it is said that this tacit agreement was entered into. If it was, in fact, a tacit agreement which was so clear—that it did not have to be reduced to writing, that everybody was perfectly agreed upon it and that they knew that to be so—one would have expected that in the debates and the issues which arose in the next few years in the United Nations at least one State would have said: "but surely there was this general understanding at the time of the formation of the United Nations and at the time of the dissolution of the League." Not a single State of all those which took part in the debates, however, ever alleged anything to that effect. On the contrary, there was a substantial number which identified themselves precisely with the Respondent's contention in that regard.

That again is a factor which was not before the Court in 1950 and which, in our submission, affords very cogent and conclusive proof, in conjunction with the other two factors, on this issue of tacit agreement in 1945 and 1946.

The questions which fall to be considered in regard to these new facts, Mr. President—questions which I have dealt from our side, are, firstly, to what extent and in what sense they are new, and secondly, to what extent they are material. We have, from our side, consistently and repeatedly stated our attitude, and I need not repeat it. I have just stated it again as far as the materiality—the important significance—of these facts is concerned. But it remains, Mr. President, to consider what the present attitude of the Applicants is in this regard.

Our contentions in regard to both these aspects—both in regard to the newness and in regard to the materiality of the facts—were disputed by

the Applicants in the previous stages of these proceedings, particularly in the Preliminary Objections proceedings. In their Observations the Applicants stated the following:

> "Respondent's contention [that is, the new facts contention] is advanced with little grace or merit.
>
> First, not one of the so-called 'new facts' has come into existence since 1950. Respondent had full opportunity to develop at length each and every one of them during the Advisory proceedings." (I, p. 430.)

Mr. President, we have, of course, never contended to the contrary. That was not the sense in which we ever said that the facts were new. We merely said they were new in the sense that they were, in fact, not presented to the Court in 1950. The quotation from the Applicants' statement in the Observations continues as follows:

> "Second, not one of the so-called 'crucial new facts' is in reality either new or crucial. Each one of them was before the Court in 1950, and, obviously, was not deemed crucial." *(Ibid.)*

That was their contention, Mr. President, in 1962.

Also, in the Oral Proceedings, on these Preliminary Objections, the materiality of the new facts was disputed by the Applicants, but their contention in that regard was based on the construction of the reasoning of the Court in 1950, the implications of which I have pointed out to the Court before. Their argument at page 299 of the 1962 Oral Proceedings read as follows:

> "In the case of each 'new fact', the alleged element of 'crucial importance' assigned is that of so-called 'tacit agreement' or 'consent' as it is alternatively called."(**VII**, p. 299.)

Inasmuch as the Applicants' attitude then was, as I have pointed out, that none of the decisive reasons underlying the 1950 Opinion rested on a premise of tacit consent, the Applicants, therefore, contended as follows:

> "Respondent does not interpret the 'new facts' in a manner consistent with the true significance of the Court's reasoning, or 'general considerations'. The Respondent, on the contrary, interprets, or rather misinterprets, the Court's reasoning so as to give a false significance to the 'new facts'." (**VII**, p. 300.)

That was the attitude adopted in 1962, Mr. President.

In the Reply, the Applicants still did not concede either the essentiality of the agreement in 1945 to 1946 as an element in their case, or the correctness of Respondent's interpretation of the 1950 Opinion as being in an essential respect based on consent. Thus they still said at page 552 of the Reply (**IV**):

> "All such assertedly 'new facts' were placed before the Court in the *Preliminary Objections* and in Respondent's Oral Arguments thereon. The Court nonetheless reaffirmed its *Advisory Opinion* and, in the words of the Court:
>
> 'All important facts were stated or referred to in the proceedings before the Court in 1950.'
>
> Accordingly, no purpose would be served by showing, as Applicants submit, that Respondent's reiteration of the alleged 'new facts' add nothing 'new'." (**IV**, p. 552.)

Mr. President, in regard to this passage, we might pass the following comment: Firstly, the remark of the Court in 1962, that all important facts were stated or referred to in the proceedings before the Court in 1950, as I have indicated, related to the compromissory clause issue and not to the issue regarding Article 6. It is not necessary to refer to that any further. Secondly, the judgment, therefore, does not assist the Applicants in showing that the new facts regarding transfer of functions under Article 6 were, indeed, known to the Court in 1950. Thirdly, Mr. President, no argument has been presented to the Court, by my learned friends, in these present Oral Proceedings, towards showing that the facts were not new, in the sense that they were, in fact, before the Court in 1950. We have heard no argument to that effect.

From our point of view, it would be time-consuming to run through all the records so as to establish the negative averment that the facts were not before the Court. We say, of course, they were not. We have been through the records and we are satisfied that they were not before the Court, but we invite the Applicants, Mr. President, in the circumstances, to demonstrate (if they abide by their assertions in the Reply) which passages in the documentation of the 1950 proceedings indicate that there was any discussion of, or a reference to, any of these new facts. We know that they tried to do that in the Oral Proceedings of 1962, but we also know that the effort failed entirely.

In the absence of such a demonstration by the Applicants, Mr. President, we shall assume that the Applicants have now abandoned also this part of their argument, as would, indeed, seem to appear from the lack of reference thereto in their oral statement, and we shall assume that the Applicants now accept that the new facts are, in fact, new, in the sense in which we submit that they are new.

That brings us, Mr. President, to the argument now advanced by the Applicants in the Oral Proceedings regarding the significance of the new facts. They are in a difficult position since they now concede that some form of consent in 1945 to 1946 is necessary to their case, and they now interpret the 1950 Opinion accordingly, namely that that element of new consent in 1945 to 1946 is necessary. Consequently, they cannot now deny the relevance of the new facts, on the basis that the facts relate only to tacit consent, as they did before. They said earlier that these facts relate only to a question of tacit consent, and tacit consent played no part in the Court's reasoning in 1950. They can no longer say that.

Indeed, Mr. President, they themselves now rely on facts derived from the record from this period in an attempt to establish that consent, and, therefore, I cannot see how they can possibly any longer deny the relevance and indeed the significance of these new facts, derived from the very same record—from the very same period—as bearing on the question of such tacit consent, or tacit intent.

In their attempts in the Preliminary Objections proceedings to show that the Court in 1950 was, in fact, aware of these facts, the Applicants came off second best.

Applicants are also faced with this position that some of the honourable Members of this Court, in their opinions on the Preliminary Objections, indeed placed very heavy reliance on some of these new facts. We referred to that in the Counter-Memorial, **II**, at page 155, and I need not elaborate on that at this stage.

Consequently, Mr. President, the Applicants were now forced, for the

first time, to consider these new facts on their merits—for the first time in these Oral Proceedings, they were forced to consider them as factors bearing on the intent of the Parties. How did they set about it?

To summarize, Mr. President: Firstly, as regards the facts showing deliberate abstention from express provision regarding a transfer of supervisory functions to the United Nations, the Applicants' attitude is a completely illogical and an untenable one. We pointed out before that they admit that there was a deliberate abstention, both on the part of the United Nations and on the part of the Members of the League at its final session, to make a specific provision in that regard. But, Mr. President, they take up the attitude that this deliberate abstention related only to an express agreement and not to a tacit or implied agreement—that the deliberate abstention related only to the form of the agreement, and not to the existence or the content of the agreement. I have dealt with the illogicality of that attitude before and I need not repeat my submissions.

Secondly, Mr. President, as regards the attitudes of States, they attempt to refute our demonstration that there was a general acceptance that supervision had not passed to the United Nations. They attempt to demonstrate that by showing a contemplation on the part of certain States that the Mandate was in existence. That is the way in which they try to meet our case in that regard—by arguing an entirely different question, as we have shown.

My learned friend, Mr. Moore, attempted positively to demonstrate the contrary to what we are contending for. He attempted to demonstrate a general contemplation that supervisory power was vested in the United Nations—a general contemplation on the part of the States concerned—and that attempt, Mr. President, as the Court would know, has met with singular lack of success. I need not repeat our submissions and the conclusions at which we arrived after a full review of all the relevant facts in that regard.

In the result, Mr. President, the significance of these new facts has not been affected by any of these various attempts made by the Applicants to minimize their significance.

In conclusion, Mr. President, I may submit, just by way of summary, the following factors as to our contention in regard to the approach to the 1950 Opinion.

In our submission, it becomes perfectly clear, with respect, that this is indeed a case where the Court will feel itself constrained to re-open the consideration of the whole matter, and to consider it afresh on its merits.

The reasons for our submission are briefly the following: Firstly, on the interpretation given to the 1950 Opinion by both Parties, as at the present stage, the reasoning of the Court rested on some basis of consent in 1945 to 1946. Secondly, all facts relating to consent are, therefore, relevant, and some crucial facts were not before the Court in 1950. That also now appears to be common cause. Thirdly, on the Applicants' construction of the 1950 Opinion, the Court's reasoning regarding Article 80, paragraph 1, was at fault. On *their* construction, the Court's reliance on this Article was one of the main bases of the Court's reasoning —at least this was the construction the Applicants gave in 1962. They did not advert to this point in the present Oral Proceedings, namely as to the importance of the reliance placed by the Court on Article 80, paragraph 1, in 1950. The fourth point, Mr. President, is that the Court's

Opinion in 1950, on this point, was a majority one, and that the minority view was more favourably received by authors and publicists on international law in their subsequent comment on the judgment and opinions. We deal with the review of the relevant publications in the Counter-Memorial, **II**, at pages 148-151, where we point out also that some of these authors appear to have had access to the additional material, or some of the additional material, which was not before the Court in 1950, and which we have now laid before the Court.

The fifth point is that the whole matter was thrashed out in 1962, and, as we have shown, such indications of opinion as are afforded by the judgment and the opinions, given in 1962, uniformly support the view that the 1950 Opinion was not correct in the respect under consideration.

Sixthly, Mr. President, we say that the very fact that Applicants, which commenced by saying that the 1950 Opinion was "clear, sound and that it means what it says" (**VII**, p. 302), have now changed their interpretation thereof, and in a material respect they suggest that it was incorrect. That fact in itself, Mr. President, indicates, in our submission, the need for a complete reappraisal.

In all these circumstances, we respectfully submit that this Court will not hesitate to re-open fully the question of a transfer of supervisory powers, or a substitution of supervisory organs, and that the Court will, for the reasons which we have given, come to a contrary conclusion to that arrived at in 1950.

Mr. President, in regard to the 1955 and 1956 Opinions, we find that the Applicants, in the verbatim record at page 109, *supra*, refer to these opinions as "confirmatory and interpretive of the 1950 Opinion". I need hardly point out that the word "confirmatory" is wrong. One can see from the requests for the opinions, as they are recorded in the opinions themselves, that the Court was, in both instances, asked for an interpretation only of the 1950 Opinion. The passages in that regard are so clear that they hardly need demonstration. The first one is in the *I.C.J. Reports 1955*, at page 69. We find that the first paragraph of the request for an advisory opinion read as follows:

> "Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950."

The second paragraph proceeded to ask a further question "If this interpretation . . . is not correct".

In the 1956 Advisory Opinion, the record, at page 24, shows that the request read as follows:

> "Is it consistent with the Advisory Opinion of the International Court of Justice of 11 July 1950 for [certain things to take place]."

It is also significant, Mr. President, that Judge Read, one of the judges who gave a minority opinion in 1950 on this question, had no difficulty in both these instances in 1955 and in 1956 about voting with the majority. Sir Arnold McNair was, by then, no longer on the Court. I am quite certain that Judge Read would have been rather surprised to hear a suggestion that he thereby confirmed an opinion which he had, in the respect in question, considered to be wrong at the time it was given, and it would have been more surprising if he had done so, Mr. President, without giving any reasons why he decided to give such confirmation, and no reasons at all for his change of attitude in that regard.

It is perfectly clear, therefore, that these opinions take the matter no further as far as the merits of the conclusion arrived at in 1950 are concerned.

Mr. President, that brings me to the conclusion—of the oral presentation on the question of Article 6—of the continued existence, or the lapse, of supervisory functions, or of an obligation of accountability, as provided for initially in Article 6 of the Mandate.

I need not summarize the respective attitudes of the Parties again—I shall give a summary of all the various alternative contentions at the end of this consideration, after I have dealt also with the next question which concerns the lapse, or otherwise, of the Mandate itself.

Now, Mr. President, before dealing with the merits of that question, I should like to deal with a representation of our attitude in that regard, which has been given to the Court by my learned friends on behalf of the Applicants. My learned friend, Mr. Gross, persisted in indicating to the Court in his oral presentation that the Respondent has now reversed or abandoned arguments advanced in the 1962 proceedings on the Preliminary Objections in this regard.

This, of course, is entirely unsound, Mr. President. It is incorrect. It will be very clear from the written pleadings to date, and from the argument which we advanced in the Oral Proceedings in 1962, which is fully on record, that there has been no change of attitude whatsoever in this regard. The position is simply this, that for purposes of the argument which we presented to the Court at the time on the question of the Preliminary Objections regarding jurisdiction, we made certain assumptions for purposes of that argument, and we have nowhere, Mr. President, altered our attitude as to what was contended for to the Court in that regard.

One of our Preliminary Objections taken in 1962 to the jurisdiction of the Court, the Court will recall, was based on an argument that the Mandate had lapsed "in the sense and to the extent that it is no longer 'a treaty or convention in force' within the meaning of Article 37 of the Statute of the Court". That we find in the Preliminary Objections, page 298 **(I)**.

We indicated, Mr. President, in those Preliminary Objections, that the Court in its 1950 Opinion, in effect, held that "in addition to its operation as a treaty or convention, the institution known as the Mandate for South West Africa acquired an objective or a 'real' existence, as constituting a special status for the Territory, and that in this objective or 'real' aspect the Mandate survived the dissolution of the League". That we find in the Preliminary Objections, at page 299 **(I)**. It was purely a matter of an interpretation which we put on the 1950 Opinion in that regard, and we said that that was what we understood the 1950 Opinion to have held, namely a continuation of the Mandate in the sense of being an institution in that objective or real sense. We proceeded to state, and I quote from the Preliminary Objections at page 299 **(I)**:

> "The correctness or otherwise of this proposition does not require to be reviewed for the purpose of Respondent's Objection to jurisdiction—as will appear from reasons dealt with hereinafter. Irrespective of the question whether the Mandate as an institution survived the League in an objective or 'real' sense and, if so, with what exact content and to what exact extent, Respondent contends that in its aspect of operating as a treaty or convention the Mandate

for South West Africa lapsed upon dissolution of the League, and that for this reason Applicants' claim to jurisdiction must fail."

Our attitude could hardly have been expressed more explicitly. We were not addressing argument to the Court on the question whether that finding of an objective or real existence of the mandate institution was a correct one or not. We were prepared to make assumptions both ways in that regard. Our contention was that in the aspect of being a treaty or convention, the Mandate had lapsed.

We dealt again with this aspect in the Preliminary Objections at page 359 **(I)**, and, further, Mr. President, in the oral argument in the Preliminary Objections proceedings, the attitude we took up in that regard was very clearly stated in several instances. Right at the outset of the argument, my learned friend and Agent, Dr. verLoren van Themaat, in the course of his opening statement, said the following:

> "We state there that our submission under the first Objection concerns only the Mandate *as an agreement*; our contention being that *as a treaty or convention* the Mandate is no longer in force. We state further that no submissions are advanced about the question whether the Mandate in the wider sense of being an institution survived the League or not. The logical effect of this attitude is that, although we make no admissions in that regard, we are prepared for the purposes of our argument in these Objections to assume that the Mandate as an institution survived the League." **(VII**, p. 21.)

Later, Mr. President, I had occasion to say the following, which is recorded at pages 33-34 **(VII)** of the Oral Proceedings:

> "I am merely indicating for the moment that we are, without making admissions, assuming for purposes of our argument that the Mandate is still in force as an objective institution; meaning, on the one hand, the title, the rights, the powers of the Mandatory under the Mandate, and on the other hand, the substantive Trust obligations undertaken by the Mandatory which obliged it to use those powers and rights for the advancement of, and the well-being of the inhabitants of the Territory. We are assuming, for purposes of argument, that to that extent the Mandate remains in force, but we are contending that it ceased to be in force as a treaty or convention, as an international agreement."

That attitude was again repeated on several occasions during the argument of Counsel in 1962. I can refer to the Oral Proceedings, at page 66, at pages 69-71, and at pages 353-354 **(VII)**. This last passage occurred in my reply, and there I indicated specifically, Mr. President, that it was not necessary for our purposes, as far as the Preliminary Objections were concerned, to go into the question of severability or inseverability of Article 6 from the rest of the Mandate. I indicated the severability of Articles 6 and 7 which were then under consideration, on the one hand, from the rest of the mandate institution, on the other. I indicated that we were for the purposes of argument on the Preliminary Objections prepared to make assumptions either way in that regard. If one assumed inseverability, then our contentions about Articles 6 and 7 having lapsed would mean that the whole mandate institution had lapsed, and that would, for purposes of jurisdiction, have led us to the conclusion that the Applicants had no jurisdiction in these proceedings. On the other hand,

if the conclusion was that there was severability of Articles 6 and 7 on the one hand, from the rest of the institution, on the other; then the Mandate could survive, but without any international accountability or administrative supervision, and without any jurisdiction on the part of this Court as initially provided for in the compromissory clause. That again led us to the same conclusion in so far as the jurisdiction of the Court was concerned—an attitude, therefore, Mr. President, which made it perfectly clear that that was a matter which we were leaving open; we were not then advancing contentions or argument to the Court on the question whether the Mandate did or did not survive in its form of an institution with an objective existence.

But now we find, Mr. President, that in the Judgment on the Preliminary Objections, the Court in 1962 stated the following:

> "It is argued that the rights and obligations under the Mandate in relation to the administration of the territory of South West Africa being of an objective character still exist . . ." (*I.C.J. Reports 1962*, pp. 332-333.)

I draw attention, Mr. President, to the word "argued". That word, of course, in the light of the explanation which I have just given, was not a correct indication of what our attitude was, in fact, in 1962. Mr. President, in our Counter-Memorial, we referred to this matter—to this passage in the Judgment—and we stated in Book II, at page 166 **(II)**, in footnote 3: "If the Judgment on the Preliminary Objections is to be understood as suggesting . . . that Respondent contended positively that some aspects of the Mandate still exist, such suggestion would be erroneous."

But, Mr. President, when we look at the manner in which the Applicants deal with the subject, we get a different impression. The Applicants, in their presentation, rely on this passage in the 1962 Judgment which I have just quoted, in order to contend that we have now abandoned a prior argument which we advanced in 1962. I quote from the verbatim record at page 112, *supra*, where the Applicants, after quoting this passage from the 1962 Judgment, said the following:

> "This was, as the Applicants understand it, an alternative argument—I have just quoted from the Court's characterization of the argument.
>
> In the present phase of the proceedings, however, Respondent has reversed or abandoned this argument, alternative or otherwise."

Mr. President, surely there is no justification whatsoever for speaking of reversing or abandoning any argument, alternative or otherwise. On the same day my learned friend, Mr. Gross, said the following, according to the verbatim record at page 129, *supra*:

> "Respondent, accordingly, repeats its rejected contention as to the survival of the Mandate as a treaty, and reverses, or repeals, its contention as to the survival of the Mandate in a 'real' or 'objective' sense. As I have said before, it matters little for the purpose in this context whether such argument was made by Respondent as an alternative argument or not."

And we find a repetition of the same argument by my learned friend in the verbatim record at page 176, *supra*, which I need not quote.

Mr. President, it is quite clear from the record in 1962 to which I have referred again, that we did not in 1962 argue that the Mandate was in

force in any sense whatever. We merely assumed that for purposes of argument. We assumed that the Mandate continued in force as an institution, or in a "real" or "objective" sense, and we made it perfectly clear that we reserved our position as far as that question was concerned. We did not address any argument to the Court in 1962 on the question of the lapse or survival of the Mandate.

It was for this very reason, Mr. President, that in the joint dissenting opinion of the honourable President and Sir Gerald Fitzmaurice, we find the following at page 495:

> "The fact that the issue raised by the First Preliminary Objection is not whether the Mandate is simply 'in force', appears to have been completely lost sight of. The issue arising on Article 37 of the Statute is whether the Mandate is in force *as a treaty or convention*. For this purpose it is not sufficient to rely on the Court's 1950 Opinion as establishing that the Mandate is, in any case, in force on an *institutional* basis."

This passage, Mr. President, very clearly drew the distinction between the two aspects of the matter, and referred to the attitude which we took in that regard.

The Applicants now say in the verbatim record at page 176, *supra*:

> "It was, of course, clear on the face of Respondent's statement before this honourable Court in 1962, and in its written pleadings on the Preliminary Objections, that Respondent's argument in this respect was an alternative argument."

Mr. President, even this statement is wrong. There was no "alternative argument". There was one argument on our part. That was an argument which related to the question of survival, or otherwise, of the Mandate as a treaty or convention. On the question of survival or otherwise of the Mandate as an institution there was no argument. There was simply a willingness on our part to make assumptions both ways as far as that question was concerned, for the purposes of the only argument which we did put before the Court. That I thought I ought to make clear to the Court before commencing this argument on the question of the lapse of the Mandate as a whole.

It now becomes necessary to consider, for the purposes of these proceedings, whether the Mandate survived in any sense whatsoever, in an institutional sense or in the sense of a treaty or convention.

The Court will see from the pleadings and from the manner in which I have advanced this argument that we approach this question in this particular way. We do not say that the Mandate lapsed for some reason or other, and that consequently there is no longer any accountability under Article 6. We argue these propositions in the inverse order. We say, Mr. President, that the accountability provided for in Article 6 has lapsed. We advance that argument first and foremost. It is not based on any assumption which we make as to severability or inseverability of the obligation of accountability from the rest of the mandate institution. For purposes of the argument that Article 6 has lapsed we are again prepared to make assumptions in either direction, and we made those assumptions in both directions, as I dealt with the argument regarding Article 6. It does not matter whether we start off with an assumption that Article 6 was an essential part of the mandate institution, or that it was not an essential part of the mandate institution, or whether we start

off with an attitude of neutrality in that regard—of not paying attention for the moment—of not giving any significance—to the question whether it was or was not essential; we can make all those assumptions, each and every one of them, but still on a consideration of the field which I have covered in my argument so far, we can come to only one conclusion, and, that is, that Article 6 of the Mandate lapsed on dissolution of the League. And it is as a consequence, Mr. President, of that conclusion that the further question then arises: must one look upon Article 6 as having been an indispensable, inseverable part—an essential part—of the mandate institution, so that upon its lapse the whole of the mandate institution also lapsed, or was it severable, so that the rest of the institution could survive without an obligation of accountability?

[Public hearing of 13 April 1965]

I am dealing with the contention of Respondent that the Mandate as a whole has lapsed, and I have pointed out that this is a contention which follows on the contention that the obligation of accountability as provided for in Article 6 of the Mandate has lapsed. Indeed, much of the argument which I have already addressed to the Court in regard to the lapse of Article 6 of the Mandate is relevant also to the argument to which I am addressing myself now.

The basis upon which I contend for lapse of the Mandate as a whole is purely and simply one of severability or inseverability, divisibility or indivisibility. The question is, in other words, whether, if one accepts that Article 6 has lapsed, the rest of the mandate institution was, in accordance with the intentions of its founders, capable of further existence.

Mr. President, we point out in the Counter-Memorial, **II**, pages 165 to 166, and in the Rejoinder, **V**, pages 58 to 59, that, as a matter of legal principle in international law, the possibility of severability or separability of treaties or institutions is well recognized. There is consequently no reason in principle why the Mandate should not continue in existence, even in the absence of any duty of accountability. There is no general legal principle in international law which makes that impossible.

Further, Mr. President, as a question of notion and a question of fact, it would not be impossible at all to have a mandate institution without an obligation of accountability. It would surely be possible to have the notion, as described in the 1950 Opinion, of a title which is limited by the concept of a trust, the title being held by the titleholder for the purpose of complying with a trust, which operates in favour of the inhabitants of the territory. Whether or not there would be accountability to an international institution, in the case of a trust of that kind, could not affect the legal nature of the obligation resting upon the titleholder—the trustee, or the mandatory—to comply with the obligations of the trust and to utilize his powers for the purpose for which they were conferred upon him, namely the advancement, the promotion to the utmost, of the well-being and progress of the inhabitants of the territory.

There are many institutions in international law which do not contain any provision for reference of disputes to adjudication and where there is no question of enforceability of obligations through ordinary legal processes—through ordinary processes of adjudication—and yet the existence of legal obligations is fully recognized; and there are various

ways, with which I need not deal—the Court is fully acquainted with them—in which obligations of a legal nature in international law can, in some way or other, be enforced, even if not through the ordinary legal processes of adjudication.

In this case the Court found in 1962 that the Mandate was still in existence, together with an obligation to submit to the adjudication of this Court on questions arising from it. If one has as a premise a mandate with an obligation to submit to adjudication, it becomes perfectly clear that there could be no notional reason why there must necessarily also be submission to international accountability, or international administrative supervision. But even if there should be no provision for adjudication at all, even if Article 7 should no longer exist, it is still notionally possible to have a mandate in the form of a trust institution, which would be an institution with legal rights and with legal obligations.

The only question, Mr. President, with which we are concerned here, is the question of the presumed intent of the authors of the system, i.e., whether they would have intended that a mandate should exist without international accountability—without submission to supervision on the part of an international organization. And that is the only legal basis upon which this question of severability or inseverability can be decided. One is faced immediately with the difficulty that it seems fairly obvious that the authors of the mandates system never, in fact, applied their minds to this question; they never in fact anticipated that the League would be dissolved, and consequently, they could never have had any factual intent on this question whether, if the League was dissolved and the supervisory organs in respect of accountability fell away, without any replacement in that regard, the rest of the mandate institution should survive or whether it should lapse.

The present inquiry, Mr. President, is consequently, not an inquiry into actual intentions—that seems fairly obvious; it is an inquiry into presumed intentions. Such an inquiry often arises in matters of this kind, because the factor which raises the question of severability or inseverability is very often one which arises for the first time a long time after the original institution was agreed upon, or enacted by legislature, or whatever the position might be. One has, therefore, to argue back, from a situation which has arisen in practice, to see what would have been the intentions of the particular legislature, or the particular contracting parties, would have been on this question, if it had been raised for their consideration.

The main guide, in the present case, to the presumed intentions of the authors of the Mandate, on the point under consideration, is afforded by an appraisal of the role which it was intended that League supervision should play in the mandates system, and by an appraisal of the degree of importance attached to it by the authors of the mandates system. We have to look at all the relevant evidence in order to see to what extent they regarded this part of the institution as important—to what degree they regarded it as essential. For that purpose one has to weigh all the evidence and have regard to all the indications—one way and the other.

It, therefore, follows, Mr. President, as we also point out in our pleadings, that the nature of the question to be determined of necessity imports some element of speculation into the inquiry, and for that reason it is not surprising that opinions which have been expressed on this question have, in fact, differed. As we have pointed out in our pleadings,

the 1950 Advisory Opinion appeared to be based on the premise that Article 6 was, indeed, severable from the rest of the Mandate. We referred to that earlier in these oral proceedings, and also in the Oral Proceedings on the Preliminary Objections, **VII**, at pages 69 to 71, in 1962.

. This contemplation of severability appeared very clearly from the minority opinions of Judges McNair and Read. As I pointed out before, they both came to the conclusion that the Mandate continued in existence although Article 6 had lapsed. But the view of severability was also implicit in the majority opinion. It is particularly important to note that the Court first came to a conclusion that the Mandate survived the League as a trust, in regard to both the powers of the mandatory and the obligations imposed by Articles 2-5 of the Mandate. The Court first came to that conclusion before considering the effect of the dissolution of the League on Article 6 of the Mandate.

If I may refer the Court to the Opinion at page 133, it is very significant to see how the Court put the matter there, and what its approach to the enquiry was. The Court referred, at page 133, to the two kinds of international obligations embodied in the Mandate, and it defined the first-mentioned group of obligations as those described in Article 22 of the Covenant and in Articles 2-5 of the Mandate. In regard to these obligations the Court said:

> "These obligations represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon." (*I.C.J. Reports 1950*, p. 133.)

Mr. President, the emphasis here falls on the fact that these trust obligations were not dependent for their existence on the existence of a supervisory organ, or, by implication, on the existence of a system or an obligation of accountability. That was the basis of the Court's reasoning on this whole problem, and, as I have said, the Court completed, at pages 133-136 of the Opinion, its consideration of the question whether the Mandate, in relation to the rights and powers of the mandatory and the trust obligations in Articles 2-5, had survived before it gave consideration at all to what it called the obligations of the second group relating to measures of implementation, under which the Court then dealt with Article 6 of the Mandate.

Those, then, were the opinions on this point in the 1950 Advisory Opinion of the Court.

In 1962 we find that Judge Bustamante expressed a view to the contrary. We quote that view at pages 168-169 of the Counter-Memorial **(II)**. I do not propose to read it to the Court. It is to the effect that the obligation of accountability, as provided for, was to be regarded as an essential part of the mandate institution.

There is also a passage in the Judgment of the Court itself in 1962 which we quote at page 168 of the Counter-Memorial, which, although not very clear, may or may not have been intended to apply to this particular question relating to Article 6. The passage reads as follows:

> "The findings of the Court [i.e., in the 1950 Advisory Opinion] on the obligation of the Union Government to submit to international

supervision are thus crystal clear. Indeed, to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate."

Why I say this is not perfectly clear, Mr. President, is because there is a general reference to the obligation to submit to international supervision. In the context in which this expression occurred (I dealt with it yesterday), the Court, as far as one can see, expressly and deliberately refrained from dealing with the problems which arose in regard to Article 6 of the Mandate. I gave the reasons yesterday why we say that that is so. The Court did deal with the other aspect of what it regarded as essential, namely judicial protection, and it may be that in referring here to the obligation to submit to international supervision the Court had in mind the dual aspect which apparently underlay its reasoning, i.e., the concept that there had to be some supervision, either administrative or judicial, or both, in the manner in which I explained it to the Court yesterday. Therefore, when the Court spoke of "to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate", it had in mind, not necessarily that there had to be administrative supervision of a mandate, but that there had to be supervision of one kind or the other—that appears to have been the basis of the Court's reasoning in this particular part of its Opinion. As I have said, that is a passage which may or may not have a bearing on the subject. The point I wish to make is that the opinions which have been expressed thus far, are not harmonious—and, indeed, Mr. President, one does not find anywhere that a court, or this Court, has ever given full and systematic consideration to the question of severability or inseverability, in answer to conflicting contentions addressed to it by parties appearing before it. Opinions have been expressed in isolated respects, as I have indicated, but there has been no comprehensive consideration of this whole question anywhere, as far as I have been able to discover.

In the Counter-Memorial, **II,** at pages 165-166, we also refer to (and quote) a passage from the minority opinion of Judges Spender and Fitzmaurice in 1962, dealing with the principles of severability and indicating, although not quite explicitly, a view tending towards the conclusion of severability in the particular case of Article 6 of the Mandate—but there, too, the matter was not dealt with fully or comprehensively, as far as this particular aspect of application of the principle was concerned.

Mr. President, to the authorities which we already quote in the pleadings and to which I have now made further reference, I might also add a reference to an article by Professor James F. Hogg in the *Minnesota Law Review*, Volume 43, January 1959, No. 3, at pages 435-436—the title of the article is "The International Court: Rules of Treaty Interpretation". In the course of this article Professor Hogg expressed the view that it was quite obvious that the mandate institution could exist without accountability, even if it was also quite obvious that it would be better to have accountability, if possible, and he then expressed certain views on the basis on which the Court came to its conclusion in 1950 as to the survival of accountability. The point I make for the moment is merely that his view was based on a conclusion that there was severability, as far as the mandate institution was concerned, in regard to Article 6.

A view to the other effect, one finds in Kelsen—*Principles of International Law 1952*, page 164, in footnote 48. Again, the question is not fully discussed. It is merely a statement of a view by the learned author.

We pointed out, Mr. President, in the pleadings and in this oral argument also, that the views and the conduct of various interested States at and shortly after the dissolution of the League, showed ambiguity and difference of opinion on this very question.

In dealing first with the States present at the last Assembly of the League of Nations, we pointed out in the Rejoinder, V, at pages 59-63, that their attitudes appeared to be ambiguous. The ambiguity, as we see it and as we analyse it on those pages of the Rejoinder, Mr. President, appears to amount to this, that if one considers the actual statements made on behalf of mandatory powers at the time, and at the reference in the League's resolution to those statements, i.e., to the manner in which those statements were made and the effect thereof as described in the resolution of the League, one can put one of two possible interpretations on them. The one interpretation would be that the States concerned were of the opinion that the mandates would remain in existence as legal institutions, with legal obligations involved in them, but without an obligation of accountability. Such an interpretation would, of course, premise a view of severability of the obligation of accountability from the rest of the mandate institution. The other possible manner of looking at those statements, and at the League resolution, is that indicated in the joint dissenting opinion of the honourable President and Sir Gerald Fitzmaurice, which involves an indication that, in the normal course of events, the mandates, as institutions, would have lapsed completely —i.e., that in law nothing would have remained of them after the dissolution of the League—but that the mandatories undertook that, as far as the substantive obligations, as distinct from an obligation of accountability, were concerned they would act, until further arrangements were made, as if those obligations of the mandates were still in force. That is a possible alternative construction which could be placed upon the situation.

What I want to emphasize at the moment is that this ambiguity related to a choice between the two alternatives contended for by the Respondent—in other words, firstly, the lapse of the old Mandate, or alternatively, the survival of the Mandate without accountability to a supervisory authority. There was no contemplation at all, as far as one can see, of the alternative contended for by the Applicants, namely the survival of the Mandate with a substitution of the United Nations for the League as an administrative supervisory authority.

I have given this view of the various attitudes of States and authorities in order to indicate what possible range of views there could be on this subject, and to what extent there have, in fact, in the past, been differences of opinion, and even uncertainty, upon the subject.

It may be convenient at this stage, Mr. President, to refer to an argument raised by the Applicants according to the verbatim record, page 212, *supra*, which reads as follows:

> "Acceptance by Respondent of this resolution [the final resolution of the League] clearly involved an explicit undertaking of some sort, unless it be deemed a mere statement of Respondent's present intention as of that moment. In that case, however, the phrase 'until other arrangements have been agreed between the United Nations and the respective Mandatory Powers' would have been meaningless, if not, indeed, misleading."

Now, Mr. President, we have given our reasons for submitting that the

resolution did no more than take note of expressed intentions and that, consequently, agreement to the resolution did not involve any undertaking in law at all. In other words, Mr. President, we submit that if the true view should be that the whole mandate institution lapsed on the dissolution of the League, those statements made by mandatories did not have the effect of causing the mandates to survive in law, not even to the extent of the substantive rights and obligations, to the exclusion of accountability. The situation, in our submission, was merely one where, if it is correct to say that the mandates did lapse upon the dissolution of the League, those mandatories acted on the same basis as if the mandates were still in force, and not on a legal basis which involved that the mandates were in force.

Mr. President, the point which I wish to make at this stage is that, even if we were to be wrong in this respect, even if those statements of intent were to be regarded as undertakings in law, it would still mean that the undertakings related only to the substantive powers and obligations under the Mandate, and *not* to an obligation of accountability, as orginally provided for in Article 6 of the Mandate. If one puts that construction on what happened at the final assembly of the League, the result would be exactly the same as if one said that Article 6 was severable from the rest of the institution, that accountability therefore lapsed, but that the rest of the institution survived. That very same result would follow from putting upon the situation the construction I have just dealt with—the construction of saying that the Mandate lapsed on the dissolution of the League, or that it would have lapsed but for a legal undertaking on the part of the mandatories to carry on with the substantive obligations and powers under the Mandate.

So, Mr. President, if an undertaking, as suggested, were, in fact, given, it would seem to suggest that in the minds of the States there assembled, it was possible to continue the substantive obligations of the Mandate without making provision for any supervision, and that the undertakings could not have had any greater effect than to provide for such continuation, that is, without any supervision.

Now, Mr. President, it appears from the review which we have given, that there were extensive differences of opinion also in the views expressed in the United Nations in the years 1946-1949, on the question whether the Mandate was still in existence. As we have shown in the Oral Proceedings, as well as in the Rejoinder, V, pages 63-67, there was a considerable difference of opinion regarding the question whether the Mandate existed at all. However, as we have also shown, the difference of opinion again related substantially to the two alternatives for which we contend, namely, either the lapse of the Mandate as a whole, or alternatively, the survival of the Mandate without any accountability to a supervisory authority—again to the exclusion of the position, contended for by the Applicants, namely of a survival of the Mandate with accountability to the United Nations. It was only from the end of 1948 that a few States adopted the attitude now urged upon the Court by the Applicants—and then, as we have shown, for different reasons. And we have also indicated that those States were, in some cases, not consistent with themselves, and they in no case advanced a contention in the form in which it is now advanced to the Court by the Applicants, or on the same grounds.

I have dealt with the various possible ways of viewing the matter, Mr. President, for the purpose of showing that the Court is not being

forced into a straight-jacket, as it were, in the manner which was suggested by the Applicants at one stage of the proceedings. The suggestion in the Reply, as we read it, was that the Court is now, by virtue of the attitudes adopted by the Parties, really forced to decide only on the basis of one of two extremes, the two extremes being either that the Mandate must have lapsed altogether, or that the Mandate must exist with accountability to the United Nations. The review I have given of the various possible views one could take of the situation, and of the various possible views that *have* been taken in the past, indicates very clearly that there are several other possibilities to be considered in this regard—alternatives on the basis of which the Court could come to a conclusion.

Mr. President, in regard to the attitudes of States, some reference should be made also to certain statements made on behalf of Respondent which, in the earlier years up to 1948, would seem to show a contemplation of a continuation of the mandate obligation. Again we must emphasize, as we did before in dealing with those statements, that they clearly showed that any continuation of the Mandate would not, in Respondent's view, involve any accountability to the United Nations. The question whether in those circumstances the Mandate could still continue as an institution, is a pure question of law, involving, as has been noted, an ascertainment of the presumed intentions of the authors of the mandates system regarding a matter to which they had not, in fact, directed their minds. We submit, therefore, Mr. President, that statements by the South African Government of the time on a pure question of law of that kind can, by themselves, have only very limited probative value, either as an admission, or otherwise. It is a point with which I shall deal further at a later stage in order to assess the legal value to be given to statements actually made at the time. We refer in this regard to the 1950 Opinion of the Court when the Court said, referring to certain statements made by Respondent:

> "These declarations constitute recognition by the Union Government of the continuance of its obligation under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court." (*I.C.J. Reports 1950*, pp. 135-136.)

Now, Mr. President, there are certain points to be noted from this statement by the Court. The first is that the declarations were relied upon by the Court solely as supporting a conclusion already reached, and the Court, therefore, did not have to consider what value the declarations would have had if the Court had been uncertain as to the correct interpretation of the Mandate. Secondly, Mr. President, it must be quite clear that in this regard one should draw a distinction between statements relating purely to a question of law, on which opinions could differ, and statements relating to a question of fact, or of mixed fact and law, such as, for instance, the question whether there was, in fact, a certain understanding or a tacit agreement on a particular question. In our submission, that is a self-evident distinction which would have to be drawn when applying any principles of the kind which the Court had in mind in the passage under consideration.

Further, Mr. President, it is also significant that the Court relied on these statements by the Respondent only to show a recognition on Respondent's part that the Mandate existed. The Court did not place any reliance on them in considering the second question, namely whether supervisory powers had passed to the United Nations. The Court did not even refer in that part of its Opinion to any of the statements made by the Respondent. In our submission, Mr. President, this shows that the Court did not interpret Respondent's statements as involving any consent to a substitution or replacement of supervisory organs, although it interpreted them as acknowledging continuation of the Mandate. This was again, Mr. President, in keeping with the Court's treatment of the two questions as being severable—the question of the continued existence of the Mandate, and the continued existence, or otherwise, of Article 6 of the Mandate and the obligation provided for therein.

A further question which could arise in connection with these statements is whether Respondent's conduct could have given rise to an estoppel. We dealt last week with the principles of estoppel and set out on Friday what they involved. In our submission, they could clearly not be applicable in a situation of this kind, for the simple reason that there is no indication whatsoever that any State changed its attitude in relation to the Respondent, or in relation to this whole subject-matter, on the basis of any of the statements made by the Respondent. There is no evidence, and no suggestion whatsoever, of any such change of position and, indeed, there could not be any such evidence because Respondent's statements related to a continuation of the Mandate without supervision, that is, a continuation of the sacred trust obligations. As a matter of practice, whether the Mandate is to be regarded as being in force or not, Respondent has continued to honour its sacred trust obligations under the Mandate. And it has expressed its intention of maintaining this attitude, whether it did so as a matter of legal obligation, or as one of moral approach, a matter of policy to act in accordance with the spirit of the Mandate, does not matter for the moment: that has been Respondent's factual approach to this whole situation.

Mr. President, it, therefore, seems unlikely in the circumstances that any States would indeed have altered their attitude or their position to their own prejudice, and there is, indeed, no suggestion, no allegation, that any such alteration of position has occurred on the part of any State—certainly not on the part of the Applicants.

It therefore seems, Mr. President, that that one essential element of estoppel, the alteration of a party's position to his prejudice is completely lacking in this instance, and that for that reason alone there could be no suggestion of applying the principles of estoppel in this case.

Consequently, Mr. President, it is submitted that Respondent is fully entitled to advance the contention that the Mandate as a whole has lapsed. Our contentions in this regard are set out in the Counter-Memorial, **II**, pages 167-169, on the question of severability, or inseverability, which arises here. For the reasons set out there we contend that the Mandatory's obligations to report and account to, and to be supervised by organs of the League, must be taken to have been intended by the authors of the Covenant to form an essential and unseverable part of the Mandate, and for that reason we submit that upon lapse of those obligations the whole mandate institution must be taken to have lapsed in law.

We emphasized in the pleadings, Mr. President, and we do so again,

that this conclusion is one which is arrived at on balance. It is arrived at on an *ex post facto* basis which, as I have said before, necessarily involves a measure of speculation as to the presumed intention of the authors of the mandates system on a matter to which they admittedly did not give positive and active consideration. It does not mean, in particular, that all States must at all times have regarded accountability as an inseverable part of the mandate institution, and the evidence on record with which we have dealt is absolutely clear that they in fact did not.

It is also clear, Mr. President, that the Respondent's own Government in the years 1946-1948 clearly did not regard the matter in this light. The contention which we now advance is, therefore, one which we ask this Court to accept on a consideration of the legal position *ex post facto*, and one which does not accord with the expressed intention of the Respondent Government at that particular time, nor with the views expressed by a number of other governments at the time. I stress this because there was a tendency, as I saw it, in my learned friend's argument, and in the argument advanced on behalf of the Applicants, to argue that if this Court should come to a conclusion of inseverability, of essentiality, of accountability in the mandate institution—particularly if the Court should come to that conclusion on the basis of a contention which we ourselves, on behalf of the Respondent, advance to the Court—it must follow that all States at all times, including the Respondent, must necessarily have had that view of inseverability. I am merely stressing that that representation of the situation is an erroneous one, and that it could lead to completely erroneous conclusions.

Consequently, Mr. President, the way in which we advance our contentions to the Court, it still leaves these two possibilities. If our contention in regard to inseverability is correct, it means that the whole mandate institution lapsed on the dissolution of the League. Secondly, if we are wrong in that contention, i.e., if the Court should find that the accountability could indeed, according to the presumed intentions of the founders of the institution, be severed from the rest of the institution, the Mandate would still exist, but without accountability. And there is the third way in which that same conclusion could be arrived at: it concerns the view which could be taken of events at the last session of the League, i.e., that the institution lapsed, but that there was a renewed undertaking on the part of Mandatories to maintain the institutions in so far as obligations other than accountability were concerned. Our main contention is, as I have said, that the Mandate has lapsed; the others follow as alternatives—possible alternative views which could be taken of the situation.

I would also point out, Mr. President, in this regard, although only by way of comment as Counsel—I am not speaking in terms of any particular instructions I may have on this point—that there could not, from Respondent's point of view, be very much difference between, on the one hand, a situation where the Mandate itself has lapsed *in toto*, but where Respondent carries on in the spirit of the Mandate, administers the territory in the spirit of the Mandate—and, on the other, a situation in which the Mandate exists in law but without an obligation of accountability to the United Nations. From a practical point of view, and in view of Respondent's expressed future policy of leading all the peoples of the mandated territory, or the prior mandated territory, of South West Africa, to self-determination, it makes very little difference whether one

views the situation at the moment on the basis of a mandate which is legally in existence, together with a legal obligation to lead the peoples to self-determination, or whether one views it on the basis that the Mandate has lapsed but that Respondent acts on the basis of a firm policy to do exactly that which the Mandate would have required of Respondent if it had been in force. The important distinction between the attitudes taken by the Applicants and Respondent is, as a matter of fact—as a matter of practical importance—the question whether there is or is not United Nations supervision.

For reasons which pertain to the merits of this case and with which I do not want to deal fully at this moment—I may merely make a reference to it in passing—this is considered to be of the utmost importance. This is so, Mr. President, because Respondent considers that there are a number of States at the United Nations which, for political reasons, and for the purpose of achieving political objectives which, as Respondent sees it, are in no way concerned with the merits of administration of South West Africa, wish to force Respondent to apply policies in South West Africa which it conceives to be of a disastrous nature—policies which, in Respondent's view, can never lead to fulfilment of the objectives of the Mandate, but only to the opposite end. It is from this point of view, in this practical sense, that Respondent regards this issue of the lapse or otherwise of accountability, and of supervision, as one of the utmost practical importance.

Mr. President, as a matter of law our contentions are, as I have said, that the Mandate as a whole has lapsed. Alternatively, if the Court does not agree with our contentions as to severability or otherwise, the position remains that the Mandate is in existence, but without accountability.

Now, Mr. President, let us consider the Applicants' reaction to this contention on the part of the Respondent. The reaction is stated as follows in the verbatim record at pages 129-130, *supra*:

> "Although Respondent's argument in support of its second alternative contention that the Mandate as a whole has lapsed proceeds from a sound point of departure, that is, the nature, origin, and purposes of the mandates system, and draws the sound inference therefrom that international supervision was conceived as a basic obligation, as an essential and integral element of the system, the more logical conclusion following Respondent's correct premises in this context would no doubt have been Respondent's abandonment of its first alternative contention."

Now, Mr. President, there are various elements in this argument to which I must draw attention. I begin with the Applicants' phrase that "international supervision was conceived as a basic obligation". That phrase is used as if it were part and parcel of Respondent's argument also, as if that was a matter of common cause between the Parties. I must in this regard draw a distinction, as I have done so often in the course of this argument, and state that it is misleading to speak of "international supervision" in this particular context. We pointed that out in the Rejoinder, V, at pages 67-68. It is particularly misleading, Mr. President, at this stage of the proceedings, inasmuch as the Applicants assign a specific meaning, and specific legal consequences, to this abstract concept of international accountability or submission to international supervision. One has to distinguish between the Applicants' contentions in that

regard, and our basic contention in that regard. We have always disputed the existence of any obligation of international accountability in the wide sense contended for by the Applicants, and *a fortiori* we have, of course, never contended that such an obligation was an essential feature of the Mandate. Our contention was, and still is, that our obligation of accountability related to the specific League organs, and that it was that obligation which was essential in the mandates system. That distinction is a very important one, and must always be borne in mind when considering the attitudes of the Parties on this question of essentiality.

That appears quite clearly, Mr. President, if we analyse what are the consequences of the Parties' attitudes on this question of essentiality—essentiality of the obligation of accountability as seen by the two Parties.

First, on the basis of the Applicants' contention in regard to international accountability, what would be the consequences of considering such a wide and vague obligation to be an essential part of the Mandate? Secondly, what would be the consequences of considering the narrower concept of accountability to specific League organs, as contended for by the Respondent, to be as an essential part of the mandate institution?

I deal first with the matter on the basis of the Applicants' contention of a wide, vague obligation of international accountability. On the assumption that was the intention of the founders of the mandates system that such an obligation was to be seen as being part and parcel of the Mandate, it would seem, Mr. President, that the question whether that obligation was essential, or was to be seen as essential, or not, would really make no difference for present purposes, because the position would be this: the effect of the Applicants' contention is that, inasmuch as there is this general obligation to account or to be subject to international supervision, the disappearance of a particular supervisory organ does not affect the existence of the obligation. It could affect the practical application of the obligation, it could affect the question whether the obligation is, at a particular time, in operation or whether it is dormant, but it could not affect the existence of the obligation at all. Consequently, Mr. President, on dissolution of the League, according to the Applicants' contention as to international accountability, that obligation was not affected, but remained in existence on the analogy of what the Court found in the *Barcelona Traction* case in regard to an obligation to submit to adjudication. Therefore, Mr. President, in view of the fact that that obligation would, on the Applicants' premise, have survived the dissolution of the League, no question could arise as to the lapse of the mandate institution as a result of lapse of the obligation because, on this hypothesis, the obligation remains in existence, as part and parcel of the mandate institution, and whether it is regarded as severable or as inseverable from the rest of the institution does not matter. The institution, on that premise, survives, and it survives with an obligation of international accountability as part and parcel of it. What is, then, still required in order to bring the Applicants home on their contention, is consent on the part of the Respondent to a substitution of supervisory organs, so as to make the obligation operative and not to leave it in a dormant state. But that is an entirely different question. The question whether the obligation is to be seen as an essential part of the mandate institution or not, cannot help the Court at all in coming to a conclusion on the question whether the Respondent did or did not give the necessary consent to a substitution of supervisory organs: that is, and remains, a question of fact, which

must be answered with reference to all the relevant facts, as we have submitted before. That is the result at which one arrives on the basis of the Applicants' contention as to the meaning to be attributed to the obligation of international accountability.

On the basis of Respondent's approach, Mr. President, the question is: if our contention is correct, namely that the obligation was essentially related to particular supervisory organs and that it would, therefore, have lapsed on dissolution of the League, what would be the effect of essentiality on such an obligation? We must note in the first place that essentiality in this sense must mean that the accountability in question was intended by the authors of the mandates system to be an essential element of the Mandate, in the sense that the Mandate was not to exist without it. The view, or the contemplation, of anybody else could hardly have been of significance: for instance, the views of interested parties at later stages of the process, say, in 1945-1946, could not be of any relevance except in so far as they may have induced those parties to enter into new agreements, but that is a different question. Basically we are concerned only with essentiality in the sense that the authors of the mandates system considered the obligation as prescribed by them—the obligation to account to the Council of the League—as an essential element of the system in the sense that the Mandate could not, in their opinion, exist without it.

Now, Mr. President, on that view of the matter, it necessarily follows, that if that obligation fell away the rest of the institution could not survive, and the whole of the Mandate would have to be regarded as lapsed. The logic of that proposition, Mr. President, is probably indisputable. We find that the same question of logic arose in the *Barcelona Traction* case, and it was a question which fell to be considered particularly by Judge Morelli in his minority opinion because of the view which he took in regard to the survival or otherwise of the clauses which provided for adjudication in that case. Judge Morelli, differing from the rest of the Court in that regard, came to the conclusion that the provisions providing for adjudication had to be regarded as having lapsed on the disappearance of the Permanent Court. The question then arose, what effect could that have on the rest of the institution? Judge Morelli had to deal with an argument which was advanced to the effect that the adjudication clauses were to be seen as essential parts of the treaties in question, and they were, consequently, to be seen as having survived with the rest of the treaty. He dealt with the matter in his dissenting opinion, and pointed out that in logic the conclusion was the very opposite. We cite the relevant portion in the Rejoinder, V, at page 71:

> "This result [the learned judge stated—the result that the compromissory clause had lapsed] cannot in my view be set aside by arguing, as does the Belgian Government, the inseparability of the provisions of the 1927 Treaty. *It is difficult to find any reason why this alleged inseparability should have the effect of keeping Article 17 (4) . . . in force,* rather than the contrary effect of entailing the lapse of the entire treaty.
>
> In my opinion there can be no doubt that Article 17 (4) lapsed, for lack of object, as a result of the dissolution of the Permanent Court . . . The fate of the other provisions of the 1927 Treaty is of no interest. But if it is desired also to consider the question of the preservation in force of the other provisions of that Treaty, what

consequence must be drawn, for the solution of that problem, from the assertion that the Treaty constitutes an inseparable whole? If it is considered, as does the Belgian Government, that 'resort to adjudication is an essential part of the economy of the treaty', that 'the various methods of settlement were carefully combined, so that to remove those which concern the Court amounts to dismantling the whole system' and that Article 17 (4) 'was an *essential condition* for the consent of the parties to the treaty as a whole' *the inevitable result, assuming the impossibility, thus affirmed, of separability of the provisions of the Hispano-Belgian Treaty, would simply be that the entire treaty has lapsed.*" (Italics added.)

The majority of the Court, in the view which it took of the meaning and effect of the adjudication provisions, did not have to consider this question, and found it unnecessary to express an opinion in regard thereto. But, Mr. President, on the basis of the view taken by Judge Morelli, it was necessary to deal with the question, and these are his views as I have read them to the Court. They confirm entirely our submission in this regard, and involve a rejection of the contrary submission of the Applicants, as set out in the passage which I read to the Court from their argument, in which they said that the more logical conclusion which flowed from the Respondent's correct premises in this context would no doubt have been abandonment of its first alternative contention, meaning thereby that the Mandate as a whole had lapsed.

Mr. President, the effect of this contention, in contrast with that of the Applicants, may also be stated as follows. The authors of the mandates system knew, and contemplated, that without accountability as prescribed by them, i.e., accountability to the specific League organs, the Mandate as a whole would fall to the ground. We take that as our premise: that is what the premise of essentiality here means. This, however, Mr. President, on the basis of our contention, did not induce the authors of the mandates system to do anything about it—to do anything in the way of preventing that result if and when it should come about. The simple, logical explanation why that is so is that the authors of the mandates system contemplated that the League would endure indefinitely, that the League would have an indefinite existence. They did not contemplate the dissolution of the League, they could not contemplate the exact circumstances under which such a dissolution might take place. Therefore, they simply left the matter on that basis, i.e., that if the League should one day, under unknown circumstances, come to an end, then the consequence would be—on the assumption, of course, of essentiality—that the Mandate as a whole would lapse as a result of the disappearance of the supervisory organs.

But the authors of the system also knew that later generations would, in circumstances where the League might come to an end, make appropriate arrangements. They could make arrangements very much better than the authors of the mandates system could do so at the time when they were having their deliberations and were making their arrangements, when it was *ex hypothesi* quite impossible to foresee the circumstances in which such further developments might take place, and for which new arrangements would have to be made.

That is our explanation, and I submit that it is a perfectly logical one, for the attitude adopted by the authors of the mandates system—i.e., assuming, of course, a contemplation of inseverability on their part.

On this basis too, Mr. President, there could be no suggestion—as was suggested by the Applicants—that there must be accountability as long as rights or powers over the territory are asserted, because, Mr. President, on this premise there would be no mandate. As from the dissolution of the League the slate would be clean: there would be no assumption that if anybody exercised powers over the territory, those powers must be exercised subject to an obligation of accountability, because one would have to consider *de novo* the question of any title, or right, or powers of administration in respect of such territory; there would be no mandate. It is common cause between the Parties that there would be no legal obligation to submit the territory to trusteeship. Therefore we have an indefinite situation, in which it is not possible for anybody to say that a legal obligation to submit to international supervision exists.

The whole matter would have to be considered *de novo* to see who had any rights, or powers, or title, in respect of the territory under these circumstances. The answer would have to be found outside the mandates system and also outside of the trusteeship system; and, therefore, there could be no inference of international accountability from the mere fact that any State continued to administer the territory.

That consequence would also follow, Mr. President, from the Applicants' premise, if I may refer back to that for a moment, as to the meaning to be assigned to the concept of international accountability, namely that the obligation of accountability would survive as part of the mandate institution on dissolution of the League, but that it would, as I have said, become a dormant one. The only question that would, then, arise, would be whether, on the basis of that dormant obligation, the Respondent has taken a further step and has agreed to a substitution of supervisory organs.

I dealt before with the question whether, on that premise, the mere fact of the continued administration of the territory can be said to be proof of such a consent on the Respondent's part, and I pointed out why, in legal principle, the answer could never be in the affirmative, if one had regard to all the relevant facts bearing on the question of consent or lack of consent.

Mr. President, I may conclude the portion of the argument with which I was dealing by stating the effect of it, briefly, as follows.

The Applicants have repeatedly attempted in their Reply, and now also in their oral presentation to the Court, to avail themselves of the fact that the Respondent itself contends that the obligation of international accountability, as provided for in Article 6 of the Mandate, was to be seen as an essential part of the mandate institution. The Applicants' contention, in effect, amounts to this, that given that premise then the ultimate conclusion must not be that the Mandate has lapsed but that the Mandate exists with international accountability to the United Nations.

I have demonstrated, Mr. President, with submission, that that conclusion can in no way follow. It cannot follow either from the Applicants' way of interpreting this obligation of international accountability, or from the Respondent's way of interpreting that obligation.

On the Applicants' basis of interpreting the obligation, the result is that the Mandate remained in existence at the dissolution of the League, with an obligation of international accountability but one that had become dormant and would remain dormant in the absence of a substitution of supervisory organs. That substitution of supervisory organs,

the Applicants themselves admit, could only have taken place on the basis of a process which included the Respondent's consent. Consent is a question of fact; it can only be established by the ordinary processes of establishing any factual proposition. If we take all relevant evidence into consideration, therefore, it is quite evident that consent was never, in fact, given. What is common cause here, and what is clear, is that there is no legal principle whereby the United Nations could, on the basis of the Applicants' premise, have been substituted for the League of Nations as organ by any principle other than consent. Consent is the essential proposition to be established in this regard and it has not been established. That is the consequence which follows from the Applicants' way of looking at this obligation of international accountability.

If we look at it on the basis of Respondent's contention that it was an obligation referring to specific supervisory organs only, the only conclusion that would follow from a premise of essentiality would be that upon lapse of the supervisory organs, the whole obligation lapsed and that consequently, premising essentiality, the whole mandate institution lapsed.

In neither of these events, i.e., as postulated either by the Applicants' argument, or in our argument, could the mere fact of administration of the Territory by the Respondent after those events, therefore, lead to a conclusion that there has been a substitution of the United Nations for the League of Nations as a supervisory organ. The fact of administration, by itself, is neutral in both those events. It implies no question of—it implies no consent to—a substitution of supervisory organs.

Now, Mr. President, the only question which remains, in regard to our approach to the matter, i.e., that the obligation of accountability itself lapsed and that, therefore, the whole mandate institution lapsed, is the extent to which the compromissory clause could affect this line of argument.

The question arises for this reason. The Court will recall that in the minority opinions of Judges Read and McNair in 1950 there was a suggestion that judicial supervision under Article 7, paragraph 2, of the Mandate could be regarded as fulfilling the same function in the contemplation of the authors of the mandates system as would be fulfilled by administrative supervision.

The Mandate would, therefore, not lose its contemplated effectiveness if this obligation of submitting to judicial supervision were to remain, even in the absence of administrative supervision. The question, Mr. President, is whether that line of argument could affect the conclusion for which we contend that, namely on the lapse of Article 6, the whole mandate institution lapsed.

Our submissions in that regard, Mr. President, are dealt with in the Counter-Memorial, II—first at page 172 and then at pages 175-256.

Firstly, in the first passage to which I refer, we pointed out, Mr. President, that the majority judgment and opinions in 1962 assigned to the Court a very limited role in the exercise of its function of judicial protection under Article 7, paragraph 2, of the Mandate. Having regard to that limited role, the Court could never, in the contemplation of the authors of the mandates system, have been regarded as a satisfactory substitute for the Council of the League and the Permanent Mandates Commission. That line of reasoning we set out in the Counter-Memorial and the Applicants have in no way attempted to meet it. I merely refer the

Court to that for the moment—I do not want to expand upon it at this stage.

In the alternative we submitted that Article 7, paragraph 2, possessed a more limited scope than that held by the Court, that it did not involve a concept of judicial supervision at all. We further contended in any event, that Article 7, paragraph 2, lapsed on dissolution of the League. These submissions were fully set out in the Counter-Memorial, **II**, at the pages I have given—175-256.

The submissions, of course, Mr. President, related to questions which were fully debated before the Court in 1962, which were considered by the Court in 1962 for the purposes of the Preliminary Objections, and which were pronounced upon in the Judgment of the Court and in the opinions of various judges.

We will, therefore, Mr. President, not re-argue these issues now. We merely wish to refer the Court to our treatment of them in the Counter-Memorial, and to the answers which we gave in the Rejoinder to points raised in that regard in the Reply.

The reference to the Rejoinder is **V**, pages 85-99. For the reasons which we set out there, Mr. President, we submitted that Article 7, paragraph 2, was intended only for adjudication of disputes regarding matters in which League Members possessed legal rights or interests, and that no such rights or interests existed in respect of matters affecting only the inhabitants of the Territory. We submitted there, further, that the Article itself lapsed on the dissolution of the League, and that, for these reasons, Article 7, paragraph 2, could play no part in resolving the question whether, on the lapse of Article 6, the whole mandate institution lapsed. I want to emphasize, Mr. President, that it is in that context, and because of its relevance in that particular sense, that these questions have been raised and have been discussed at all.

The scope of Article 7, paragraph 2—that is its scope as opposed to the question whether it is still in existence—is also relevant to the question which arises in regard to justiciability of Article 2, paragraph 2, of the Mandate. Consequently, quite apart from the relevance which those questions had to the issue of the Court's jurisdiction, they are also relevant, I submit, in relation to the validity of these various contentions —these various submissions—which are advanced to the Court by the Applicants. Therefore, although we raise them only within the confines of the relevance which I have indicated already, I submit, Mr. President, with the greatest respect and on principle, that that cannot bind any Member of the Court in so far as the relevance is concerned which that Member of the Court might wish to assign to these questions, or might consider these questions to have to the issues of merit before the Court.

This is so, especially, in regard to the question of the scope of Article 7, paragraph 2—which covers, in our submission, only questions of disputes regarding matters in which League Members had legal rights or interests of their own, and not matters of the kind which have been brought before the Court in these proceedings. If a Member of the Court should be of the opinion that that contention of the Respondent, is a sound one, that may well lead that Member of the Court to decide that on that basis, I ought not to give any consideration to any of the other questions raised in this case, because they must all be regarded as inadmissible for that reason, and for that reason alone. The mere fact, I submit with respect, that the Court has, on that question, come to a decision, for purposes of

the Preliminary Objections alone, by a very narrow majority—if I may refer to it, with respect—of eight to seven, surely cannot, in principle, bind any judge as to the significance which he should attach to that question in regard to the admissibility of the claims now before the Court, particularly in view of the fact that the Court is now differently constituted, that it was divided almost on a half-and-half basis on that very question, and that the question is one that goes to the very root of the admissibility of all the claims in the case. I merely raise that as a matter which, I submit, deserves the very serious consideration of the Court. I am not now going to deal in any detail with that question. The question of the scope of Article 7, paragraph 2, will be argued as part of our case with reference to Article 2, paragraph 2, of the Mandate—the reference to the question of justiciability of that particular obligation. Apart from that, I shall give no further attention to the details of those questions, but shall refer the Court, with respect, to our treatment of them in the pleadings.

Mr. President, I am now in a position to summarize the various possible conclusions which may be reached by the Court, on the basis of the conflicting contentions of the Parties in regard to the Applicants' submissions under consideration—their Submissions 1, 2, 7 and 8; in other words, the questions pertaining to the lapse or existence of the Mandate, and the lapse or existence of the obligation of accountability.

The first possibility is that the Court may find that Respondent was subject to an abstract obligation of international accountability, as contended for by the Applicants, and that provision was made in 1945-1946 for a substitution of supervisory organs. If the Court decides to that effect, then, of course, that means acceding to the Applicants' contentions, and it would mean that the Applicants are entitled to a declaration as asked for by them in all four of the submissions I have mentioned.

The second possibility would be a finding that Respondent was subject to an abstract obligation of international accountability but that no provision was made in 1945-1946, or thereafter, for a substitution of supervisory organs. The result would then be a continuation of the Mandate, with an obligation of international accountability in a dormant or inoperative form. That would then mean Mr. President, in effect, that the Court would accede to the Applicants' Submission No. 1, relating to continued existence of the Mandate. It would accede, in part, to Submission No. 2, in so far as that submission relates to the existence of an obligation of international accountability in this general form and in this dormant state. For the rest, it would mean a dismissal of Submission No. 2 and Submissions 7 and 8, in so far as they bear upon a specific obligation to report and account, and to send petitions, to the United Nations or its organs.

The third possibility would be that Respondent's obligation of accountability was limited to specific organs, but that there was severability between that obligation and the rest of the mandate institution, and that no provision was made for a substitution of supervisory organs. The effect of that finding, Mr. President, would be a continuation of the Mandate without any obligation of accountability. That would mean, in effect, acceding to the Applicants' Submission No. 1, but rejecting Submissions 2, 7 and 8.

A fourth possibility would be the same as the third one, in other words, that Respondent's obligation of accountability was limited to

specific organs and that no provision was made for substitution, but that there was no severability between the obligation of accountability and the rest of the mandate institution. The result would then, be, that the Mandate would have lapsed. There is, however, further possibility which I want to put to the Court as one under this heading (i.e., the fourth one), which would lead to the same conclusion as the third, and that is, that although the Mandate would normally have lapsed as a result of that situation, a new arrangement was made at the time of the dissolution of the League whereby the mandatories kept alive certain parts of the previous mandate institution, in other words, those parts other than international accountability. That would lead, as I have said, to the same conclusion as in the case of the previous one—it would have the same effect. It would mean acceding to the first of the Applicants' submissions and dismissing the others.

The fifth possibility would be the same as the previous one, save that no legally binding engagements were entered into to divide even part of the mandates as a matter of law, with the result that there would have been a total lapse of the mandate institution, and that would mean a dismissal of *all* the Applicants' submissions under consideration, 1, 2, 7 and 8.

The sixth possibility is that, by reason of considerations arising from the limited scope of Article 7 (2) of the Mandate, or of the lapse of that Article, the conclusion is arrived at that all the claims are inadmissible and the result would again be rejection of all the submissions under consideration and, indeed, of all the Applicants' other submissions.

Our contention is, Mr. President, that there has been a total lapse of the mandate institution, without any revival of any part thereof by way of binding legal engagements and that, consequently, all these submissions are to be dismissed, and we contend for that on the basis I have already indicated and also on the alternative basis relating to the admissibility of the claims for reasons arising from the scope and possible lapse of Article 7 (2) of the Mandate. Alternatively, we contend that if the Mandate exists at all, it exists without any obligation of international accountability, and we, accordingly, ask on the basis of that alternative submission, that only the Applicants' Submission No. 1 be allowed, and that the others—Nos. 2, 7, and 8—be dismissed. We shall later formulate our submissions formally for the Court, but at this stage I am merely indicating the alternative effects of the arguments I have adduced to the Court.

This brings me to the conclusion of this argument, Mr. President, in regard to the Applicants' Submissions 1, 2, 7 and 8, and I proceed to deal with the next phase of the matter, namely the legal questions pertaining to the Applicants' case on Article 2 (2) of the Mandate—in other words, legal questions pertaining to the Applicants' Submissions 3 and 4. Mr. President, the major difference underlying the respective attitudes of the Parties in regard to these legal questions may indeed be found in very elementary first principles, which are so basic that it is with extreme diffidence that I address any argument on this topic to the Court at all, but, Mr. President, there is in this regard, in our very respectful submission, a complete confusion of thought inherent in the manner in which certain contentions of the Applicants are addressed to the Court. We drew attention to this fact in the pleadings, but we still find arguments involving that same confusion of thought being addressed to the Court in

the course of the Oral Proceedings. It is, therefore, necessary for us to go back, very briefly and with as little elaboration as possible, to first principles and to indicate where this basic divergence arises between the Applicants' approach and ours to these questions pertaining to Article 2 (2).

The main difference seems to be one both of concept and of terminology, as regards various processes which are involved in coming to a conclusion whether a breach of an obligation has been established, or not. Mr. President, the conclusion on the question of a breach, or otherwise, of an obligation, would in principle require three elements which would have to be considered before the conclusion could be arrived at, and I state them in a certain order. Of course, the order of consideration in each particular case need not necessarily be the same. The first element is a determination of what the law is; in other words, what is the content of the obligation? Secondly, a determination is necessary of what the relevant facts are; in other words, a determination of the facts or the transactions to which the law is to be applied. Thirdly, an application of the law to the facts is required; in other words, a conclusion as to whether the facts, as determined by the Court, constitute a compliance with, or violation of, the legal obligation, as determined by the Court. Those are the three steps in the reasoning and it may be that in the case of a particular problem arising in a particular case, one or more of these steps may be so obvious, or the answer to a particular step may be such an obvious one, that it requires very little attention. It may be that in some cases there is no dispute at all about the facts, or about the significance to be attached to the facts—the dispute may centre entirely on the question of the obligation, as to its existence or its meaning, or its content. In other cases, the obligation may appear very clearly from a document which is so plain as virtually to require no interpretation at all to ascertain its meaning, so that there can, on the face of it, be no dispute at all as to what the obligation means and what its content involves. The problems may, in such cases, arise from the facts, from a proper evaluation of the facts to which the obligation, as so determined, is to be applied. But, Mr. President, in principle, no conclusion can be reached without going through all three of these processes.

The first step, the determination of what the content of the obligation is, may involve a number of different techniques, depending upon the suggested origin or the source of the obligation, or alleged obligation. It may be, Mr. President, that the suggestion is that the obligation is to be found in general principles of law, and in that event, if there is any dispute about it, it may be necessary to conduct some research into the sources of the law in order to see what those general principles are. It may be that the allegation is that the obligation is to be found in an alleged oral agreement, or an alleged agreement entered into by conduct, in which event a factual enquiry may be necessary in the case of dispute —an enquiry whether there was in fact, such an oral agreement, or as to what it involved, or, in the case of an alleged agreement by conduct, an investigation into all the relevant aspects of the matter in order to see whether an implication of an agreement by conduct, of a tacit agreement in the circumstances, is justified as a necessary inference.

The allegation may be that the obligation is to be found in a document, in which case it is necessary to go through the ordinary processes of interpretation of that document, whether it be a will, a contract, a

statute, or a treaty. That is the relevant technique to be applied in that particular instance.

In the case of the second step, Mr. President, that is, to ascertain the relevant facts, different methods, techniques, or approaches may be applied, in order to solve disputes or differences between the parties in that regard. The facts may be admitted, or they may be disputed, but if they are disputed various systems of law and of practice employ various methods of dealing with such a situation, and sometimes those methods involve oral evidence, they sometimes involve cross-examination and sometimes do not; they may involve an exchange of affidavits; very often to a varying extent, they involve the application of judicial knowledge, inspections *in loco*, the taking of evidence on commission for the benefit of the tribunal which is ultimately to decide the question, inferences from circumstantial evidence, and so forth. All those are various techniques which may have to be employed in this second phase of an enquiry, namely to ascertain what exactly the facts are and how they are to be evaluated.

The final step, Mr. President, in ascertaining whether there has been a breach of the obligation, lies in the determination whether the facts, as ascertained by the Court, show compliance with the obligation, or a violation thereof. Normally, of course, this should eventually present no difficulty; after the ascertainment of the law and the relevant facts to which the law is to be applied, the problems ought to have been sorted out, and it should, therefore, be clear what bearing the law has on the facts. But, nevertheless, this is a distinct step in logic and a process distinct from the two former, and it seems, Mr. President, that this is where our roads diverge—our roads meaning the roads of the Parties to this case. This is the point at which it seems that the Applicants' contentions obtain the major confusion of thought, to which I have referred and which I shall endeavour to demonstrate to the Court.

Mr. President, if all this is applied to the alleged violation of Article 2 (2) of the Mandate, the only question that arises at this stage of the proceedings is a legal one, namely what is the extent of the Respondent's obligations. It will only be in the next stage of the proceedings that the Parties will proceed to the second stage, that is, a determination of what the relevant facts are. The argument at this stage is, specifically and by design, limited to the first part only; of course one refers to the second part to be dealt with later, in order to demonstrate what the important issues of law are that arise and what the significance is of what the legal points we are arguing, because of the bearing they may have on the factual disputes that are coming before the Court in the next phase. At this stage, the Court is concerned with a determination of what the law is, and we are concerned with contentions only in that regard.

And the next stage, Mr. President, namely of ascertaining the relevant facts, will, as I have said, entail a much wider inquiry than we indulge in at the present stage. It will require an evaluation of admissions made on the pleadings; it will require evaluation of oral evidence, of the facts disclosed by an inspection, if an inspection should be held; it will involve the application of judicial knowledge to the extent that may be permissible; it will involve the drawing of inferences of fact from the direct or the primary sources; and it will only be in the final stage of its reasoning that the Court will decide whether the facts as determined by it fall within or without the ambit of Respondent's obligations, as also determined by the Court.

So, Mr. President, I revert to the fact that we are at present concerned only with the first step leading to that ultimate conclusion, namely the ascertainment of the nature and extent of the obligation; and inasmuch as that obligation is admittedly embodied in a document or documents in the mandate instrument read in the light of the Covenant of the League, its nature and extent fall to be determined by a process of interpretation of those documents. The rules of interpretation in international law, as the Court would know, have been evolved with reference to treaty interpretation, but the same principles, as we have pointed out before, would apply whether one sees the mandate instruments as treaties, or as the result of treaties entered into. On both bases there would be a necessary background of consent to the relevant instruments, and the principles of interpretation would be the same. We indicated that in our Counter-Memorial, **II**, pages 107-108, and dealt specifically with that particular point.

Mr. President, all this may sound very elementary, but it is necessary to emphasize it because of the divergence in the arguments. The basic principles of interpretation which are to be applied, and which appear to be persistently overlooked or ignored, or misunderstood, or misapplied, judging by the manner in which the Applicants' contentions are put before the Court, are: firstly, that a treaty obligation derives its legal force from the consent of the party bound thereby. The proposition is elementary. We gave references to some authorities, so far as they may be necessary, in the Oral Proceedings on the Preliminary Objections, **VII**, pages 37-40.

The second basic principle is, Mr. President, that interpretation is the process of determining what it was that the Parties consented to or, in other words, the meaning or the content of their contract. One may also add the measure or extent of the obligation agreed to, or, if one sees it from the opposite angle, the limits attached to the obligation. That is what the process of interpretation is aimed at—determining what it was in that sense that the Parties consented to.

Now, Mr. President,—and this brings us nearer to our dispute—a necessary corollary of these fundamental concepts is that the treaty must always be interpreted to bear the meaning, or to possess the content, which it had as at the stage of its conclusion. It follows as a corollary of the basic concepts, namely that it is by the consent of the Parties that the obligation is brought into force and that it is by way of interpretation of that consent that one ascertains what the meaning, the content, and the scope of the obligation are. Obviously, the consent is determined as at a particular stage; for the consent was arrived at, at a particular stage—it is manifested as at a particular stage—and the factual inquiry is concerned with what this state of mind of the party or parties concerned was at that particular time. That is the only way in which one can ascertain what the obligation and its scope were. We refer in the Rejoinder, **V**, at pages 121-123, to this principle, referred to as the principle of contemporaneity. The principle has been defined by the honourable Member of this Court, Sir Gerald Fitzmaurice, as follows. (We quote a passage which is given in the Rejoinder, **V**, at p. 121.)

> "The terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded."

I read from a further quotation, where the same learned author pointed out that a failure to apply this principle "would often amount to importing into them (i.e., treaties) provisions they never really contained, and imposing on the parties obligations they never actually assumed". We find that quoted at the same page of the Rejoinder.

Mr. President, in addition to the authorities which we have referred to and which are on record, I may also refer to this passage in Schwarzenberger, *International Law*, third edition, 1957, page 490 (Vol. I):

> ". . . the decisive moment, in relation to which the interpretative function has to be exercised, is the time of the conclusion of the treaty. For purposes of interpretation, the attitudes subsequently adopted by parties to a treaty are relevant only in so far as they may throw light on the position at the time the treaty was concluded."

I skip and read further:

> ". . . the effect of judicial treaty interpretation is retroactive. When an international court or tribunal has given its interpretation of a treaty, 'the terms of the convention must be held to have always borne the meaning placed upon them by this interpretation'."

These last words, Mr. President, were a quotation by the author from an Opinion of the Permanent Court regarding the *Access to the German Minority Schools in Upper Silesia* (1931), *Series A/B 40*, at page 19.

The learned author, Schwarzenberger, then continues, Mr. President, still at page 490, to give as a reason for this rule, amongst others, the following: "As judicial interpretation relates to the date of the conclusion of the treaty, the court or tribunal has merely clarified a situation which, hypothetically, could have been established at that date." In other words, Mr. President, the position which arises is this: that the answer to be given by a court, whenever the question of interpretation arises, however long that may be after the treaty has been entered into, must be the same answer as would have been given if the question had arisen immediately after the conclusion of the treaty. That is essential to this concept of interpretation of a treaty. Different considerations might apply when we come to later stages of an inquiry, namely questions of application; then different considerations might arise according to the time or times at which one looks, but when it comes to the interpretation of assigning a meaning and a content to an obligation, the only point of time which is relevant, is that at which the treaty was entered into—when the consent was given. In our Rejoinder we showed that the principle of contemporaneity forms part of a wider doctrine which is called the principle of inter-temporal law, and that the doctrine is one which is regularly applied by the Court.

Now, Mr. President, the Applicants' difficulty with these incontestable propositions is caused, it seems to us, by the formulation of propositions which do not accept or do not acknowledge that the process of interpretation provides only *one* of the premises—the content of the obligation—from which the Court draws its conclusion. The second premise is found in the facts as determined by the Court, and then follows the conclusion, bringing into conjunction the two premises—the process, then, of applying the law to the facts; and this, it appears with respect, is what the Applicants' contentions either overlook, or prefer to ignore. We find in the verbatim record at page 260, *supra*, a statement in which the Appli-

cants refer to a contention by the Respondent. They render their contention as follows:

> "... that the Mandate must be interpreted *in accordance with* Respondent's intentions of 1920, and that a contemporary norm is, in the absence of new agreement by Respondent, not capable of what it calls 'subsequent insertion' into the terms of Article 2, paragraph 2".

The Applicants proceed to say that this contention "Respondent seeks to support... by reference to the principle of contemporaneity and by a somewhat obscure distinction between the interpretation and the application of documents".

Mr. President, it does seem to us rather surprising that any lawyer, and particularly a lawyer appearing before this eminent Court, should find a distinction between interpretation and application of documents somewhat obscure. It seems to us, with respect, Mr. President, that that distinction lies at the basis of the whole legal process in cases where rights and obligations are embodied in documents, and if lawyers who appear before a court to advance contesting propositions regarding the result of the interpretative process and the application of the process to the facts, if lawyers who appear in opposing roles in cases of this kind cannot be agreed about these fundamentals—as to what the whole enquiry is all about, then it would seem, with respect, that they do not assist the court—that their efforts rather tend in the opposite direction.

The distinction, Mr. President, is one which is reflected in the very compromissory clause in the instrument which is now before the Court, the compromissory clause which speaks of disputes relating to the interpretation or the application of the provisions of the Mandate. This point was emphasized by Quincy Wright at page 158 of his work, *Mandates Under the League of Nations*, with reference to the *Mavromatis* case. He says there: "... it would appear that a mandatory can be brought before the Court... on questions involving not only the *interpretation* but the *application* of a mandate provision" (italics added). The learned author has no difficulty in appreciating the significance of the distinction as applied to the *Mavromatis* case.

Mr. President, in this confusion between the elementary concepts of interpretation and application of written documents, lies, in our submission, the key to the confusion apparent in the Applicants' argument regarding Article 2 (2) of the Mandate. We see it particularly in a contention advanced in the Reply, **IV**, at page 515, and which was repeated in the present Oral Proceedings on 18 March. The contention was that there exists a—

> "judicially perceived necessity to interpret broadly-formulated, constitutional-type obligations, on the basis of current standards, rather than on the basis of the presumed 'intentions of the parties' at the time the obligations were conferred and accepted". (P. 118, *supra*.)

I refer, Mr. President, to the concept of a "necessity to interpret broadly-formulated, constitutional-type obligations, on the basis of current standards", which is then contrasted with an interpretation "on the basis of the presumed 'intentions of the parties' at the time the obligations were conferred and accepted".

Mr. President, our submission is that the basic principle is clear: whether a document is of a broadly formulated constitutional type, or

whether it is of a narrowly formulated, unconstitutional type, its interpretation must surely always be based on the intentions of the parties at the time when the obligations were conferred and accepted, intentions which are to be ascertained by the court in good faith, as best it can, by the means at its disposal. It is significant, Mr. President, that this very point was stressed in the Privy Council in 1932 by Lord Hankey, in a case which arose from problems in the Canadian Constitution—the British-North America Act of 1867. The case was *Re Regulation and Control of Aeronautics in Canada*, 1932, AC/54, and I read from page 70:

> "The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions, [for instance] of Sections 91 and 92 should impose a new and different contract upon the federating bodies."

The statement is very significant, Mr. President, in the first place, because it applies exactly to a document of the nature described by the Applicants in their phrase "broadly-formulated, constitutional-type" of document. It is significant further because, as Members of the Court might know, Articles 91 and 92 of the Canadian Constitution provided particular problems of interpretation to courts concerned with questions which arose in regard to them. Those are the two sections of the Constitution setting out the powers of the federal Parliament, on the one hand, and of the State or Provincial Parliament of Canada on the other; and instead of adopting the system of assigning to, say, the federal Parliament powers *(a)*, *(b)*, *(c)* and *(d)* and to the provincial parliaments powers on all matters not assigned to the federal Parliament, or vice versa, the sections embodied a system whereby the powers to be exercised by the one and the powers to be exercised by the other were in part described positively; and the problems which arose, originated from the fact that there was some overlapping in this description of powers—the description of some powers assigned to the provincial parliaments were, on analysis, found to overlap on the description of some powers assigned to the federal Parliament—and this was a very difficult problem for the courts to solve in particular cases—to decide whether particular legislation under those circumstances could fairly be said to fall under the one or the other, where there was in the legislation also an encroachment upon this overlapping field. The courts, as Members of this Court might know, evolved in that regard the so-called test of the pith and substance of the particular legislative measure to decide whether the pith and substance, as opposed to incidental provisions, fell within the relevant article or not. It was a difficult test to apply to various cases that arose, the situations in some cases tending to become even artificial, and it was under those circumstances that this warning was issued by Lord Hankey, namely that for all the need of having judicial construction of the provisions of sections 91 and 92 of that Constitution, the fact should not be lost sight of that the task of the court was to apply the original contract upon which the Federation was founded, and that it was not legitimate by any such process of judicial construction to impose a new and a different contract upon the federating bodies.

So, Mr. President, the distinction between documents of the type re-

ferred to by Applicants and more narrowly formulated documents directed at more limited purposes does not lie in the methods used in interpretation. The difference between the types of documents referred to by the Applicants in their argument, is found in the results of the interpretation, or in the meaning which the document is found to have and always to have had in the contemplation of its authors. It is not a difference in type—it is a difference in the meaning of certain provisions which are customarily found in such documents. The difference is this: that the broadly phrased, constitutional type of documents, if I may use the Applicants' phrase, are frequently so worded, and intentionally so worded, as to be capable of application to a broad class of topics, the exact future manifestation and details of which may have been foreseen, or may have been unforeseen, or may have been unforeseeable. That is very often the exact intent and the purpose of the broadly formulated, constitutional type of documents—to have a formulation which can apply according to the intent of its authors to later situations as they may evolve, whether they are foreseen or not at the time of the execution of the documents. It was this type of formulation which Judge van Wyk had in mind in the passage to which the Applicants referred in the verbatim record at page 185, *supra*, and with which we dealt in the verbatim record at pages 329-331, *supra*. This same approach, with respect, Mr. President, appears to have been inherent in the statement by the honourable President in his separate opinion in the case of the *Expenses of the United Nations*, which we quote in our Rejoinder, V, at page 134. The quoted passage is significant, and I wish to read it to the Court. It starts as follows:

> "A general rule is that words used in a treaty should be read as having the meaning they bore therein when it came into existence. But this meaning must be consistent with the purposes sought to be achieved. Where, as in the case of the Charter, the purposes are directed to saving succeeding generations in an indefinite future from the scourge of war, to advancing the welfare and dignity of man, and establishing and maintaining peace under international justice for all time, the general rule above stated does not mean that the words in the Charter can only comprehend such situations and contingencies and manifestations of subject-matter as were within the minds of the framers of the Charter ... No comparable human instrument in 1945 or today could provide against all the contingencies that the future should hold. All that the framers of the Charter reasonably could do was to set forth the purposes the organization set up should seek to achieve, establish the organs to accomplish these purposes and confer upon these organs powers in general terms. Yet these general terms, unfettered by man's incapacity to foretell the future, may be sufficient to meet the thrusts of a changing world.
>
> *The nature of the authority granted by the Charter to each of its organs does not change with time. The ambit or scope of the authority conferred may nonetheless comprehend ever changing circumstances and conditions and embrace, as history unfolds itself, new problems and situations which were not and could not have been envisaged when the Charter came into being.*" (Italics added.)

May I break there for a moment, Mr. President? I emphasize that the nature of the authority granted by the Charter does not change with

time, but the ambit and scope of the authority may be such that it may nonetheless comprehend ever changing circumstances and conditions. I proceed with the quotation:

> "The Charter must accordingly be interpreted, whilst in no way deforming or dislocating its language, so that the authority conferred upon the Organization and its various organs may attach itself to new and unanticipated situations and events... *The question whether an unforeseen, or extraordinary, or abnormal development or situation, or matter relating thereto, falls within the authority accorded to any of the organs of the Organization finds its answer in discharging the essential task of all interpretation—ascertaining the meaning of the relevant Charter provision in its context.* The meaning of the text will be illuminated by the stated purposes to achieve which the terms of the Charter were drafted." (Italics added.)

Mr. President, with the greatest respect, this quotation sets forth with such clarity the principles to be applied and the distinctions to be drawn in this regard that it is hardly necessary to refer to them any further. The capacity of the instrument to "comprehend ever changing circumstances and conditions and embrace, as history unfolds itself, new problems ... which were not and could not have been envisaged" by its authors—that, Mr. President, does not arise by reason of changing interpretations of the instrument—that is made abundantly clear. It arises by fresh applications of the terms of the instrument to new situations. It arises from the very fact, Mr. President, that the provisions of the instrument are phrased in an appropriately broad manner, always bearing the same meaning but capable of applying and intended by its authors to apply to new situations and problems that might arise, whether they were foreseen or unforeseen by the authors at the time of executing the instrument.

Both in the Rejoinder, Mr. President, and in these Oral Proceedings we illustrated this point, namely the distinction between interpretation and application, by postulating a treaty which refers to "British possessions". The meaning and interpretation of the phrase would in those cases not change, whereas its application, in practice, at various points of time, would produce widely different results.

That brings us, Mr. President, then, to the essence of the Applicants' argument in this regard: the reliance which they place upon the decision of the United States Supreme Court in the case of *Brown* v. *The Board of Education*. In our submission the fallacy of the Applicants' argument is perhaps best demonstrated with reference to the very reasoning of the Court in that case. This was the only authority which the Applicants quoted for this purpose in the Reply. The Applicants quoted a number of authorities, but this one was the only one which seemed to be even superficially relevant to the contention of the Applicants, and it is indeed the only authority at all which the Applicants have quoted in these Oral Proceedings in support of their contention of interpreting documents on the basis of present standards. They promoted the reference to this case to the very first day of the proceedings, as we find in the verbatim record at page 118, *supra*.

I may first just point out that it was also contended on that day (the record at p. 119), that Respondent's commentary on the *Brown* case does not advert to this aspect of its purported application. Mr. President,

if the Rejoinder had been carefully read, it would have surely revealed to the Applicants that we did indeed advert to this aspect and we did demonstrate in the Rejoinder that this case does not bear out the Applicants' contention. I refer the Court to the Rejoinder, **V**, at page 136, and I shall restate briefly the basis of the case and its background as we see it and as we dealt with it in the Rejoinder.

It starts on this basis, Mr. President. The law to be determined in that particular case and to be applied to the facts, was to be found in the 14th Amendment to the United States Constitution, which was introduced in 1868. That amendment, as the Court would know, was aimed at securing for all persons the "equal protection of the laws"—that was the dominant phrase. It was aimed at preventing persons being deprived of the equal protection of the laws.

In 1896 the American Supreme Court held in the case of *Plessy* v. *Fergusson* that it was not in conflict with the 14th Amendment for a state to maintain separate, but equal, educational facilities for different races. This was a case, therefore, involving application of a particular law to the facts and of arriving at the conclusion in that regard.

In 1954 in the *Brown* case the Supreme Court came to a different and opposite conclusion. Its reasoning in that regard, so far as this present issue is concerned, appears from certain passages, which are quoted by the Applicants in the Reply, **IV**, at pages 487 and 514. The first one reads as follows:

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Fergusson* was written. We must consider public education *in the light of its full development* and its *present place* in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." (**IV**, p. 514.)

The Court further, Mr. President, made a finding of fact that separation of negro children "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone". (*Ibid*, p. 487.)

The Court said, in that regard, the following:

> "... whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Fergusson*, this finding is amply supported by modern authority". *(Ibid.)*

Now, Mr. President, can it, on the basis of this very plain explanation of the reasoning of the Court, be said that the Court in any way altered the interpretation of the 14th Amendment of the Constitution—that in 1954 it gave a different interpretation to the amendment—assigned to it a different meaning and a content from that which had been assigned to it in 1896? Clearly, Mr. President, the answer is in the negative. There is nothing in the passages quoted that even remotely suggests that—nothing which indicates that the Court's view as to the meaning of the provision had changed. What is it then that had changed, as appears from these passages, Mr. President? What had changed was public education and "its ... place in American life throughout the nation". What had also changed in that regard was the extent of psychological knowledge. These changes related to—

"... the subject-matter to which the constitutional provision in question was to be *applied*, and not the content or interpretation of the constitutional provision itself ...". (V, p. 137.)

To put the matter concretely, Mr. President, in 1954 the facts concerning public education, as found by the Court in that year, were different from those in 1896.

As regards the individuals affected, the Court had the benefit of expert evidence regarding psychological knowledge, which was not available in 1896.

Consequently, Mr. President, application of the same principle—the same constitutional provision being given the same meaning as before—to fundamentally different facts, led to a different conclusion from that of 1896. What had changed, therefore, was the facts as appraised by the Court. The Court appraised the facts as they were found in 1954 to be different from the facts as they had been appraised and found in 1896 and it was because of that difference in the factual situation that the ultimate result was a different one from that arrived at before.

We submit, therefore, Mr. President, that the content of the Respondent's obligation under Article 2, paragraph 2, of the Mandate and the basis upon which it can be adjudicated falls to be determined by these same ordinary rules of interpretation.

[Public hearing of 14 April 1965]

Mr. President, I commenced yesterday with our argument on the question of the legal issues pertaining to Article 2, paragraph 2, of the Mandate, and dealt particularly with the Applicants' Submissions numbers three and four, based on an alleged violation of that Article. For the reasons which I gave in the introductory survey of fundamental principles to be applied in this regard, we submit, Mr. President, that ordinary principles are to be applied in interpreting that Article. We submit that the purpose of such interpretation is to ascertain the meaning, the content and the scope of the obligation, as was intended by its authors in 1920. We submit that only then can the next stages in the enquiry be undertaken, namely determination of the relevant facts and the application of the obligation, as interpreted in the light of the facts determined. We submit that it is only in these later stages of the enquiry that a question may arise as to the application of modern concepts and standards. It is only then that those concepts may become relevant in a manner which we shall indicate later.

As far as this first step of the enquiry is concerned, i.e., interpretation, there is, in our submission, clearly no substance at all in the Applicants' contention that there is now to be assigned to the obligation a different meaning, a different scope and a different content from that which was intended in 1920, or from that which would have been assigned to it had this question come before a court in 1920.

On the basis of true interpretation of the Article, Mr. President, we contend for a two-fold result, as far as is relevant to present purposes. We state it in the alternative, namely that the authors of the Mandate did not intend the Court to exercise jurisdiction at all in respect of alleged breaches of Article 2, paragraph 2, of the Mandate. Alternatively, we contend that the basis of adjudication was intended to be a limited one only, limited, that is, to principles analagous to those on which municipal

courts exercise a power of review, as distinct from a power of appeal, in the case of actions of other tribunals, bodies or persons upon whom discretionary powers have been conferred.

We shall deal with these two contentions in turn and, with your leave Mr. President, my learned friend, Mr. Grosskopf, will present our argument of the first of these two contentions.

7. ARGUMENT OF MR. GROSSKOPF

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA AT THE PUBLIC HEARING OF 14 APRIL 1965

Mr. President and honourable Members of the Court, as my learned senior indicated, the matter with which I shall deal is the first question, i.e., whether the Court was intended to have jurisdiction at all to adjudicate on alleged violations of Article 2 of the Mandate. This question turns on an ascertainment of the intentions of the authors of the Mandate, read in the light of all the surrounding circumstances. For the reasons set out in the Counter-Memorial, **II**, page 384, and passages there quoted, and the Rejoinder, **V**, pages 143-157, Respondent submitted that no such intention existed. These reasons, Mr. President, may be briefly summarized as follows.

Firstly, the provisions of Article 2 are wide and general, and the determination as to whether they have been complied with would involve an enquiry into matters of a political and technical nature. Although we concede, Mr. President, that legal questions are often intertwined with political and technical issues, it would be a most unusual function, in our submission, for the Court to entertain matters of the purely political nature which would arise from the adjudication of alleged violations of Article 2—that is, matters concerning the best methods of administering a territory which, in its nature, is a function of a political nature, rather than a strictly legal one. Consequently, in our submission, Mr. President, if the authors of the Mandate intended the Court to perform such a function, one would have expected them to use explicit language in order to achieve such a result.

However, not only was there no explicit language, but one finds not a single reference in the discussions preceding the establishment of the League and the Mandate—not a single reference at all, Mr. President—to indicate that such a function was contemplated for the Court.

On the other hand, one does find that express provision was made for the creation of supervisory organs, to wit, the Permanent Mandates Commission and the Council of the League, which combined both political and technical qualifications and were, therefore, in our submission, much more appropriate organs for this purpose.

We find, also in our submission, Mr. President, that the nature and composition of these administrative organs were matters of concern to the authors of the mandates system, and these questions were settled only after considerable debate.

Consequently, by reason of the above circumstances, it is, in our submission, most unlikely that the authors of the mandates system would have intended the Court also to perform a function of ensuring compliance by the Mandatory with its obligations under Article 2 of the Mandate.

That, Mr. President, in brief, was the argument we presented in our pleadings.

Now, in the Rejoinder, **V**, pages 19-22, and pages 143-146, we pointed out that Applicants failed, in the Reply, to answer this argument at all. At no stage in their Reply did they advert to this simple issue, namely what did the authors of the Mandate intend in this regard? Indeed, as we have shown, they went into long discussions to establish propositions which were not contested by us, such as that Article 2 created rights

and obligations of a legal nature, and, also, that courts are sometimes required to pass judgment on issues involving technical aspects, and so forth. Now, we never contested that, Mr. President, and the real point we made was, in our submission, never met.

In these Oral Proceedings the Applicants commenced by denying that they had in the Reply either misinterpreted or misrepresented Respondent's submission and, after quoting from the Rejoinder and the Counter-Memorial, they stated, in the verbatim record at page 234, *supra*, that:

> "... careful reappraisal by the Applicants of the foregoing quoted passages does not, it must be confessed regretfully, yet bring home to the Applicants the 'true nature' of Respondent's contention".

However, Mr. President, during the course of the adjournment the Applicants appear to have been enlightened in this respect because, on the very next morning, right at the outset, Applicants' Agent was able to say, with conviction and reasonable accuracy—and I quote from the verbatim record, page 237, *supra*:

> "Respondent's first alternative contention ... is that, given the generality of formulation and the 'political or technical nature of the obligations envisaged', ... it could not have been the intent of the authors of the Mandate to confer upon the Court the power of judicial review of disputes involving the interpretation or application of the article in question."

This is consequently the first time that Applicants have, in our submission, apparently seen fit to reply to the argument actually propounded by Respondent. In what follows I shall attempt to deal with the various contentions and arguments in turn.

Firstly, Mr. President, the Applicants said that if the Court did not possess jurisdiction to entertain disputes concerning the application or interpretation of Article 2, paragraph 2, it would amount to (and I quote from the verbatim record, at p. 236, *supra*) "stripping the obligation of all qualities which give it a legal character", and that "disputes concerning asserted breaches of that Article ... [would be] 'legal rights', which are not enforceable, for which there is no remedy".

The fallacy in this line of reasoning, Mr. President, with respect, has been repeatedly exposed in our pleadings, and also in these Oral Proceedings: it lies in equating lack of justiciability with lack of remedy, and even with lack of legal effects. In international law, in our submission, Mr. President, there is nothing anomalous in the existence of legal rights which cannot be enforced by any court of law. Indeed, this position is the normal one, provision for compulsory adjudication being the exception. In cases where no provision is made for compulsory adjudication, it does not follow that there is no remedy in international law. The treaty itself, which creates the obligation, may provide a remedy or a means of enforcement other than submission to adjudication. In the present case, it is submitted that the authors of the Mandate intended the enforcement of Article 2, paragraph 2, to be in the hands of the Council and the Permanent Mandates Commission, as an alternative, or rather as a special type of enforcement machinery.

The creation of this form of supervision is, in our submission, a very strong argument in support of Respondent's contention that the authors of the Mandate would not have intended the Court also to see to proper

performance of the obligations under the Article, which, in our respectful submission, is a task for which the Court is not really equipped.

Of course, Mr. President, purely as a matter of international law, an obligation would not be divested of its legal effect even if no remedy at all was specifically provided in the treaty. In such a case, an aggrieved party would be limited to his ordinary remedies in international law, but, since that is not the position here, where, in our submission, methods of enforcements were provided, although not of a judicial nature, that situation does not call for further consideration.

Now, Mr. President, in the course of our discussion of this topic in the Rejoinder we had occasion to refer to certain comments by Sir Hersch Lauterpacht on the possibilities and problems involved in international protection of certain basic human rights, and, in particular, on the role which could be played in that regard by an international court. That was in the Rejoinder, V, pages 154 to 157.

Applicants attempt to distinguish these comments on the grounds that they relate to (and I quote from the verbatim record at p. 237, *supra*) "international judicial review of the internal policies of States, rather than such review of governmental policies carried out under international agreements". That is the distinction which my learned friends make: international judicial review of the internal policies of States as against, on the other hand, such review of governmental policies carried out under international agreements.

But, Mr. President, in our submission, this is a distinction without any difference at all. How can the internal policies of States ever become the subject of international judicial review other than by international agreement? How is it possible to have international judicial review of the internal policies of States if there is no convention to that effect? Whence, for instance, does the European Court of Human Rights derive its jurisdiction? From a convention, Mr. President.

The situation with which Sir Hersch Lauterpacht was dealing was, in our respectful submission, the very one which Applicants say applies to the Mandate, namely "difficulties inherent in international judicial review ... carried out under international agreements" (p. 237, *supra*). And, in the passages quoted, the learned author gave his reasons why States would, in his view, not be prepared to enter into such international agreements. They may be briefly summarized as follows, Mr. President.

Firstly, the point made by the learned author as quoted in the Rejoinder, V, pages 154 to 155: he notes that criticisms of the manner in which the United States Supreme Court performed its function of judicial review show the extreme delicacy and difficulty of this task of review, involving as it does the application of law which is "indefinite and elastic in proportion to the generality of its content" (V, p. 154). The learned author continues by pointing out that within the national group there exist restraints upon the unavoidable power of judges which do not exist, to any comparable extent, in the international sphere. Consequently, the implications of conferring such powers in relation to governmental policies of sovereign and independent States upon a tribunal of foreign judges would, in the learned author's view, be very far-reaching indeed.

The next point made by Sir Hersch Lauterpacht we find in the Rejoinder, V, page 155. There he adverts to another aspect of the criticism which has been voiced concerning the attitude and the functions of the United States Supreme Court. He notes that the fact of the widespread

and emphatic criticism which one finds, even within the United States of America itself, which is the principal country which has adopted judicial review, and that the further fact that such a system of review does not exist at all in many States, in many countries of the world, render it most unlikely that any States would entrust such powers to an international tribunal. In the words of Sir Hersch Lauterpacht himself—"It is a question of the inherent merits of the system of judicial review both in the national and in the international sphere" (V, p. 155).

It is instructive, in our submission, Mr. President, to note some of the examples given by the learned author of States—

> "... which have no judicial review within their borders and in which legal opinion and legal tradition have resisted it vigorously and succesfully ...". *(Ibid.)*

The States which have no judicial review include a number of States which were prominent in the foundation of the League and the mandates system, States such as Belgium, Italy, France and Great Britain. These are all examples quoted by Sir Hersch Lauterpacht in his works.

Now, the third point made by the learned author we find in the Rejoinder, V, at page 156. He notes that a judicial organ is not flexible enough, in his view, for exercising powers of supervising obligations of the sort with which he was dealing, and which are, on Applicants' argument, analogous to those under the Mandate. The pith of this point is that in cases of alleged breaches of human rights provisions the learned author considered that assistance towards conciliation would often offer better prospects of a satisfactory solution than a purely judicial determination on the legality of the action complained of, which latter function was the only proper one for a Court.

Consequently, Sir Hersch considered that it would be preferable to have—

> "... an organ which, although not disregarding the legal aspects of the complaint and although empowered to pronounce on both facts and law and to make a binding recommendation, can avail itself of the more elastic procedure of conciliation and attempts at a compromise ...". (V, p. 156.)

Fourthly, Mr. President, on the same page we quote the learned author as saying—

> "... social and economic rights ... are not such as to lend themselves to enforcement by judicial process ... they seem to be the proper subject matter for ... supervision by a body ... operating through a procedure more elastic and informal than is permissible in the case of a court".

Mr. President, we submit that it is interesting to note how Sir Hersch Lauterpacht, apparently by a process of completely independent reasoning, reached much the same conclusion as was reached, in our submission, by the founders of the League as regards the most appropriate type of supervisory organ for obligations of this type. Thus, one finds that the Permanent Mandates Commission and the Council were, in Respondent's contention, exactly suited to meet the requirements set out by the learned author, being political and technical organs, which directed their attention more to conciliation and co-operation than to purely legal deter-

minations, but which were nevertheless able to express their views as to legal situations and to act on such views.

It seems clear, in our submission, Mr. President, that a court of law would really be, with respect, an inappropriate organ in such a situation, even if it existed merely in addition to the ordinary supervisory processes, since, if the function and the purpose in a particular case were to effect conciliation, the whole scheme might be upset if a Member of the League were suddenly to insist upon a strict legal solution of the problem; the two might very well, in particular cases, be completely inconsistent.

Now, Mr. President, these various points are not dealt with by Applicants at all; they limit themselves, as we have noted, to a distinction—which, we submit, is untenable—between the content of Judge Lauterpacht's comments and the nature of the Mandate. Applicants then proceed to say in the verbatim record at page 238, *supra*—

> "... scholarly authority has found little difficulty with the proposition that the authors of the mandates system contemplated that the Court would exercise powers of judicial enforcement with respect to disputes relating to the interpretation or the application of any or all provisions of the Mandate, including Article 2, paragraph 2, thereof".

The only scholarly authority quoted by Applicants is Quincy Wright, and in none of the passages quoted does he, in our submission, advert to the present problem at all. The closest he comes to it is in a statement regarding a related, though not identical, topic, to the effect that:

> "League Members have rights in the mandated territories not only for the protection of their national interests, and the interests of their nationals, but also for the protection of the interests of the inhabitants of the area." (Professor Quincy Wright, *Mandates Under the League of Nations* (1930), p. 475, quoted in the verbatim record at p. 238, *supra*.)

This statement deals with the issue as to the scope of the compromissory clause, which was the matter raised in the third preliminary objection to jurisdiction. The Court is referred to the Preliminary Objections, **I**, pages 389 to 394, for a full discussion of Wright's view, and of the views of other authors on this point, and the Court is also referred to the Counter-Memorial, **II**, pages 192 to 193, and the 1962 Oral Proceedings, **VII**, pages 223 ff., where this matter was also dealt with.

From these discussions, it will, in our submission, appear, firstly, that Wright himself was not very definite on this point, and that he does not appear to have given the matter much consideration. It most certainly cannot be said, in our submission, that he found little difficulty about solving this question in the way Applicants contend.

Secondly, Mr. President, we submit that the most emphatic and the best recent analysis on this point by scholarly authorities, is that of Professor Feinberg, which was quoted by Judge Winiarski in his dissenting opinion on the Preliminary Objections at page 455, and by us in the Counter-Memorial, **II**, page 193. With the Court's permission, I should like to read two short extracts from that statement. The first is:

> "Like most of the writers who have, in their works, expressed a view on the question, I consider that the judicial settlement clause does not confer on Members of the League of Nations the right uni-

laterally to bring a Mandatory Power before the Court except in cases where they can allege the violation of some right of their own or some injury to the interests of their nationals."

It is significant, we submit, Mr. President, that, later in the course of his address, the same learned author stated:

"It is indeed difficult to imagine that, by the inclusion of the judicial settlement clause in the text of the Mandates, it was intended to give each Member of the League of Nations a power so extensive that it would enable it to set itself up as a censor of the Mandatory's administration.".

However, Mr. President, we do not propose re-arguing, in these Oral Proceedings, the substance of our submissions on the former third preliminary objection, although, with respect, we fully abide by them, as my learned senior indicated yesterday. This was an issue (i.e., the third preliminary objection) on which, as we have noted, the Court was very evenly divided and on which Respondent's submissions are set out fully in the Counter-Memorial, **II**, pages 175-193, to which the Court is respectfully referred. On those pages we also discussed briefly the various opinions and judgments of the Court in this regard.

One important point, however, which we did make in that discussion and which might bear repetition is that, in our submission, it could not have been the intention of the authors of the mandates system to create an anomalous situation in which all Members of the League would be entitled to assail measures or policies which had been approved by, or had even been recommended by, the Permanent Mandates Commission and the Council of the League. This, in our submission, is a very important point bearing on probable intention, Mr. President, and it is a point which the Applicants have never really attempted to answer in these proceedings.

Now, Mr. President, to deal with a further point raised by Applicants: they refer again, in the verbatim record at pages 239-240, *supra*, as in the Reply, to various cases decided under the provisions of the mandates, and, in particular, to three cases—*Murra*'s case, *Altshuler*'s case and *Winter*'s case. In the first two cases the provisions for the Mandate for Palestine were in issue. These provisions are set out in the Rejoinder, **V**, page 148. If I may just read them to the Court:

In *Altshuler*'s case, Article 15 of the Palestine Mandate was applied and this reads as follows: "... no discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language." (V, p. 148.)

In *Murra*'s case, Article 2 of the Palestine Mandate was in issue and that Article prescribed that "... the Mandatory [shall be] responsible for 'safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion' ". *(Ibid.)*

In our submission, Mr. President, both these articles referred to prohibitions on discrimination on the ground of race, religion or language, and both constituted specific provisions prohibiting more or less clearly defined action. Respondent submitted in the Rejoinder that such prohibitions could not be regarded as analogous to the wide provisions of Article 2. Applicants, however, dispute this contention and, in the verbatim record at page 239, *supra*, they suggest that the correct analogy between these provisions and the Mandate would be:

> "Like the latter Article [Article 2, paragraph 2], the provision of the Palestine Mandate in question was humanitarian and protective in purpose, general in formulation, and involved day-to-day administration of the mandated territory, and accordingly a wide degree of discretion on the part of the mandatory."

Now, Mr. President, as regards this, we say, firstly, that the words "humanitarian" and "protective" apply to all, or nearly all the provisions of the South West Africa Mandate, and probably to most of the provisions of the mandates. They also apply to completely specific provisions, such as those in the South West Africa Mandate regarding missionaries or fortifications or any of the others—intoxicating liquor, any of those—so that the mere fact that provisions are humanitarian or protective in purpose would, indeed, appear to be completely immaterial for present purposes. These qualities do not support, in our submission, a contention that judicial review was intended in addition to administrative supervision, nor, indeed, do they support the contrary contention that such review was not intended. In our submission, they are completely neutral, they do not bear upon the issue raised by our contention in this regard at all.

Now, the second point of analogy referred to by my learned friends, is that of generality in formulation. Generality in formulation would, in our submission, appear to be a matter of degree. However, in this respect we contend that the difference between the provisions are so substantial as to amount almost to one kind. I shall come back to that point in a moment, Mr. President, when I deal with the last alleged point of analogy.

Now, the final suggested analogy is that these provisions involved day-to-day administration and, consequently, also the discretion of the mandatory. In our submission, Mr. President, that does not follow. The fact that the provisions of the mandates involved day-to-day administration does not mean that they involved a wide degree of discretion on the part of the mandatory. The two questions are entirely distinct. In fact, the prohibitions set out in the Palestine Mandate constituted specific limitations on the mandatory's discretion, and were, in that respect, similar to Articles 3 to 5 of the South West Africa Mandate. They did not, as was the case with Article 2 of the South West Africa Mandate, indicate only a goal to be achieved, leaving the method to be employed to the discretion of the mandatory, and it is the existence and nature of that discretion which, we submit, was granted by Article 2 (and which, as I understand, my learned friends representing the Applicants do not dispute, that is, that there was a discretion), which, in our submission, leads to the conclusion either that Article 2 was not intended to be justiciable at all, or, alternatively, that if it were intended to be justiciable, then it was to be such only on the basis of Respondent's good or bad faith—the alternative contention with which we shall deal later. Of course, I am now dealing only with the first contention, namely that, in our submission, it was not intended to be justiciable at all.

That, then, is our argument concerning the two cases Mr. President. In addition Applicants relied on a case in the South African Appellate Division, *Winter*'s case, which referred specifically to Article 2 of the South West Africa Mandate. In regard to this case Applicants say: "The Court in that case, therefore, did not refrain from adjudicating the issue whether legislation was in conflict with the obligations of Article 2, paragraph 2, of the Mandate." (P. 240, *supra*.)

Now, we dealt with this matter, Mr. President, in the Rejoinder, **V**, at pages 149-150, and we pointed out there, firstly, that the Court expressly gave no decision on the point whether "... the Courts in S.W.A. would have jurisdiction to declare *ultra vires* any legislation in conflict with the provisions of the Mandate ...". So, the Court did not decide the issue whether it really had any power—any testing power, or power of review—as far as the Mandate for South West Africa was concerned.

But, in addition, Mr. President, the Court, in effect, held that Article 2, paragraph 2, imposed no limitation at all on the full sovereign authority of the mandatory in the respect in question. The Court held that, in the relevant respects, there was no limitation, that the mandatory had full sovereign authority to act as it did. Consequently, there could be no question—and no question could or did arise—whether the legislation was indeed, to quote Applicants "in conflict with the obligations of Article 2, paragraph 2, of the Mandate" (p. 240, *supra*). If power is full and sovereign then it can *ex hypothesi* not be exceeded.

Now, consistently with this approach, the court, in *Winter*'s case, did not conduct an independent enquiry into justiciability of a recital in the preamble to the proclamation which was in issue and which stated that:

> "... the ordinary law of the land [was] inadequate to enable the government to fulfil its duty in safeguarding the welfare of the inhabitants ...".

In effect, therefore, the judgment taken as a whole, meant no more and no less than that it was for the legislature, in the exercise of its sovereign or discretionary powers, to decide on the expediency or necessity of the particular measures, and that it was no function of the Court to determine whether those measures were necessary or expedient, or, for that matter, lawful.

Now, Mr. President, in dealing with our contention regarding the intention of the authors of the mandates system on the question of justiciability by the Court, Applicants also refer to the concept of the denial of justice. They did so in the verbatim record at page 240, *supra*, where they said:

> "The concept of judicial review of international obligations was familiar to the founders of the mandates system. One illustration among many is to be found in the area of state responsibility for denial of justice.
>
> This legal doctrine often had been applied to policies and practices of executive and legislative authorities, as well as to decisions of judicial tribunals.
>
> Inasmuch as the doctrine of denial of justice applies to treatment of aliens, international statal responsibilities often are involved in the application of the doctrine. International judicial review of governmental policies and actions with respect to aliens involve considerations of law and of justiciability analogous in important respects to governmental policies and practices affecting inhabitants of mandated territories."

To understand the full import of this contention, Mr. President, it would, in our submission, be necessary to refer also to a further passage, where the Applicants dealt with this topic. This further passage really relates to our alternative contention, but, for the sake of completeness and, also, to get the thread of the argument, we think we should refer

to it at this stage also. They said at page 254, *supra*, in support of the argument that "... the concept of discretionary powers limited by legal norms is well known to international judicial tribunals", that such norms existed as so-called international norms which govern the treatment by governments of aliens living within their borders. There are two ways in which Applicants appear to rely on these rules regarding aliens, and which may be analysed as follows: they rely on them, firstly, to show that the founders of the mandates system were familiar with the idea of judicial review of internal policies and practices of States and, secondly, to demonstrate that international judicial tribunals judge such policies and practices according to legal norms and not with reference to a test of good or bad faith. At present we are only concerned with the first contention—the latter will be dealt with at a later stage.

Now, this first contention would, upon analysis, Mr. President, appear to be this, namely that a State commits an international delict if it treats an alien otherwise than in accordance with certain minimum international standards. The argument proceeds that it is no defence for the State concerned to show that the alien was treated in accordance with the laws of the State, in exactly the same manner as its own nationals are treated, if the laws themselves fall below the minimum standards. And, the argument goes on, international judicial tribunals must consequently often evaluate the normal internal policies and practices of a State in order to ascertain whether its system of law and administration complies with such international minimum standards. All this brings my learned friends to the conclusion that the authors of the mandates system were familiar with the concept of such judicial review, and that they would consequently have found it perfectly natural to provide for judicial review of Respondent's policy and practices in South West Africa.

Now, Mr. President, before proceeding to consider the merits of this argument, there is one point on which I think we may fairly comment, and that is whether the Mandate made provision for some form of judicial review. That has been an issue in these proceedings since the Preliminary Objections were filed, and now, for the first time, Applicants raise this question of denial of justice to aliens—and, indeed, they elevate it to their prime example of the type of judicial review which, they say, was so common that it was adopted in the Mandate without objection or even discussion. This is the pattern which they suggest the authors of the Mandate intended to apply to the Mandate. Now, if the rules regarding aliens were indeed so generally known, and so closely analagous to those of the Mandate, as is suggested by Applicants, the question arises why it has taken the Applicants three-and-a-half years to realise their significance? Mr. President, we submit that this whole argument is an afterthought, and that the reason why it was not raised earlier will become apparent when its merits are considered.

To substantiate this contention Applicants have, in our submission, to prove at least two facts—firstly, that the existence and validity of the so-called international minimum standards were generally accepted in 1920, and secondly, that judicial review involving the application of such standards was a common-place and well-known occurrence at that stage. As to the first question, that is, whether the so-called international minimum standards were generally accepted in 1920, we submit that Applicants have completely failed to establish such a proposition. In fact, they did no more than quote the views held by Mr. Elihu Root

in 1910; that we find in the verbatim at pages 254-255, *supra*. Now, we are quite prepared to concede that Mr. Elihu Root, and probably a number of other scholars, were, at that stage, of the opinion that every State was obliged, according to international law, to treat aliens in accordance with a certain minimum standard, but this does not, of course, mean that this view was generally held at that stage, or even that States generally accepted such a responsibility, or that *all* commentators on international law, or even most of them, accepted that that was the rule at that stage. In our submission, the true position is that, until relatively recently, at least until after 1920, the prevalent view was that a State could not incur international liability as long as it treated aliens in the same manner in which it treated its own nationals. This view may be, and has been, called the theory of national treatment, and we may refer the Court in that regard to Andreas H. Roth, *The Minimum Standard of International Law Applied to Aliens*, page 62 and following. At page 62, the author of this work says the following regarding this theory:

> "This theory starts from the major postulate that the alien must accept the legal conditions which he finds in the country of residence, and that neither he nor his government can justifiably complain if he is accorded, like nationals, the benefit or application of those conditions."

It suffices, Mr. President, to cite a few instances in which this theory was propagated, both before and subsequent to 1920. One finds that in May 1914, four years after the statement by Mr. Roth upon which Applicants rely, the American and British Claims Tribunals in the *Cadenhead* case spoke of—

> "... the generally recognized rule of international law that a foreigner within the United States is subject to its public law, and has no greater rights than nationals of that country". (*American and British Claims Arbitration. Report* of Fred K. Nielsen, p. 507.)

In 1926, Mr. President, there was a sub-committee of the Committee of Experts for the Progressive Codification of International Law, appointed by the League of Nations, the Rapporteur of which was Mr. Guerrero, who wrote at the time:

> "Unless we are ready to overset the one true basis of international law—the collective will of States—we will not entertain the supposition that States, when they entered the community, ever contemplated an abridgment of the dignity and authority of their own courts of law. That, however, would be the final result of rehearing a case where no provision for appeal existed under the legislation of the State concerned; and yet the advocates of the theory of international responsibility, in connection with judicial decision vitiated by *manifest or flagrant injustice*, would inevitably be led to provide for some such rehearing." (Quoted by Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice*, p. 630.)

On the same occasion Mr. Guerrero also said the following regarding the treatment of aliens:

> "The maximum that may be claimed for a foreigner is civil equality with nationals. This does not mean that a State is obliged to accord such treatment to foreigners unless that obligation has been embodied in a treaty. We thereby infer that a State goes be-

yond the dictates of its duty when if offers foreigners a treatment similar to that accorded to nationals. In any case, a State owes nothing more than that to foreigners, and any pretension to the contrary would be inadmissible and unjust both morally and juridically." (Andreas H. Roth, *The Minimum Standard of International Law Applied to Aliens*, pp. 72-73.)

Now that was as late as 1926, Mr. President.

Reference may also be made to the views expressed by certain delegates at the conference for the Codification of International Law, which was held at The Hague in 1930, regarding the concept of denial of justice. I do not wish to read them all, but would refer the Court to one or two of the views. The first is that of the Egyptian delegate, Abd el Hamid Badaoui Pacha, which one finds in the minutes of the Third Committee, League of Nations' document C 351(C)M145(C), page 105. Then, I would also refer the Court to a statement by Mr. Sipsom, of Roumania (in the same document at p. 114), and thirdly, the following statement by Mr. Wu, of China (at p. 187):

"I have to propose, therefore, a single standard, a definite standard; that of the treatment accorded to a nation's own nationals. From the point of view of logic, from the point of view of justice, I do not see that any nation can complain. When a person goes to another country he goes there with full knowledge of the conditions, whether they are as good as those in his own country or whether they are worse...

Secondly, he goes there uninvited. I do not think any nation legally and morally invites foreigners to come to its soil; foreigners go there of their own accord. Why, therefore, should the Government of that country be saddled with a heavier responsibility than that which it has towards its own nationals?"

Now, that, Mr. President, was as late as 1930, that is, ten years, or more, after the Mandate was founded.

As a final reference to authority on this aspect I quote an extract from a work, also published in 1930, which is called *The Canons of International Law*, by T. Baty. At page 123 the author says:

"It is easy to be seen how this hampers the self-development of a nation [this being the concept of a denial of justice]. It creates a privileged class in its midst, to whom the laws and the standards of the country are not applicable.

. . . It is not enough for the modern exploiter that he receives equal treatment with the native. He demands better treatment, and much better treatment. He must not only have a due application of the native law, but the native law must be such as his Government considers just.

So far, the evil has not gained a great hold on the world: it is mainly in the area of the Caribbean—in Mexico, San Domingo, Hayti, Nicaragua, San Salvador—that it has raised its head. But it is a very menacing phenomenon."

So, in our submission, Mr. President, it follows that there is no substance at all in any contention that it was generally accepted, round about 1920, that a State's treatment of aliens was governed by so-called minimum international standards. Mr. President, the implications are, of

course, that if the rule required only equality of treatment between aliens and nationals, then any tribunal determining whether the rule had been complied with, did not review at all the merits or the efficacy of a State's machinery—administrative, judicial, or legislative: it then had a purely factual enquiry before it, namely what standard applied and what treatment was available to nationals, and what treatment was given to the alien, and, on comparison, did the alien get similar treatment to, or the same as, the national—no question as to the merits of the governmental machinery, or policies, of the State would arise at all. So, Mr. President, once we show that these minimum standards were not generally recognized in 1920 at all, that by itself sufficiently negates any validity the Applicants' argument might have had. But, Mr. President, we go further and say that, even if one assumes that such standards were generally recognized, Applicants would still have to show that there was *judicial review* as regards these standards, and that *judicial review* as regards such standards was so common that the authors of the mandates system would, without discussion and without comment, have applied a similar type of review to the Mandates. This, in our submission, Applicants have also not done. Judicial review can, in the nature of things, arise only pursuant to express provision in treaties, and, as far as Respondent is aware, there certainly were not many treaties providing for adjudication on the treatment of aliens in 1920—nor, for that matter, are there at the present stage. And, indeed, Applicants refer to only one case in which such standards were applied by a judicial tribunal, and that is the Roberts claim, which was considered by the General Claims Commission in 1926. This, in our submission, is not surprising, since the application and development of the theory of international minimum standards in the judicial sphere is generally attributed to this very Commission. Thus, the very first case in which the standards were applied, in a manner to which we will refer at a later stage of this argument, was decided in 1926—the case which pioneered this system on which my learned friends rely was decided as late as 1926, after the authors of the Mandate had long performed their functions.

It follows, therefore, in our submission, Mr. President, that, contrary to what Applicants contend, the concept of judicial review of the internal policies and practices of a State in relation to aliens, the concept of judicial application of so-called minimum standards to a particular State's treatment of foreigners, was unknown, or at least virtually unknown, when the mandates system was conceived; and even today, Mr. President, as far as we are aware, compulsory jurisdiction regarding allegations of denial of justice to aliens is not such a very commonplace phenomenon either.

Now, even the concept on which my learned friends rely, that of minimum international standards, is, in our submission, much more limited than they suggest. We shall come to that at a later stage when dealing with the basis upon which Article 2 (2) should be adjudicated, if at all. At this stage it will suffice to say that the test to be applied by a tribunal in determining whether the obligation has been violated is, for all practical purposes, indentical with the test of good faith which, as we submit in our alternative contention, is the only test which can be applied by the Court in determining alleged violations of Article 2 of the Mandate. However, we shall discuss that at a later stage.

In any event, Mr. President, the obligation regarding aliens is on any

basis, by its very nature, a much more limited one than the obligation which my learned friends suggest applies in the case of mandates. This is so by virtue of the fact, firstly, that it relates only to aliens, so that if the government of any country is under an obligation in that regard, the obligation is limited to a relatively small class of persons, namely aliens; and furthermore, Mr. President, only the States of which the complainant alien is a national would have the right to complain; there is not at all, there never was, and there never can be, the very wide type of judicial review which my learned friends suggest applies in the case of the Mandate, where every Member of the League could bring the Mandatory before the Court. One would have, in respect of aliens, the position that only the State of which the alien was a national could raise the matter, either through diplomatic channels or otherwise, or before a tribunal.

So, for all these reasons, Mr. President, we submit that this new argument which Applicants have now introduced in the Oral Proceedings in an attempt to explain the basic improbability inherent in their case, on this aspect, must fail, as, we submit, must the other arguments in that regard.

Now, linked up with this aspect we have the question of the minorities treaties and the Constitution and Conventions of the International Labour Organisation. The Applicants referred to these instruments at pages 241-242, *supra*. These instruments, Mr. President, have been canvassed very thoroughly in the pleadings, and it is not necessary to say a great deal about them here. As we have shown in the Rejoinder, **V**, pages 150-151, and in the Counter-Memorial, **II**, pages 187-190, the content and purposes of these instruments were so vastly different from that of the Mandate, and the extent of the Court's power so much more limited than is suggested to be the position in the case of the Mandate, that they tend to support the Respondent's contention rather than the Applicants. The features of distinction between these provisions and the Mandate were, as we summarized them in general, firstly, that clear and express provision was made in the said instruments for jurisdiction by the Court—they provided clearly and expressly that the Court was to have jurisdiction—which is not the case here as regards Article 2 (2). The obligations themselves were, secondly, in our submission, specific, or much more narrowly formulated than in the case of the Mandate. Thirdly, the obligations applied in a much narrower sphere, thus limiting the implications of the Court's powers. And fourthly, a narrower circle of States possessed *locus standi* to institute proceedings; in the case of the minorities, *locus standi* was confined to the Principal Allied and Associated Powers and other members of the Council of the League. As for the conventions under the International Labour Organisation, such as that referred to by the Applicants in the verbatim record at page 242, *supra*, only States which had ratified such a convention could invoke the jurisdiction of the Court; so one has the ordinary situation there that only parties to the particular convention, which provides for jurisdiction, can invoke the jurisdiction of the Court. But in this regard we refer the Court respectfully to the more detailed discussion in the Rejoinder and the Counter-Memorial, at the pages I have quoted. However, in regard to the circle of States competent to invoke jurisdiction, there is one point that I do think we should note at this stage, and that is that the only argument which the Applicants advanced to explain the difference in this

regard, i.e., to explain why there was such a limitation as to States entitled to invoke the Court's jurisdiction in regard to minorities, on the one hand, as against mandates, on the other, was that the intention was one "of keeping to a minimum the international disputes which might arise with regard to this question" (p. 241, *supra*).

Thus, Mr. President, according to their contention, only a limited number of States were entitled to invoke the Court's jurisdiction in the case of minorities because the founders of the minorities system intended to keep to a minimum the international disputes which might arise with regard to the question of minorities. The suggestion, if we understand it correctly, seems to be that a grant of competence to invoke jurisdiction to more States would have resulted in more international disputes, or, to put the matter differently, the creation of machinery for adjudication was regarded as something which would tend to give rise to disputes between the States competent to utilize such machinery.

Now, we have always assumed, Mr. President, that the converse was the position, namely that compulsory jurisdiction tended to limit the number and gravity of disputes, and not extend it. On the Applicants' contention, carried to its logical conclusion, the authors of the Mandate must have been imbued with the intent to increase to a maximum the international disputes which might arise with regard to this question, inasmuch as they gave the right to institute proceedings to all the Members of the League: on a parity of reasoning they must have thought that they would thereby provoke a great number of disputes, and not limit them, as in the case of the minorities.

Now, Mr. President, Applicants at pages 242-243, *supra*, of the same verbatim record, quote further examples of cases of justiciability which they suggest are analogous to that under the Mandate. These are all matters which were dealt with on the pleadings, and it is, therefore, not necessary to say much more about them, except that, in our submission, they are concerned with topics which either are not analogous to the Mandate—or relate to conventions concluded much later than the Mandate—in some cases, years later, and in some cases more than a quarter of a century later, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms. This Convention is quite an interesting example in its way, Mr. President, because it shows that even at that stage, even after the Second World War in 1950, agreement could be reached among the contracting parties only after much discussion, and only with carefully devised precautions such as relatively precise definition and the creation of a unique and elaborate system of enforcement. We note these points on the Rejoinder, V, pages 151-153, and, Mr. President, we also contend there that if a relatively closely knit number of States required so much discussion and so many precautions in 1950, it is difficult to imagine how the large number of States coming from all parts of the world which created the Mandate and the League in 1920 could have introduced a system of judicial review much more far-reaching without any discussion, without any comment, without any debate. In our submission, Mr. President, the comparison between the two instruments and the manner in which they were drafted clearly shows up a weakness in Applicants' case, and not in Respondent's.

In the light of what I have said, Mr. President, it is in our submission remarkable that Applicants can say, as they do at the end of the discussion of this matter—page 243, *supra*, of the same verbatim record:

> "In the premise then, Mr. President, it is not at all surprising, given the numerous examples and wide knowledge and acceptance of, the principle of international judicial review of governmental policies, including those encompassing political, economic and technical aspects, that the authors of the mandates system not only should have bestowed a like power upon the Permanent Court, but that they did so without objection and even without discussion."

In fact, we submit that the Applicants have not produced any examples at all of "international judicial review of governmental policies" prior to the establishment of the Mandate. Prior to the Mandate, in our submission, there was nothing of the sort, and Applicants do not, in our submission, quote any examples of such judicial review existing at any time, prior to or subsequent, which is as far-reaching as that which they suggest was included in the Mandate "without objection and even without discussion".

Thank you, Mr. President.

8. ARGUMENT OF MR. DE VILLIERS

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA AT THE PUBLIC HEARINGS OF 14-26 APRIL 1965

Mr. President, if it were to be held that the Court was intended to possess jurisdiction regarding disputes arising from the interpretation or application of Article 2 of the Mandate, even in cases where no interests or rights of the Applicant States are directly involved, then the question arises as to the basis upon which such alleged breaches of the Article fall to be considered by the Court—the basis upon which the Court is to determine whether or not violations of the Article have been committed.

Mr. President, the nature of the problem arises immediately from the very wording of the Article, from that broad, general formulation: "The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants" . . . It does not say, Mr. President, that the mandatory shall build so many schools every year. It does not say that the mandatory shall make roads. It does not say that the mandatory shall build dams, that it shall provide for economic development of particular areas and it does not specify how many hospitals are to be built, how many factories, which industries are to be developed, and so forth. Those are the types of matter which are encompassed in the whole objective, as set out in the Article, of promoting to the utmost material and moral well-being. Now it may happen that the mandatory in a particular period has built, say, 15 schools and two hospitals. Is the Court to say to the mandatory, "You ought to have built more hospitals and less schools", or "You could have done better—you could have built more schools and more hospitals", or "You gave too much attention to education in this period and too little to economic development"? I am just mentioning examples, Mr. President. On what basis does a court determine that it can say things of that kind to a mandatory, when the function of governing the country has been given to the mandatory, and the function of promoting well-being and progress to the utmost has been committed to the mandatory's charge? That is the type of question which immediately arises here, in a practical way, and, therefore, the question arises, if the court is to have a function of adjudication at all on the conduct of the mandatory, what is the legal basis of that adjudication to be? This, of course, involves a pure question of interpretation of the obligation in its setting in the mandate—interpretation, that is, on the principles which we have discussed. And we find, Mr. President, that the confusion which is inherent in the Applicants' argument again manifests itself here—the confusion between interpretation and application. It leads them to attribute an argument to us which we have never used: we find it in the verbatim record at page 118, *supra*, and it reads—

> ". . . that the scope and content of its obligations [that is, Respondent's obligations] under Article 2, paragraph 2, should be measured essentially on the basis of standards prevailing in 1920, when the Mandate was conferred".

Mr. President, we never contended for anything of the kind. We contend simply that Article 2, paragraph 2, should be interpreted to bear the

meaning it bore in 1920, and, therefore, to have the scope and the content intended by its authors. Whether Respondent should maintain standards prevailing in 1920, or standards prevailing in 1965, or to what extent standards enter into the picture at all, depends, Mr. President, on the question of the meaning, the scope and the content which the Article had in 1920, which it has in 1965 and which it will still have in 1975, if not modified in the meantime.

Mr. President, the question under discussion is then, what is, in the sense which I have indicated, the correct interpretation of Article 2 in regard to the basis upon which alleged violation of its provisions is to be determined.

I speak purposely in this regard of Article 2, the whole of Article 2, because I submit that it is only on considering the Article as a whole and, of course, also in its context in the mandate instrument as a whole, read against the background of the Covenant, that one can properly assign an interpretation to paragraph 2—to the obligation set out therein.

I shall deal, Mr. President, with this question of interpretation for present purposes, in the following order. First, with the true interpretation which, in our contention, is to be put on the Article, regard being had at the same time to comment and criticism of that interpretation which have been offered by the Applicants' representatives. Secondly, I shall proceed to consider the so-called interpretation offered by the Applicants themselves.

Now, Mr. President, in regard to our interpretation, the Court will recall that we summarized our contentions by way of certain propositions, set out at pages 157-158 of the Rejoinder (V). We called them simple propositions, simple, of course, in the sense of being elementary. We were not thinking of Simple Simon.

It may be useful, in the light of what the Applicants have said in this regard, to begin the discussion by referring again to the wording of those propositions as they are summarized.

At page 157, proposition *(a)* read:

> "Respondent was granted 'full power of legislation and administration'. Such grant necessarily entailed that Respondent was required and entitled to use its discretion as to the need for and the manner of the exercise of its powers."

It was, therefore, necessary to use discretion in that regard—in regard to both the need for and the manner of the exercise of the powers.

Proposition *(b)* reads:

> "It is of the essence of a discretionary power that an act purported to be in exercise thereof is not illegal unless it is contrary to some legal provision regulating such exercise, or exceeds the limits expressly or by implication placed upon the power. No *regulatory* provisions were imposed in respect of Respondent's powers under the Mandate, thus leaving only the question as to the nature of the *limitation* imposed by Article 2, paragraph 2."

The statement that no regulatory provisions were imposed is qualified by the footnote, to this effect, that:

> "[2] For present purposes the limitations expressed in Articles 3, 4 and 5 of the Mandate . . . are not relevant and are therefore not mentioned."

They are, of course, particular limitations upon the power of the Mandatory. They do not, however, affect the issue for the moment, as far as Article 2, paragraph 2, is concerned.

Mr. President, in regard to these statements, as contained in our propositions *(a)* and *(b)*, the Applicants, according to the verbatim record at page 243, *supra*, stated that the propositions "appear unobjectionable, subject only to certain cautionary comment", which I need not refer to further at this stage. I shall refer to it later.

The Applicants' real difficulty with our propositions, concerned propositions *(c)* and *(d)*, which I shall now read:

> "*(c)* The only limitation placed by Article 2, paragraph 2, on the discretionary power vested in Respondent was that such power should be exercised for the purpose of promoting to the utmost the well-being and progress of the inhabitants of the Territory." (V, p. 157.)

And proposition *(d)*:

> "*(d)* Consequently the Court can determine whether a legislative or administrative act or policy constitutes an infringement of Article 2, paragraph 2, only by examining whether or not the exercise of discretion involved in such act or policy, was directed at the purpose of promoting to the utmost the well-being and progress of the inhabitants. Such an examination would, in the circumstances, involve an enquiry as to the good or bad faith of the Mandatory." (*Ibid.*, pp. 157-158.)

Now, Mr. President, the comment of the Applicants on these propositions *(c)* and *(d)* is in the verbatim record at page 243, *supra*, and it was, as the Court will recall, a highly excited one. The general comment was this:

> "Propositions *(c)* and *(d)*, however, are destructive of the sacred trust and rob the obligation to submit to international supervision of any meaningful reality."

After quoting proposition *(c)*, Mr. President, my learned friend, Mr. Gross, proceeded:

> "Respondent's insertion in the formulation of the phrase 'for the purpose of promoting' is, of course, a gratuitous gloss on Article 2, paragraph 2, and vitally alters its character. The actual terms of that Article embody no such express or implied limitation, contain no reference to the purpose of promoting, but state a flat and unqualified obligation that Respondent 'shall promote to the utmost', and so forth, in the words of the Article. In view of that fact it may be fair to comment that Respondent's formulation is not merely a gratuitous gloss, but implies a unilateral and off-hand modification of the terms of that provision."

At the next page (p. 244), after proposition *(d)* had been read, the further comment was:

> "Therefore, the amendment of Article 2, paragraph 2, implicit in proposition *(c)* is a vehicle for importing into the Article the good or bad faith test, as is made explicitly clear in proposition *(d)* which I have just quoted."

The issue then, Mr. President, is fairly joined on our formulation in proposition *(c)*—the formulation which brought the powers and the obligation in conjunction with one another, with reference to a concept of purpose. That is said to be a "gratuitous gloss" and the unilateral and off-hand modification of the terms of the provision.

Now, Mr. President, in our submission, these comments show a complete lack of understanding, or of acknowledgement, of two matters, firstly, of the ordinary legal relationship, logical relationship, between the powers of a trustee and the obligations of a trustee and, secondly, Mr. President, of the principles upon which violation of a discretionary function can be held to have occurred. Those are the two basic concepts underlying the whole problem, here, the two concepts to be borne in mind, and the Applicants' comment, I submit, shows no acknowledgement of those concepts at all, nor of the principles involved in that regard.

Let us take the first one—the relationship between the powers and the obligations of a trustee. We have, in that regard, very pertinent comment expressed by the former President of this Court, Sir Arnold McNair, in his minority opinion in 1950. I read a quotation from page 149 of that opinion:

> "The Anglo-American Trust serves this purpose, . . . [of] the vesting of property in trustees, and its management by them in order that the public or some class of the public may derive benefit or that some public purpose may be served." (*I.C.J. Reports 1950*, p. 149.)

In other words, the following is the function or purpose which the trust serves: property is vested in trustees; powers of management are given to trustees for a purpose, the purpose being public benefit, or the serving of some public purpose, as expressed by the learned judge.

I quote at the same page this further passage:

> ". . . the trustee, *tuteur* or *curateur* is under some kind of legal obligation, based on confidence and conscience, to carry out the trust or mission confided to him for the benefit of some other person or for some public purpose;".

Again there is mention of a relationship, Mr. President, between the functions, and powers which are given and the purpose for which they are given.

The next quotation I wish to read, appears at page 150 of the same opinion:

> ". . . the measure of its powers [now these concepts are applied to the Mandatory, and when Sir Arnold McNair says 'its powers' in the context it means the Mandatory's powers] is what is necessary for the purpose of carrying out the Mandate . . . [the powers] are 'tools given to him in order to achieve the work assigned to him';".

Mr. President, this quotation which has often been stressed by my learned friends in another context, indicates exactly the relationship which we contend to exist between the powers given to the mandatory and the mandatory's obligation, a relationship of purpose, of object. I am not tied to terminology. We could talk of a purpose; we could talk of an object; we could say they are given to him in order to achieve the work. The concept, however, remains the same.

So, Mr. President, already there is an indication that if we have put

any kind of a gloss, gratuitous or otherwise, on this Article, then we seem to be in very good company. But the matter does not end there. I refer, Mr. President, to another work to which the Applicants have often referred in these proceedings—the work entitled *The Mandates System: Origin, Principles, Application*—a League of Nations publication. We refer to it in the Rejoinder, V, at page 20, where there is set out the comment, that the sacred trust principle in the mandates system relates to "... the *fundamental objective* of the mission undertaken by the Mandatories".

It is quite natural on the part of all these commentators to speak of the sacred trust principle, of the obligation to promote well-being and progress, as being the fundamental objective of the mission or of the mandate undertaken by the mandatories.

We refer at the very same page to an extract from a well-known report by Mr. Hymans in the League time—

> "[p]aragraphs 1 and 2 of Article 22 have indicated the spirit which should inspire those who are entrusted with administering peoples not yet capable of governing themselves . . .".

Again, there is the same concept of an objective, of a spirit.

Now we come to the majority opinion in 1950. At page 132 thereof we find this formulation:

> "The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants." (*I.C.J. Reports 1950*, p. 132.)

Again, Mr. President, the relationship is expressed in the phrase: "with the object of." As I have said, I am not wedded to terminology. I am perfectly prepared to substitute "object" for "purpose".

At the same page we find the following said by the Court:

> "The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization."

At page 133 the Court said, after referring to the obligations contained in Articles 2 to 5 of the Mandate:

> "These obligations represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain." (*I.C.J. Reports 1950*, p. 133.)

So, Mr. President, if my learned friend speaks of a gratuitous gloss he could now begin to indicate whose gloss he is talking of.

We come to a passage which appears at page 152 of Sir Arnold McNair's minority opinion in 1950, in which he cited a statement by Chief Justice Latham of Australia, which read as follows:

> "The mandatory, as a kind of international trustee, receives the territory subject to the provisions of the mandate which limit the exercise of the governmental powers of the mandatory." (*I.C.J. Reports 1950*, p. 152.)

In other words, Mr. President, there is, again, the concept that the relationship between the powers, on the one hand, and the provisions,

providing for obligations, on the other—a relationship of obligations limiting the powers.

In the 1962 Judgment, at page 329, we find the Court using this description "[The mandates system] ... is dedicated to the avowed object of promoting the well-being and development of the peoples concerned: ...". I quote again at the same page of the 1962 Judgment: "The rights of the Mandatory ... are, so to speak, mere tools given to enable it to fulfil its obligations."

Again, Mr. President, we find the same concept in that phrase "tools given to enable it". The tools were given for a purpose—with an object of bringing about fulfilment of obligations.

Still at the same page, I quote again from the 1962 Judgment:

> "... each Mandate under the Mandates System constitutes a new international institution, the primary, overriding purpose of which is to promote 'the well-being and development' of the people of the territory under Mandate".

This very explicit statement and formulation, Mr. President, accords exactly with our contention. The powers were given in the first portion of Article 2, and were limited with reference to a purpose, the purpose being the sacred trust. This principle had already been set out in Article 22 of the Covenant of the League, and was then re-formulated, in the second portion of Article 2 of the Mandate, as an obligation imposed upon the mandatory.

So, Mr. President, nothing of the nature of a gloss is involved in our contention, which merely contains the ordinary natural description given by any commentator to the relationship between the powers of a trustee and the obligations imposed upon the trustee. Powers are given for the purpose of complying with the trust—with the object of complying with the trust—and complying with the trust means fulfilling the obligations.

We have, quite naturally, a similar formulation by Lord Hailey in a passage which we cite in the Counter-Memorial, **II**, at page 388, a passage which was written in 1946 by Lord Hailey, specifically with regard to Native Affairs in South West Africa:

> "It need hardly be recalled that the Mandate did not itself set forth the methods to be pursued in the conduct of Native Affairs. Article 22 of the Covenant of the League placed on the Mandatory a general obligation to consider the well being and development of the population whose tutelage it had undertaken. The Mandate laid down that while the Mandatory should have full power of administration and legislation over the territory as an integral portion of its own territory, it should promote to the utmost the material and moral well being and the social progress of the inhabitants. The primary object of this provision was clearly to protect the interests of the Native inhabitants of the territory ...
>
> In regard, however, to the policy to be observed in Native Affairs the prescriptions of the Mandate, where they were in any sense precise, were of a negative rather than a positive character. Thus it required the Mandatory Government to prohibit the slave trade and the supply of intoxicating beverages to Natives, to control the traffic in arms, and to permit forced labour only for essential works and services. It prohibited the military training of Natives, save

> for purposes of internal police and local defence, and it guaranteed the free exercise of all forms of worship and the free entry of all missionaries belonging to any State member of the League of Nations. *But in other respects it left the Mandatory Government to interpret the methods by which it should promote the well being of the Natives of the territory. Thus it remained for it to frame its own policy, within this general objective*, in respect of matters such as the control over land, the system of justice, the procedure of taxation, the extent to which regard should be had to native law and custom, the provision to be made for the social services of health and education, and the part to be taken by the Native population in the political institutions of the country."

All the matters, to which the last portion of the quotation refers, were left to the discretion of the mandatory. The mandatory was to frame its own policy with regard to them, but within the general objective, the general objective being, as stated by the learned author, to promote the well-being of the Natives of the Territory.

So, Mr. President, any formulation which we choose, in that regard, i.e., in relating the powers of the mandatory to the obligations of the mandatory—whichever way we try—we must come to a concept of a relationship of purpose, a relationship of object, whatever words we may use to express that concept.

And that brings us to the second part. The second aspect which, I submit, was completely overlooked by the Applicants in formulating their submissions, relates to the principles upon which a discretionary power—a discretionary function—is exercised, and the principles upon which it can or cannot be said that there has been a violation of an obligation involved in such a discretionary function.

In that regard, Mr. President, I should, first of all, like to refer the Court to the wording of Article 2 of the Mandate itself:

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

First, Mr. President, there is this general concept of full power of administration and legislation vested in the mandatory. Now, surely, that concept, in itself, involves the grant of a sufficient discretion to enable a government properly to exercise its power of administration and legislation. It is of the essence of all our concepts regarding the nature of governmental powers that a government, upon which powers of administration and legislation conferred in a broad general formulation of this kind are, is not only entitled, but also obliged, to use its discretion in deciding what it should do by way of exercise of those powers, what particular acts it should decide upon, which courses it should pursue, which it should leave, and, particularly, the manner in which it will pursue any particular action.

That is part and parcel of the general concept of a full power of government—a full power of administration and legislation.

Secondly, we find, it is stated, that the mandatory "may apply the laws of the Union of South Africa to the Territory"—not "shall" but "may". Who is to decide whether any particular law of the Union of

South Africa is to be applied to the Territory or not? The mandatory is to decide. It is required of the mandatory to use its discretion in deciding whether a particular law is or is not to apply. And this concept is subject to the limitation expressed in the words "subject to such local modifications as circumstances may require". In regard to this limitation the same principle applies. Who is to decide whether the tax to be levied in South West Africa is to be the same as that in any of the provinces of South Africa. Surely that is, in essence, a matter in the discretion of the authority to whom full power of administration and legislation has been given, namely the mandatory.

So, Mr. President, the basic concept which we have is that of a discretion inherent in this grant of power. The only further question which could arise is a matter of interpretation, namely as to what extent that discretion was limited, by any of the other provisions of the Mandate, and in particular, for present purposes, by the provisions of the second paragraph of Article 2 of the Mandate. I shall come back to that in a moment.

First, I would like to refer the Court to the very explicit recognition that has been given by various commentators to this factor of discretion, and to its importance. We refer the Court first, to a statement by Chief Justice Latham of Australia in the same judgment mentioned previously. We quote it in the Counter-Memorial, **II**, at pages 387-388. After stating that "In the case of 'C' Mandates ... the mandatory powers ... has full powers of administration and legislation over the territory subject to the mandate as an integral portion of its territory", and, after further discussion, the learned Chief Justice stated, Mr. President, *"It is clear that it was intended that in the case of 'C' Mandates, the fullest powers of government should be conferred upon the mandatory power"*. (Italics added.)

We proceed to a quotation from a statement by M. Orts, a member of the Permanent Mandates Commission, contained in the minutes of the Ninth Session of the Permanent Mandates Commission:

> "The development of primitive peoples could be carried on by different means, and these means would be such as were proper to the native genius, traditions, and the political and philosophical conceptions of each mandatory State. The mandatory States would fail in their task if a system and method foreign to their mentality were imposed upon them.
>
> The duty of the Commission was confined to discovering whether the mandatory powers conformed to the definite obligations imposed upon them by the Covenant and by the mandates, and in addition, whether, within the limits of these acts, they were *honestly performing their task* in order to justify the confidence reposed in them." (Italics added.) (**II**, p. 388.)

The statement provides, Mr. President, an exact confirmation of our contention as to the manner in which the mandate instrument is to be interpreted, namely as containing a full grant of powers of legislation and administration, carrying with it all the discretion necessary for that purpose, subject only to such limitations as are indicated later in the same instrument. These comprise a general limitation in the second paragraph of Article 2, and specific limitations in Articles 3 to 5. As this learned member of the Commission said, those specific, definite obligations were to be complied with and, in addition, the mandatories were charged with the obligation of honestly performing their task, in order

to justify the confidence reposed in them. The discretion, therefore, in so far as there is not a specific provision to the contrary, remains, and it remains both in regard to the exercise of a power and in regard to the compliance with the obligation—the general trust obligation—imposed in Article 2 of the Mandate. We refer, in that regard, also in the Counter-Memorial, at page 388, to a statement from Quincy Wright, reading:

> "... the prescriptions of the Covenant and of the mandates vary greatly in definiteness. Some regulations like those on slave, arms and liquor traffic, military bases, recruiting, and the open door are quite definite; but, on the other hand, certain principles like 'the well-being and development' of the inhabitants ... are so vague as to admit of a broad variety of policies."

Again, Mr. President, there is the same concept. The learned author brings the broad grant of a discretionary power into conjunction with the broad obligation of promoting to the utmost material and moral well-being. Accordingly one has a full retention of discretion in the whole concept, because there is, apart from Articles 3 to 5, nothing which prescribes exactly what the mandatory is to do, what it is to leave, and in what manner it is to act in achieving this general obligation imposed upon it.

That is the essence also of the statement which I have already read to the Court from Lord Hailey which is repeated in the Counter-Memorial, **II**, at page 388. In addition, we quoted in the Rejoinder, **V**, a commentary from Bentwich on the mandates system; that is at page 158 and reads: "No attempt is made in the Mandate documents or by the Mandates Commission to lay down any particular system of government applicable in these territories. The Mandatory in this respect has a free hand, and may introduce such measures of autonomy as he thinks fit. The *guiding principle* is that the Government *must have in view* the interests of native inhabitants. Great variety in the system of administration, in fact, exists, even within a single country under mandate, and some of the mandated territories have indeed been divided by the Mandatory for legislative and administrative purposes." (Italics added.) Thus this author also stresses the existence of an element of discretion, save and except where there are specific provisions to the contrary.

Now, Mr. President, the essence of a discretionary power in our submission is that the holder thereof is entitled to exercise a choice on the question whether particular measures or action are to be taken, or whether they are not to be taken, whether others are to be taken in preference to them, and particularly as to the manner of carrying those measures into effect.

The essence of this matter is that the holder of the discretion is entitled as of right to make that choice. And it follows, Mr. President, that if the discretion is an absolute one, in other words, if it is not subject to any restriction at all, the holder is entitled as of right to exercise his function in whatever manner he thinks fit as long as it still, as a matter of concept, constitutes the exercise of his function and does not really constitute something else.

It follows, Mr. President, that any action taken in the exercise of the discretionary function would in those circumstances be legal; or, conversely, that no action taken with a view to exercise of the discretionary function could be regarded as illegal. In principle, the situation in this

regard is the same also where one has limitations on this question, except that then the field in which the discretion operates is narrowed down. Where one has specific provisions saying how discretion is to be exercised in particular instances, then, of course, those are to be observed. Where there are general directions as to the manner in which a discretion is to be exercised, or as to matters to which regard is to be had in the exercise of a discretion, all those can constitute fetters or limitations upon the total area in which a discretion is to be exercised. However, even after all the fetters have been taken into account, there remains a residuum, and within that residuum where no specific provision applies, the exercise of a discretion is required and authorized.

Mr. President, it does not, therefore, matter as a matter of principle whether we are dealing with a situation where there are some limitations upon discretion, or with one where there is none. As soon as we have isolated the residuum from the limitations, then we come into a sphere where, when the Mandatory acts honestly with a view to fulfilling his function, he acts legally. There is then no basis upon which it can be said that he is not acting legally, because he is doing not only what he is entitled to do, but also what is expected of him.

Consequently, Mr. President, it should be emphasized at this stage, that it is the discretionary nature of the Respondent's powers which gives rise to the basic consequence for which we contend in respect of the obligation contained in paragraph 2 of Article 2, namely the consequence that the Court is not entitled to express a judgment on what it regards as the merits of an exercise of the discretion, but that the only function of the Court is to determine whether or not any of the limits imposed in regard to the discretion were exceeded. Of course, if the Court were to find that, on a proper construction of the instrument, some limitation was imposed either expressly or by necessary implication on the Mandatory's discretion, and that that limitation has been exceeded, then of course there is a basis upon which the Court can say that the Mandatory has acted in violation of its obligations. But if the Court finds that the Mandatory has remained within the sphere of its discretion, there is no legal basis upon which the Court can substitute its discretion for that of the Mandatory. The Court will, therefore, in those circumstances give to the merits of the Mandatory's actions only such consideration as may be necessary in order to see whether any limit has been transgressed at all. It will not, however, give to the merits of a decision the type of consideration which is given by an appeal tribunal. It will not decide whether, if it had to decide that question for itself, it would decide it in the same way as the Mandatory decided it. The Court's function is not that. The discretion, the function of governing, was given to the Mandatory and the Mandatory is to exercise it, not the Court. If the Mandatory exercises its discretion within a sphere in which it was intended that the Mandatory should exercise it, the Mandatory acts legally, and whether the Court thinks it acts wisely, or whether the Court likes the policy applied or does not like it is, legally speaking, irrelevant. It may sometimes be necessary to give attention to the merits of what the holder of a discretionary power has done as a factor in the consideration of the question whether a particular limit to the discretion has been exceeded or not; but that is a different question; that is a different purpose for which consideration is given to the merits of the action of the particular holder of the discretionary power and duty.

These consequences which I have just mentioned, Mr. President, are logically inherent in all cases where courts have to decide on the legality or otherwise of the exercise of a discretionary power. Therefore, we find that it is recognized in all systems of law of which we are aware. We gave references in the Rejoinder, V, pages 158-159, to the laws of England, France, Germany, Italy, Belgium, the Netherlands, and Luxembourg, in this regard.

Mr. President, it is on the above-mentioned basis that the question of good or bad faith comes into the picture, namely on the basis of testing whether what was done in a particular case, was, in fact, done in the exercise of the power assigned to the holder of the power, with a view to achieving the objects attached to the power, with a view to complying with the obligations imposed upon the holder of that power, or, on the other hand, whether it was directed at some other objective—whether it was motivated by some other consideration. That, after all, is the fundamental test, namely whether an action, in truth (apart from what might be pretended in that regard), falls within the scope of that function which was intended to be exercised by the holder of the power. And that is why one then comes upon this concept of good or bad faith. The broader concept of which it forms part is the concept of a proper use of powers as opposed to one of an abuse of powers. There are various ways in which a discretionary power can be abused: one of them is constituted by an act of bad faith, bad faith in the sense that the powers are not utilized for the purpose for which they were granted, but for an unauthorized purpose. There are in fit cases, of course, other bases upon which the Court, in the exercise of what might be called a function of review, as distinct from appeal, could give consideration to a matter of this kind. The Court could have regard to an express limitation upon power, an express limitation upon discretion, an express injunction as to the manner in which the holder of the power is to act in certain circumstances. If anything of that kind has been transgressed, of course, there is a basis for interference. Limits may be indicated in another manner. They may be indicated simply by the positive description which is given to the function or the power, e.g., that the holder thereof may go so far and no further. If I may use the analogy, one may have in a federal constitution a setting out of matters A, B, C, D, and E on which a federal parliament might legislate. The very limits of the powers of that particular government would then be indicated by the enumeration of those matters A, B, C, D and E. They go so far and they go no further. So if that parliament were to legislate on subject F or G, which is not included in the enumeration at all, then it does something which it has not been authorized to do. That in itself would constitute something which runs contrary to the powers and contrary to the obligations or limits upon powers imposed in the particular case.

But, Mr. President, those are merely examples of the type of situation which might arise. One may also find that, in certain cases where a discretionary power has been conferred or a discretionary function has been imposed upon a person or a body, such a person or body may for some bona fide reason fail to exercise its discretion. The person or body may misinterpret the function assigned to it; it may misinterpret the terms of reference, if I may call them that—the provisions of law which describe and circumscribe its functions. And it may then consider that what it is supposed to do, relates to subject A, whereas it, in fact, relates

to subject B; or it may wrongly suppose that in fulfilling its function there is a rule which requires it to act in a particular manner to the exclusion of other methods, whereas, in fact, it ought to apply its mind also to the possibility of applying such other methods. In circumstances of that kind it is, of course possible for a court to say that, despite complete bona fides on the part of the holder of the power, the holder has still failed to exercise its power or its function and has, therefore, violated its obligation, because its obligation is to apply its mind to all relevant questions. Those are bases well known to courts which have to exercise a function of review—bases upon which they can come to a conclusion that there has been an excess of the limits imposed upon a discretionary power—bases which may, as I have said, in fit cases involve complete acceptance of the bona fides of the holder of the power.

But, Mr. President, as we emphasized in the pleadings, and we emphasize again, there is no practical possibility of a situation of that kind arising in regard to the Mandate for South West Africa. The position is stated so clearly; there is no possible chance of a misunderstanding; and the Applicants, as we understand them in their pleadings, do not allege any bona fide misunderstanding on our part at all. They allege that a policy is being applied by the Mandatory—the Government of the Union of South Africa—which is, as far as a particular part of the population is concerned, not aimed at the objective of promoting to the utmost, but aimed at a different objective. That is in effect, if we analyse their factual allegations, whatever label or tag they may give to them, the effect of the allegations they make. They do not suggest anywhere that the Mandatory Government, in fact, misunderstands its function or that it acts bona fide in a manner contrary to what is required of it; the allegations are that, by a deliberate and systematic process, it pursues certain objectives which are not authorized objectives. And that is the whole basis, as we see it, of the dispute between the Parties in regard to Article 2, paragraph 2, of the Mandate.

It is, therefore, Mr. President, by a process of elimination that we come to this ultimate conclusion, which is stated in our propositions *(c)* and *(d)* in the Rejoinder which I read to the Court previously. We start off with the discretionary power given to the Mandatory. We then consider whatl imitations there are on that power. We have regard in that context to the provisions of Articles 3 to 5 of the Mandate, prescribing specific things that are to be done and indicating negatively specific things that are not to be done. We exclude those from consideration since they do not apply for present purposes—allegations of contraventions of those particular articles, are dealt with in a different part of the case.

That leaves only the statement of the obligation in the second paragraph of Article 2. That statement is one of a broad obligation. When it is analysed one finds that it does not say specifically "the Mandatory is to do this, the Mandatory is not to do that". It states that a certain objective is to be pursued. When the whole concept of promoting to the utmost material and moral well-being of a people, or of peoples, is analysed, Mr. President, that concept is one of broad objective—it does not indicate manner, it does not indicate particular actions. It indicates a broad objective which corresponds with the objective stated at the very head of the whole formulation of the principles of the mandates

system set out in Article 22 of the Covenant itself. And it is for that reason that one finds, on analysis, that the only limitation relevant for present purposes is the limitation relating to the objective, or the purpose, for which the powers that have been granted may be exercised. If the Court is to exercise a function at all of adjudicating on questions falling under Article 2, paragraph 2, of the Mandate, this is, in our submission, the only legal basis upon which it can do so. It can decide whether actions taken, whether a policy that has been formulated, whether measures that have been adopted—whether all these are directed to the purpose set out in the mandates system as a whole, i.e., in Article 22, and reformulated in the second paragraph of Article 2 of the Mandate. That is the only basis of testing the legality or otherwise of the actions of the Mandatory which are under consideration at the moment. It is in that sense that the concept of good or bad faith becomes relevant, i.e., in the sense of determining whether actions, policies and so forth are in good faith directed at that objective, or whether they are in bad faith directed at some ulterior objective, some ulterior motive, something unauthorized, something not comprised in the intentions of the authors of the mandates system.

It is also in that sense, Mr. President, that the authorities speak in this regard of good or bad faith. I referred the Court before to the formulation of M. Orts which is quoted in the Counter-Memorial, **II**, page 388. He stated that the Permanent Mandates Commission had to consider "... whether, within the limits of these acts, they [the mandatories] were *honestly performing their task* ..." (italics added). Lord Hailey, in the passage quoted on the same page, said that the general obligation was "to consider the well being and development of the population"; and Bentwich, in the portion which we cited, spoke of "The guiding principle is ... that the Governments must have in view the interests of the native inhabitants".

The other passages I had in mind, Mr. President, are in the Rejoinder, **V**, page 161. I cite first from an eminent English judge, who said:

> "When, however, it is said that the court must not interfere with the exercise of that discretion by the statutory body which has the power vested in it unless the statutory body is using the power vested in it otherwise than in good faith, I think that means, otherwise than for the purpose for which those powers are vested in it."

That was Lord Justice Vaughan Williams, in 1907. Then, Mr. President, we have Lord Lindley stating as follows:

> "I take it to be clear that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purposes for which they are conferred."

That, therefore, Mr. President, is the sense in which good and bad faith is relevant to this matter, and by a process of elimination we eventually find that that is the only test which is capable of being applied in this particular case. It is not a matter of importing a gratuitous gloss into the article; it is not a matter of unilaterally modifying it, it is not a matter of building a bridge towards importing this test of good or bad faith—it is one which follows as a matter of law and of logic from the very nature of the powers which have been granted, and the manner in which they

are circumscribed by reference to obligations, in the mandate instrument with which we are dealing. It is the only conclusion at which one can arrive by a process of interpretation of that instrument.

And, Mr. President, we find then that if we analyse the Applicants' attitude in this regard, it does not amount to assigning to these provisions of the mandate instrument a different meaning in this respect. The Applicants do not say that the mandate instrument is to be so interpreted as to eliminate this element of discretion on the part of the Respondent Government. On the contrary, they admit—subject only to certain qualifications, to which I said I would refer again—that the formulation of our first and second propositions was perfectly in order; that it was unobjectionable. So they admit that element of discretion. They do not contend that in some way or other the Court is now to decide whether the Mandatory, in doing certain things, in achieving a certain measure of progress over a certain period, has, in fact, promoted to the utmost. They do not suggest, Mr. President, that there are factual standards or bases upon which such a proposition could be tested—standards or bases whereby the Court could say to the Mandatory: "You ought already to have reached this point, but you have only reached a point about halfway at this particular stage." Indeed, Mr. President, that would be a very difficult approach for any court to follow. It would really be imputing to the authors of the mandates system also an intention which they could as a matter of probability never have had, because this approach would involve a determination *ex post facto* of the legality, or otherwise, of a mandatory's conduct: one would have to allow the mandatory to continue for two years, or for five years, or for ten years, and then suddenly clamp down on it and say: "Now, let us see—how far have you got?" In the meantime one would not be able to interfere, since the Mandatory exercises a function in respect of which it has a discretion, as the Applicants admit. The Mandatory would be carrying on its task ostensibly in the exercise of that function, and only after a certain period, the Court would say: "Well, you ought to have done more. You know you have not really promoted well-being and progress to the utmost at all." Surely, Mr. President, that could never have been the intention of the authors of the system. A very pertinent factor in this regard is the feature to which my learned friend, Mr. Grosskopf, referred this morning, namely the positive contemplation of the authors of the mandates system that in the functioning of this system mandatories would have the assistance and the collaboration of the Permanent Mandates Commission and the Council of the League—in other words, the assistance of those processes of administrative supervision, as well as the technical assistance and expert assistance involved therein, which would really constitute a process of continual consultation between the mandatory and those administrative supervisory bodies—a process of consultation which would lead it from step to step in the application of certain policies. So how could there possibly have been a contemplation that after a certain period of years a court should suddenly be asked to decide whether the mandatory has indeed, or has not, promoted to the utmost? And the question might be asked, Mr. President: On what basis, upon what criterion, does the court decide that? Would the court decide it with reference to comparative circumstances as far as possible, i.e., by referring to what has been achieved in other comparable territories, in Africa or elsewhere?

That is not the basis which is being suggested by my learned friends in this case. They are not suggesting that that ought to be the basis of approach. In fact, they went to the utmost lengths in the pleadings to *deny* the relevance of comparisons of this kind, which we introduced into the picture in order to restore some balance. They deny the relevance of comparisons, and have great difficulty with a proposition that there is to be an inspection to compare comparable standards. The whole basis of this legal contention, as I understand it, is that one is now to have regard to modern standards, modern legal norms—contemporary norms and standards which are to be read into the Mandate by means of a process of interpretation. And these suggested norms and standards will be found to relate *not* to the question, Mr. President, whether there has factually been progress of a certain kind, or not. On the contrary they relate only to a particular method of dealing with some of the problems which arise in a territory like South West Africa, and which could arise in other territories with a multi-racial composition. Thus they relate to the question of whether members of the various population groups are to be treated alike, whether the children, for instance, are to be put into the same schools or separate schools, rather than to the question of whether the number of schools and the number of children of school-going age actually at school, proves in that respect that the mandatory has fulfilled its task.

The whole contention, Mr. President, centres not on what the Applicants allege to be a flat obligation of actually promoting progress, but relates purely to a certain technique, a certain method, a certain manner in which, they say, certain of the problems inherent in a task of that kind are to be approached. And that, Mr. President, as we have pointed out, they seek to achieve not by assigning an alternative *meaning*, or an alternative *scope* to the obligation as originally agreed upon by the founders of this system in 1920, but by importing into this instrument certain things that are not there, and which they admit were *not* there in 1920. They say so themselves. They say certain current norms and standards are to be regarded as relevant in this context. They say they arrive at *that* result by a process of interpretation, although, of course, one finds nothing stated in the mandate document regarding any standards of that kind—no reference whatsoever to any questions of method of that kind—no norms of the kind referred to by the Applicants—no express reference to that at all—and yet they say "by a process of interpretation" we are now to read the mandate instrument as containing those things. We submit, Mr. President, that there is quite obviously no legal basis whatsoever for a contention of that kind.

[Public hearing of 22 April 1965]

Mr. President, my learned friend, Mr. Grosskopf, and I dealt last Wednesday, before the adjournment for Easter, with our argument on the correct interpretation of the Mandate on the question of the legal basis, if any, upon which the Court can adjudicate upon alleged violations of Article 2, paragraph 2, of the Mandate. My learned friend, Mr. Grosskopf, dealt with our main contention in that regard, namely that the Court was not intended by the authors of the Mandate to adjudicate at all upon questions where no direct rights or interests of the Applicant States are involved. I commenced our argument on the alternative contention,

namely that if there is a basis for adjudication it must be one similar so that upon which municipal courts exercise a power of review of decisions of a tribunal, a person, a body exercising a discretionary function, as distinct from appeal therefrom. We submitted that, in the ultimate result, the only possible criterion for adjudication in the present case would be on the basis whether the actions taken by the Mandatory were performed in pursuance of powers which were exercised with a bona fide purpose or objective of promoting well-being and progress to the utmost. It resolves itself, into other words, in an enquiry as to the purpose or the objective of the action, the policy, the measures under consideration.

Now, Mr. President, may I, with respect, before proceeding with the argument, just by way of summary—even although it may involve a slight measure of repetition—indicate the main steps which led to this result that is, to our above-mentioned construction, so as to provide the basis for considering further the argument presented against our construction by the Applicants. I dealt with the subject in some detail—I virtually covered the field—I am now merely stating the main steps by way of conclusion and summary.

Our contention is that Article 2, paragraph 1, of the Mandate conferred full power of administration and legislation. This, in the first place, covered the whole field of possible governmental action—the whole conceivable area in which a government could act by way of administrative action or by way of legislation—nothing was withheld. In other words, there is no possibility here of a situation arising in which an action can be said to be *ultra vires* merely because no power was given to take that kind of action. The only possible basis for holding an act to be outside of the powers granted would be of a different kind: such basis would be the transgression of a limitation upon powers; it cannot be said that powers to do a particular kind of thing were not conferred.

This grant of full power of government and legislation included the necessary discretion which is inherent in all powers of this nature—a discretion to decide what action to take, and how, or in what manner, that action is to be pursued. I gave the Court references to a number of authorities, mainly in municipal law, on this particular question. I omitted, however, to refer to an important decision in this regard by the Permanent Court, namely the *Lighthouses* case. We refer to that case in the Counter-Memorial, **II**, at page 387. The Permanent Court there said:

> "... any grant of legislative powers generally implies the grant of a *discretionary right* to judge how far their exercise may be necessary or urgent; ... It is a question of appreciating political considerations and conditions of fact, a task which the Government, as the body possessing the requisite knowledge of the political situation, is *alone qualified* to undertake." (Italics added.)

As I say, I gave other references to municipal law and also to commentators on the mandates system itself, who came to this same conclusion.

The only limitations on a Mandatory's powers, Mr. President, and, therefore, the only basis on which action by a Mandatory could possibly be regarded as *ultra vires* or in contravention of its obligations, would be those which were expressed in the mandate itself. One finds two classes of such limitations: the first—not the first mentioned, but the first to which I refer—comprises those set out in Articles 3 to 5 of the Mandate; they are "particular obligations", as the Court described them in the

1950 Opinion, at page 133, and relate to the slave trade, the provision of liquor and so forth. The other limitation was the general obligation—to promote to the utmost—set out in Article 2, paragraph 2. This description is also in accordance with the Court's terminology in 1950. The majority opinion distinguished in this regard between the general obligation in Article 2, paragraph 2—to promote to the utmost—and the particular obligations set forth in Articles 3 to 5. The particular obligations are not relevant to the present part of the case. In so far as the Applicants base any changes on the particular obligations, it falls to be dealt with in a different part of these proceedings. We are concerned for the moment only with the general obligation imposed in paragraph 2 of Article 2. The effect of that general obligation is to limit, or to qualify, the Mandatory's discretionary powers in one way only, and, that is, to prescribe the object or the purpose for which the Mandatory is obliged to use its powers. This, Mr. President, we submit, is evident for two reasons, with which I have also dealt fully: the first is that promotion of the well-being and progress of the peoples concerned is the overriding trust purpose or object of the whole mandates system, and, indeed, of every mandate. I gave the Court a number of references to authorities stressing that aspect of the matter. Secondly, Mr. President, the very generality of the obligation makes it clear that one is concerned here merely with a matter of objective or purpose, and not with matters of detail concerning methods of achieving the purpose: the obligation, as it is recorded, relates only to a broad aim, or an objective, or purpose.

In the result, Mr. President, except for Articles 3 to 5, there is nothing which impairs the Mandatory's discretion to decide on specific actions, measures, or policies, or on methods to be applied in pursuance of measures, actions or policies which are directed at achieving this general, prescribed objective. In the result we contend further that as long as the Mandatory honestly attempts to achieve this objective, its conduct cannot be regarded as a violation of its obligation.

Whether a court, or anybody else, agrees or disagrees with the methods and policy employed in the attempt, or whether a court, or anybody else, likes or dislikes those policies, does not matter. The legality of the action of the Mandatory is not affected as long as it honestly attempts to achieve the said objective.

Stated conversely, Mr. President, the proposition amounts to this, namely that violation of that obligation can occur only, firstly if the Mandatory makes no genuine attempt at all to fulfil its obligation, or, secondly, if the Mandatory directs its measures and its policies at some unauthorized objective or purpose. Those are the only conceivable bases upon which, in our submission, a Mandatory can be said to violate its obligation under Article 2, paragraph 2, of the Mandate.

Both of these bases involve an abuse of power. In the first case, where the Mandatory does not try at all, it knows that it is obliged to attempt to achieve that result, to promote to the utmost. Secondly, where the Mandatory directs its powers of government and legislation at an objective which is not the authorized or prescribed one, it would likewise be abusing its power, in view of the fact that there is no possibility of misunderstanding in this regard.

Mr. President, in the circumstances of a case where, as I have said, there is no possibility of a misunderstanding—a bona fide misunderstanding—on the part of the Mandatory a violation of Article 2 on either

of the two bases would necessarily involve an element of intentional, or *mala fide*, abuse of power. The Mandatory would intentionally and knowingly be violating its obligations. That is the only basis upon which violation can occur, in our submission, in the particular circumstances of the Mandate.

Now, Mr. President, we have already dealt with certain of the Applicants' arguments against that construction which we submit to be the only possible one which can be put on Article 2, paragraph 2, i.e., on the assumption that the Court was intended to exercise any power of adjudication in this regard at all. We have dealt with their suggestion that the incorporation of the idea, or concept, of a purpose into the matter amounted to a "gratuitous gloss" or a "unilateral and off-hand modification of the provisions of the Mandate"—that it amounted to a vehicle for importing into the article the good or bad faith test. I have dealt with those arguments and I need not refer to them again.

It remains for us to deal with certain other arguments advanced by the Applicants, and I wish to do so now.

The first of those arguments we find in the verbatim record at pages 256-257, *supra*. There, the Applicants deny that there is any relevant distinction, for the purposes under consideration, between Article 2, paragraph 2, on the one hand, and Articles 3 to 5 of the Mandate, on the other hand. They say in this regard that Article 6 requires reports concerning "... the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5 ..." (P. 256, *supra*.) Next, Mr. President, they say that this shows, in their submission, that:

> "... the authors of the mandates system envisaged no distinction of a legal character between the obligations under Article 2, as distinguished from Articles 3, 4 and 5" *(ibid)*.

They refer to a possible distinction, Mr. President, on the basis of generality of formulations, but they say, even in this regard, that:

> "... the wording of Article 6 of the Mandate Agreement indicates, ... that *no* distinction was drawn or perceived by the authors of the Mandate between, or among, these articles on the basis of the method of their formulation" (p. 257, *supra*).

That is on the basis of generality as opposed to the specific formulation of Articles 3 to 5.

Mr. President, in our submission, this argument of the Applicants hardly warrants a reply. It is so clear that that distinction does exist, and that it forms part of the very nature of the whole framework of the Mandate.

Nevertheless, in so far as the reference to Article 6 of the Mandate is concerned, we submit that the inclusion, in this Article, of reference to all the Articles of the Mandate (that is from Articles 1 to 5), indicates that they were regarded as identical in one respect only, and, that is, that they all required accounting. That was the only respect in which they were identical for purposes of Article 6. No further inference is logical, or possible, from the mere fact that Article 6 refers to them all.

I have dealt with the obvious differences that, in fact, exist between Article 2, on the one hand, and Articles 3 to 5, on the other, and a number of commentators, as I have pointed out, have referred to this feature of the matter.

The most striking feature is the generality of formulation of Article 2 and, as a necessary corollary, as we pointed out, Article 2 provides, or allows, scope for the exercise of a discretion, whereas most of the other articles allow no discretion at all, or hardly any discretion.

We referred, in regard to these differences, to the Opinion of the Court in 1950, and to commentators such as M. Orts, Hailey and Bentwich, all of whom emphasize this aspect of difference and distinction between Article 2 and Articles 3 to 5.

What is strangest of all, Mr. President, is that the Applicants conceded the existence of a discretion under Article 2. Thus they conceded in effect, the main difference between Article 2 and the others but, they nevertheless say that no significant distinction can be drawn between Article 2 and Articles 3 to 5 as to the basis of adjudication.

We submit that there is no substance whatsoever in that argument.

Then, Mr. President, we find that the Applicants in the same verbatim record, and following on the argument with which I have just dealt, refer to a well-known report of Mr. Hymans to the Council of the League —the portion of the report in which Mr. Hymans indicated that it would be part of the function of the Council, as the supervising administrative authority, to concern itself not only with the question whether the mandatory power had remained within the limits of the powers which were conferred upon it, but also with the question whether the mandatory power had made good use of those powers and whether its administration has conformed to the interests of the native population.

In this regard they submitted, Mr. President, that, in the words of Mr. Hymans, the Council was to consider "whether the administration has conformed to the interests of the native population", which, they say—

> "... is quite a different standard than to say or to ask whether the interests of the 'Native' population have been served according to the best judgment or good faith of the Mandatory" (p. 257, *supra*).

And at page 258 they say:

> "What was for examination was, in the words of Mr. Hymans, the question of the whole administration, not the conscience of the administrator."

Mr. President, we fully agree that when it came to the function of administrative supervision to be exercised by the Council, the Council had, certainly, to concern itself with the whole administration and, therefore, also with the question whether the mandatory power had made good use of its power. The question for examination was, then, the whole administration, but that was examination by the authority exercising administrative supervision. As we have indicated before, that authority had the task of collaborating with the Mandatory in so far as the exercise of the Mandatory's discretion was concerned.

It is quite a different matter, Mr. President, when it comes to deciding whether a violation has occurred of the Mandatory's obligations by reason of any particular conduct on the part of the Mandatory. The Mandatory's discretion is referred to by Mr. Hymans himself in this report—in the very words to which the Applicants refer—where he distinguishes between the question "whether the Mandatory Power has remained within the limits of the powers which were conferred upon it"

(p. 257, *supra*): i.e., the question whether the mandatory power has acted in accordance with its rights or powers, or whether it has violated any obligations. That is the question on the one hand. And it is from that proposition that Mr. Hymans distinguishes the other one, namely whether the mandatory power had made good use of those powers.

Nowhere does Mr. Hymans suggest that there would be any violation of an obligation, or, indeed, any ground for the Council to interfere with the Mandatory's conduct upon a mere difference of opinion between the Council and the Mandatory as to the manner in which the Mandatory's discretion is to be exercised, or as to whether a particular action is to be regarded as good use of the powers, or is not to be regarded as such.

Indeed, Mr. President, in the very next portion of Mr. Hymans' report he draws that distinction and makes it clear that beyond acting in the case of an abuse, or a violation, of powers the Council would have to proceed very carefully, since it acted as a collaborator, in other words, not as a judge. We quote the passage in the Counter-Memorial, **II**, at page 120. It read—

> "*In this matter the Council will obviously have to display extreme prudence so that the exercise of its right of control should not provoke any justifiable complaints, and thus increase the difficulties of the task undertaken by the Mandatory Power.*" (Italics added.)

Immediately before that we quote the well-known statement by Mr. Lloyd George, where he said that—

> ". . . he regarded the system merely as a general trusteeship upon defined conditions. Only when those conditions were scandalously abused would the League of Nations have the right to interfere and to call on the mandatory for an explanation. For instance, should a mandatory allow foul liquor to swamp the territories entrusted to it, the League of Nations would have the right to insist on a remedy of the abuse."

Mr. President, a clear distinction is made between what an administrative authority could do by way of collaboration in assisting a Mandatory to make the best use of its powers, and what a judicial authority could do in deciding whether there had been a violation by the Mandatory of its obligations; or, which is the same thing, whether there would be a right on the part of the League to interfere with the Mandatory's conduct.

Then, Mr. President, there is also the Applicants' reply to the fourth of our propositions as summarized in the Rejoinder. The Court will recall that after we set out the first three propositions in the Rejoinder—that is at pages 158-159 **(V)**—we also set out an additional proposition which, we said, afforded independent confirmation of the first three. That proposition read as follows:

> "The conclusion set out in sub-paragraph *(d)* is strengthened by the consideration that, whenever there is scope for honest difference of opinion (as there often must be) on the question whether a particular legislative or administrative measure or policy *does or does not, or will or will not, in fact promote well-being and progress to the utmost*, there are no legal norms—as distinct from political or social views or theories—which a Court can apply for giving preference to any of the conflicting opinions to the exclusion of the others. Consequently, the only legally prescribed basis upon which the

> Court can determine whether the Article has been violated, is to enquire whether such measure or policy was *intended to promote well-being and progress to the utmost.*" (V, p. 158.)

Mr. President, in this passage we italicized certain words. We italicized the words "does or does not, or will or will not, in fact promote well-being and progress to the utmost", and we italicized at the end the words "intended to promote well-being and progress to the utmost". We thereby indicated and intended to bring out clearly the distinction between one for which no legal norms, in our submission, existed, and an inquiry for which a legal norm did exist. There would be no legal norm, in our submission, for inquiring whether a particular policy or measure does or does not, or will or will not, in fact, promote well-being and progress to the utmost. That is, as stated in the proposition, an inquiry for which no legal norms would exist.

On the other hand, we submitted that the only legally prescribed basis upon which the Court can determine whether the Article has been violated is to inquire whether such measure or policy was intended to promote well-being and progress to the utmost. For purposes of this latter inquiry, therefore, we indicated clearly that there was a legal basis for adjudication—that is, in terms of the alternative contention which I am now presenting to the Court.

We find, Mr. President, that despite this the Applicants say, in the verbatim record at page 244, *supra*, that "Respondent then concludes . . . that no legal norms exist by which a court can judge Respondent's . . . good or bad faith". Mr. President, it is very strange how a submission of this kind could be made at all. We made it so clear, it seemed to us. We said that for that purpose a legal norm does exist. The legal norm is the one which we have indicated, the one, namely of an inquiry into the purposes of the Mandatory, and of the Mandatory's particular action or policy complained of. Is the purpose or objective the authorized one of promoting to the utmost, or is it an unauthorized ulterior objective or motive?

That is a legal basis for adjudication, and that is the basis upon which we submitted that the Court could adjudicate the question of the Respondent's good or bad faith—in other words, of the legality of its action.

The inquiry in this regard, Mr. President, i.e., whether a particular person, body or authority has acted in good faith with a view to achieving a certain objective, or whether he or it has acted in bad faith, is always an inquiry of fact, on the outcome of which certain legal consequences follow. The consequence in this particular instance involves a distinction between a violation or abuse of power, and acting within the terms of the power, or, in other words, acting legally.

Later we shall indicate and deal with the methods which a court of law employs in practice, and which are regularly employed by municipal courts, in conducting an inquiry of this kind. It would, therefore, Mr. President, appear that the Applicants' contention that there is no legal norm and no factual basis for adjudication along the lines suggested by the Respondent's contention, is also without any substance.

It remains for me, Mr. President, to revert to what the Applicants called their "cautionary comment" on our propositions (1) and (2) as set out in the Rejoinder. I indicated to the Court that the Applicants said that they found our propositions (1) and (2), relating to the wide ambit

and the discretionary nature of the Mandatory's powers under Article 2 of the Mandate, to be unobjectionable, subject only to certain cautionary comment. That we find at page 243, *supra*, of the verbatim record and it reads as follows:

> "... subject ... to the cautionary comment that Respondent's reference ... to 'discretion' does not imply that such discretion is not reviewable on the basis of objective criteria and legal norms, and subject to the comment that Respondent's reference in proposition (b) to the absence of 'regulatory provisions' does not exclude the international regulations of the mandates system itself".

Now, Mr. President, that part of the cautionary comment need not detain us at all. The Applicants proceed (may I first complete this) by stating later in the same record, at page 254, *supra*, that "... the concept of discretionary powers limited by legal norms is well-known to international judicial tribunals". It is not of the essence of a discretionary power that it must necessarily be unlimited. Therefore the Applicants are perfectly correct in saying that the concept of a discretionary power limited by legal norms is, indeed, well-known. We entirely agree: we do not contend that the discretion conferred upon the Respondent as Mandatory, by Article 2 of the Mandate, was a wholly unfettered or unlimited discretion. We admit certain limitations and we have indicated the scope of those limitations.

So, in that respect, Mr. President, there is common cause between us. The only conflict between the Parties is on the question, what norms exist which act as a limitation upon that discretion? We have made our submissions and argued fully in that regard, and by a process of elimination we arrived at the proposition which I have put to the Court before, namely that the only possible test in the circumstances of this case is that of good or bad faith in striving after an authorized or an unauthorized objective.

But, Mr. President, the Applicants in effect say—in fact, they say expressly—that there are other legal norms which serve to limit this discretion, and which in some respects—although they do not stress this aspect—in effect, serve to destroy and rule out the discretion altogether. They say that they arrive at those limitations by a process of interpretation. That brings us to a consideration of the Applicants' contention in that regard in some more detail, and to weigh it against the Respondent's interpretation.

I may just say, before embarking upon that inquiry, Mr. President, that the manner in which we have approached the interpretation of the Mandatory's powers and obligations is the standard manner which is normally followed in the interpretation of all constitutional instruments. Members of the Court may be aware of the pronouncement of Lord Selborne in the celebrated Privy Council case of *The Queen* v. *Burah*, Three Appeal Cases, 1877-1878, at pages 904-905. This was a case which arose under the then operative Constitution of India, and it concerned the validity or otherwise of a legislative measure of the Indian legislature. Lord Selborne said (at p. 904):

> "The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which prescribe these powers ... The established Courts of Justice, when a question arises whether

> the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, . . . it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

As I have said, Mr. President, this was a very celebrated pronouncement, because there was occasion in later litigation throughout the British Commonwealth to refer to it again and again—repeatedly—on questions of the validity or otherwise of statutory measures.

You may recall, Mr. President, the history in Australia in that regard, running through *Webb* v. *Outram*, the *Engineers'* Case and so forth I had occasion to go into that for other purposes some years ago. What was stressed, I know, in Australia, by the Courts in South Africa, by the Canadian Courts, and by the Privy Council sitting in appeal in various cases was that the approach indicated in that particular passage from the *Queen* v. *Burah* must have been in the minds of the makers of subsequent constitutions; i.e., the makers of the Australian Constitution in 1900; the makers of the South African Constitution in 1909-1910, and others.

That case reflects the perfectly logical approach to finding out what a constitutional instrument says, namely what powers does it positively confer, and what limitations does it negatively impose upon those powers. If we look at the mandate instrument, if we look at the manner in which it was drafted, it seems perfectly obvious, Mr. President, that that same logical approach was inherent in the whole process of drafting. It begins with a general provision setting out the powers of the authorities, in this case the Mandatory, and then proceeds to indicate limitations upon those powers. Thus the sole enquiry is this: does that which is being impeached in this particular case fall within the generality of the powers positively conferred? There is no dispute about the fact, Mr. President, that it does fall within the generality of the powers conferred. It all concerns the question of administrative and legislative power in respect of South West Africa.

The only further question then is: does it come into conflict with any limitation on power, with any prohibition imposed upon the Mandatory, does it exceed any limitation, and where does one find those limitations? One finds them in this self-same instrument, and in such circumstances, particularly when a constitutional instrument of this kind is dealt with, it is not for a court of law "to enlarge constructively" those restrictions or limitations.

The effect of the Applicants' submission, Mr. President, is not only that they ask the Court "to enlarge constructively" upon limitations or restrictions, but that they also, in effect, as I shall demonstrate, ask this Court to indulge in judicial legislation in that regard. They ask the Court, in other words, to state or find the existence of restrictions or limitations by virtue of no known process of interpretation or any other legal process pertaining to the origin of obligations or limits upon powers.

Mr. President, may I point out, firstly, that the Applicants' argument is to the effect, as the Court knows, that Article 2, paragraph 2, of the

Mandate is to be interpreted in the light of modern norms and standards. I indicated to the Court last Wednesday that, as we analysed the Applicants' case regarding Article 2, paragraph 2, it indeed amounted to an allegation of bad faith on Respondent's part in the sense under discussion—bad faith in the sense that the powers granted were used for an unauthorized purpose. When I said that, Mr. President, I was referring to the case as we understood it to have been originally made by the Applicants in their Memorials. I was not referring to the new introduction into their case, in the Reply, of a so-called norm of non-discrimination and non-separation—a norm which was first, we say, introduced in the Reply, and which is still relied upon in the oral argument although in a somewhat modified form.

I shall deal later with our contention that this is, in effect, a new cause of action, because that is also contested by my learned friends on behalf of the Applicants. For the moment I merely want to indicate that, when I said that the Applicants' case indeed amounted to a charge of *mala fides*, I referred to their case as set out in the Memorials and which was in part, as we understood it, retained in the Reply.

If we have regard to the alleged norm of non-discrimination and non-separation, as formulated in the Reply, and even as modified now in the oral argument before the Court, we find that it involves a suggestion of a different norm upon which the Court can adjudicate. It would, indeed, as formulated in the Reply, constitute an objective norm—a norm which could be applied objectively and precisely to the circumstances of a particular case in the same way as Articles 3 to 5 of the Mandate could be applied objectively and precisely to a specific case.

It would, then, under those circumstances, be unnecessary to enquire into any question of good or bad faith. One would simply have to see, objectively, whether the provisions of that particular norm would apply just as the Court in adjudicating upon an allegation that there is in fact slave trade in a mandated territory, would simply consider the facts of the case, and decide whether those facts do or do not constitute slave trade in contravention of the Article: it would not consider any question of good or bad faith on the part of the Mandatory. Similarly on the basis of the norm of non-discrimination and non-separation as formulated in the Reply, the Court would simply have to decide whether or not there has been discrimination or separation in conflict with the content assigned by the Applicants to that particular norm. And therefore it could, in such an instance, be said to be a case of an objective criterion or basis, and not a criterion referring to good or bad faith at all. But what I want to stress, Mr. President, is that the argument in favour of this proposition does not rest on a rival interpretation of the Mandate—an interpretation which is offered by the Applicants in reply to the interpretation which we put on the terms of the Mandate. It is not founded, Mr. President, on anything stated in the Mandate at all.

In the first place, it does not rest on the alleged meaning in 1920 of any provision of the Mandate—the Applicants have made that clear. Indeed, it is not founded on anything alleged to have been contained in the Mandate at all in 1920, whether expressly or by implication and it does not rest on anything alleged to have been agreed or consented to by the Mandatory. That is the effect of the Applicants' contention, and yet they say that their contention in regard to this norm rests on interpretation of the Mandate.

Now, Mr. President, in saying that the Applicants' contention does not rest on the alleged meaning in 1920 of any provision of the Mandate, there is one aspect with which I wish to deal, because it is of importance. The Court will recall that the Applicants, by way of their "gratuitous gloss" argument, attacked our interpretation that the crucial question for decision is the question of the purpose or the objective with which the mandatory acts. They said, in contrast, that one does not deal with an obligation setting out any concept of objective or purpose in that regard, but that there was a flat and straightforward obligation, if I remember correctly, to promote to the utmost.

Now, Mr. President, if they wished to follow up that contention and to say that that is the correct interpretation of the Mandate, it would mean that the Court would have to test the legality or otherwise of the Mandatory's conduct with reference to results achieved and not with reference to the objective with which the Mandatory embarked upon a particular policy or a particular course of conduct. The Court would then have to adjudicate, very often *ex post facto*, whether certain conduct or a certain policy of the Mandatory has or has not, in fact, resulted in promotion to the utmost.

I indicated in my argument last Wednesday that it is most unlikely that that could have represented the intention of the authors of the mandate system. In the first place, nobody would have known whether the Mandatory was complying with the Article until enough time had elapsed for the results of the policy to become apparent. And even then, Mr. President, it would seldom be clear in retrospect whether an alternative policy would or would not have achieved better results. The Court would have to adjudicate *ex post facto* on the hypothetical basis of weighing alternative policies against each other. It would have the actual results attained under a particular policy; it would then have to weigh by way of contrast what results could have been achieved if a different policy had been followed. Our submission is that it seems most unlikely that the Court could ever have been intended to apply a test of that kind. It would, of course, destroy the discretionary element in the Mandatory's functions and the Court would then, in effect, be substituting its own discretion for that of the Mandatory.

In addition, Mr. President, this method of construction would bring us to the result that the Mandatory could contravene the Article if its policy did not come up to expectations, even through no fault on the Mandatory's part. The Mandatory could, by the best possible application of its mind to the problem and by the best possible application of its resources, embark upon a particular policy with a view to promoting well-being and progress to the utmost. A court could then afterwards say to a Mandatory although you did your best and honestly acted to the best of your ability, you could have done better, or the results could have been better, although there was no fault on your part, the results could have been better if you had followed a different policy from the one you did follow. Again, Mr. President, it seems most unlikely that anybody could have intended that *that* was to be the basis upon which the Mandatory's conduct under Article 2 (2) was to be adjudicated upon.

The point I want to make now and to emphasize, is that the Applicants themselves do not, so it appears on analysis of their proposition, contend for an interpretation of that kind. They do not contend that the policy of the Mandatory is to be adjudged according to its results on merit, i.e.,

according to what it has achieved in contradistinction to what it should have achieved by way of total promotion of well-being and progress. The norms upon which the Applicants rely are not sought to be justified on the factual basis that their application would have led to greater well-being and progress than has actually been the case. The Applicants have not, as I have pointed out, attempted—indeed, they have steadfastly resisted—any comparison of standards attained in South West Africa with standards attained in other African States. By way of illustration of this point, Mr. President, and because it is an important distinction, I should like to refer to the manner in which the Applicants dealt with certain comparisons they made in the sphere of education. We find that they made that comparison not for the purpose of showing what progress and promotion of well-being there has been in South West Africa, or what progress has, in fact, been made in the different territories, but that they somewhat illogically describe the mere application of their norms as progress, and that they make comparisons for those purposes. The illustration to which I should like to refer, is their comparison of Somaliland under Italian administration with South West Africa in the field of education, in the Reply, **IV,** pages 402-403. We dealt with it in the Rejoinder, **VI,** pages 163-165. The Applicants in the Reply, **IV,** page 402, referred to Somaliland as an example of:

> "The promotion of the moral well-being and the social progress of all the inhabitants of a territory by implementing non-discrimination in education ..."

The Applicants proceeded to say that during the years that Somaliland was under trusteeship, there was an increase in the number of Somali students in Italian elementary schools. That is the progress of which they were speaking—the increase in the number of Somali students in Italian elementary schools. By 1957, they concluded,

> "... of a total enrolment of 971 in the 'Italian' elementary schools, 405 were found to be idigenous inhabitants of Somaliland". (**IV,** p. 403.)

Now, Mr. President, in the Rejoinder, **VI,** at page 164, we drew attention to the fact that the only kind of development mentioned by the Applicants was the presence of a few hundred Somali children in Italian, Indian and Pakistani schools. They were *all* called Italian by the Applicants. We also pointed out that no evidence was advanced of, for example, increased educational facilities, or increasing school-attendance figures. We pointed out further that, in this territory which the Applicants chose to quote to the Respondent as an example of progress, the percentage of school attendance was appreciably lower at those times than in South West Africa, and gave the figures in the Rejoinder, **VI,** at pages 164-165; to which I would like to draw the Court's attention:

> "In 1950-1951 there was a total enrolment of 7,479 in all schools, i.e., about 1.5 per cent. of the school-age population. In 1954-1955, ... the total number of school children stood at 11,219 ..."

which was described by a representative of a country in the Trusteeship Council as—

> "'only some 4 per cent. of the school-age children attend[ing] school'. In 1956 it was noted by a member of the Council that 'Even from the city population only 17 per cent. of children of school age atten-

ded school'. In 1957 a United Nations' Visiting Mission noted 'that the enrolment of children in schools was low, being 12,557 in 1956-1957, while the target of the five-year plan had been 22,080'. In 1958-1959 total enrolment in all schools in the country increased to about 18,600." (**VI**, p. 165.)

Now, Mr. President, if the figure for 1954-1955, 11,219, respresented some 4 per cent. of the school-age children attending school, then the figure of 18,600 must have represented something in the region of 7 per cent. By comparison, we indicate what the position was in South West Africa in the years in question, and give that in the Counter-Memorial, **III**, pages 444-445. In 1951, the number of Native children at school in South West Africa actually numbered 24,527, which meant that, on the same basis of comparison as used for Somaliland, 30.3 per cent. of all Native children of school-going age were at school in that year. In 1960, the figure, on the same calculation, had increased to 39 per cent. of all Native children of school-going age in South West Africa.

There is a reference at page 444 to further increases after 1960, which I need not deal with now. We deal with the matter in the Rejoinder and we shall deal in evidence with the further spectacular increases which have been attained since those years. I merely wish to point to the comparison for the moment.

In Somaliland over the period 1951 to 1959 the increase was from 1.5 to 7 per cent. In South West Africa the range was 30 to approximately 40 per cent.

So, Mr. President, it becomes quite clear: the concern of the Applicant in the application of this norm is not with progress in fact made—and, may I say, when I make these comparisons, the intention is not to cast any reflection at all upon Authorities in other territories concerned. We are not analysing the circumstances in those territories, I am not criticizing anybody. I am merely making comparisons with a view to indicating what the general standards in South West Africa are by way of comparison with other comparable territories. For the moment the purpose of my comparison is purely this: to indicate that the Applicants' concern is not with the total progress which is in fact being made in the sphere of promotion to the utmost of material and moral well-being. It is concerned only with one kind of progress, and that is progress in the application of the very norm for which the Applicants are contending.

And that makes it perfectly clear, Mr. President, in our submission, that the Applicants are not relying on an alternative interpretation of what is to be found in Article 2 or, indeed, in any provision of the Mandate. They are relying on a norm not to be found in the Article at all, which could be incorporated into it, if at all, only by a process of implication or by a process of amendment if the Mandatory should subsequently have agreed to the introduction of such a norm into the Mandate.

Now, Mr. President, if the Applicants truly relied on interpretation of the mandate instrument—interpretation as that term is usually understood—in order to bring them to the result of this norm for which they were contending, then, as we pointed out in the Rejoinder, **V**, at page 140, they would have to contend that Article 2 must be read as containing, and as having always contained, a provision like the following:

"The mandatory shall, when exercising its full power of administration and legislation, give effect to such standards or norms as

> may at the time of such exercise be generally applied by other States."

That is the only basis upon which one can, by a process of interpretation, or of ascertaining what this provision meant in 1920, come to the conclusion that there are now current norms and standards which are, as a matter of law, to be applied to the circumstances of the particular case.

We said further in the Rejoinder, at the same page, the following:

> "Inasmuch as no such qualification was included in the express terms of the Mandate instrument, Applicants would have to contend that it must be read into the Mandate as a necessary implication. It is, however, unthinkable that the authors of the Mandate (which included several Mandatories) would have decided upon, and that the Mandatories would have consented to, the imposition of an obligation of such uncertain content, posing so many difficulties of application and giving rise to the possibility of interminable dispute. Since Applicants do not rely on such an implication, and no material has been adduced to suggest the existence thereof, Respondent will not devote any further consideration thereto."

Now, Mr. President, we find that in the oral presentation my learned friends declined to state whether or not they contend for such an implication in the mandate instrument. In the verbatim record page 261, *supra*, my learned friend quoted the statement from the Rejoinder which I have just read, and he said he found it unnecessary to comment further on it. He confined himself to this contention, and I quote:

> "... that the legal dispute now presented to this honourable Court is occasioned, *inter alia*, precisely by Respondent's failure to apply currently accepted norms and standards to its administration of the Territory".

Mr. President, this contention on the Applicants' part, even if it were true, would hardly assist in showing how and why the Respondent has become obliged in law to apply such norms and standards. The statement is merely to the effect that the trouble arises from our failure to apply currently accepted norms and standards, but it does not say why we are obliged in law to apply those norms and standards. It also fails to state, Mr. President, how this Court would have any jurisdiction on the basis of the provisions which the Applicants invoke in this case, namely Article 7 (2) of the Mandate; it does not state how this Court could have any jurisdiction whatsoever to adjudicate upon the application or non-application, or applicability or non-applicability, of current and accepted norms and standards, other than by way of a process whereby those norms and standards can be said to form part and parcel of the provisions of the Mandate.

So, Mr. President, what do we find on analysis? We find, firstly, that the Applicants have not attempted to show that the alleged currently accepted norms and standards ever formed part of the Mandate. They do not allege that they were ever in any way agreed or consented to by the Respondent: in fact, the Applicants admit that these norms were not part of the Mandate in 1920, and they do not allege that the Respondent ever agreed to them subsequently. I may perhaps just refer the Court to the passage in the verbatim record where the Applicants make this perfectly clear. It is at page 261, *supra*:

> "Respondent commences its discussion of the meaning of Article 2, paragraph 2, with a comment that the generally accepted standard of non-discrimination or non-separation was not '*contained* in Article 2 of the Mandate as at the date of its execution' ... Applicants, of course, have never contended otherwise."

So that makes it as clear as can be. The obligation did not form part of the Mandate in 1920. Our learned friends do not contend that there was any process of amendent of the Mandate; in other words, they do not allege that Respondent ever agreed or consented to such an obligation.

Nevertheless, Mr. President, they seek to foist these currently accepted norms and standards upon the Respondent as binding obligations, and they say that this process—this conclusion—is to be arrived at by interpreting Respondent's obligations in the light of such currently accepted norms and standards. Mr. President, in my submission, the Applicants could hardly have made it plainer that they are unashamedly asking this Court to apply a process of judicial legislation.

Mr. President, I merely wish to offer a few concluding remarks on the portion of the argument I addressed to the Court before the adjournment. My submission is that the very technical process by which the Applicants say that they arrive at their conclusion of a legal, currently accepted norm of non-differentiation or non-separation—that very technical process shows that their contention is wholly unsound. It ignores the basic fabric upon which the whole of international law and international jurisprudence is founded. Making it clear that they nowhere allege, or attempt to prove, that Respondent has given its consent to an obligation of the kind for which they contend, they, nevertheless, ask this Court to find that that obligation is binding upon the Respondent. They ask the Court to find, independently of the Respondent's consent and, indeed, in the face of its protests, that the Respondent is obliged in the administration of South West Africa to apply this norm of non-discrimination and non-separation, to do away with any differentiation on the basis of race, colour, ethnic grouping, tribe, and so forth. Even if the Respondent should be entirely convinced that to do so would lead tomorrow to chaotic results; that it might lead to the departure, say, of the whole of the more developed white community; that it might lead to a resumption of faction and tribal fighting; that it might lead to a complete collapse of the whole structure in South West Africa; that eventually it might lead to chaotic conditions of misery for everybody involved: even if the Respondent Government were to be convinced of all those things, even then this obligation is to be imposed upon it by this Court as something which it is to be coerced to fulfil. And why do the Applicants say that? Not because the Respondent ever agreed that such an obligation is to be binding upon it; not because it was to be found in the mandate instrument initially; not because the Respondent subsequently agreed by way of amendment of the mandate instrument that that obligation is to be binding upon it. The Court is to find that such an obligation exists merely because it reflects, in the Applicants' contention, currently accepted norms and standards, and they say that the mandate instrument is now to be interpreted in the light of those currently accepted norms and standards. I repeat, Mr. President, that a clearer instance of asking this Court to apply judicial legislation can hardly be imagined. The Court is, in effect, asked to act as a rubber stamp for the views of majorities in political bodies. That is what it amounts to—to that, and nothing more,

and calling it interpretation in the light of modern standards does not help; a rose, in our submission, by any name still smells sweet.

I shall demonstrate in other ways also that this contention regarding currently accepted norms and standards, and particularly this one of non-discrimination and non-separation, is entirely unfounded; but I submit that the arguments I have already adduced up to this point are in themselves sufficient to show that that is so, that the whole contention of the Applicants in this regard is entirely without any substance in law.

Before approaching the matter from the other points of view, I should like to revert first to an argument which the Applicants adduce as an objection to the only basis upon which we contend that this adjudication can be undertaken, namely the basis of determining the Respondent's good or bad faith in this regard—of determining whether Respondent is pursuing the authorized objective of promotion to the utmost or whether it is in bad faith pursuing some other objective. The Applicants say, in effect, in that regard that there is no practical way in which a court can undertake such an enquiry, and they seek to distinguish between a subjective and an objective intent. It may, therefore be as well, before we proceed with the argument, to see whether we can obtain some clarity as to what it is that the Applicants are driving at, and as to what the true legal position is in that respect.

In the course of the Oral Proceedings, Mr. President, the Applicants frequently asserted that Respondent's subjective intent is not relevant in regard to an evaluation of its policies and practices for the purposes of Article 2, paragraph 2, of the Mandate, and they said that when it comes to the concept of intent the only test to be applied is the one according to which a man is presumed to intend the reasonably foreseeable consequences of his acts. We shall give examples later of the manner in which this submission was expressed in various places by the Applicants, but in order to have a clear understanding of what the Applicants' contention really is in this regard, it is necessary to note what extent the Applicants have relied on Respondent's intent in the written pleadings. We pointed out in the Counter-Memorial, **II**, page 392, that Applicants in their Memorials appear to have based their whole case regarding alleged violation of Article 2, paragraph 2, of the Mandate on a contention of bad faith on the part of the Respondent. Examples were given in our Counter-Memorial of numerous instances in which the Applicants spoke of deliberate and systematic conduct on the part of the Respondent. We also pointed out that in their final conclusion the Applicants summarized their allegations by stating the following:

> "In its administration of ... South West Africa, the Union, as Mandatory, has *knowingly and deliberately violated* the letter and spirit of the second paragraph of Article 2 of the Mandate ..." (**II**, p. 393.)

Now after we had pointed this out in the Counter-Memorial, Mr. President —that that seemed to be the sole basis of the Applicants' case regarding Article 2, paragraph 2, of the Mandate—the Applicants reacted in a different way in the Reply. We find that they attempted to explain away their use of these expressions—"deliberate and systematic" conduct, "knowing and deliberate violat[ion] of the letter and spirit" (**II**, p. 393) and so forth—and their explanation is this (we find it in the Reply, **IV**, at p. 257):

> "Applicants' characterizations of Respondent's policies and objectives by terms such as 'deliberately', 'knowingly', and the like, clearly are intended as inferences and conclusions reasonably flowing from Respondent's course of conduct, which is set forth explicitly and fully in the Memorials. Such characterizations reflect a universally accepted axiom that, in the absence of evidence to the contrary, the predictable consequences of conduct are presumed to be intended."

Mr. President, in so far as the statement indicates that the use of these terms, such as "deliberately", and so forth, "are intended as inferences and conclusions reasonably flowing from Respondent's course of conduct, which is set forth explicitly and fully in the Memorials"—in that respect the passage gives no difficulty at all. Whenever a person's or a body's intent is a relative consideration in any enquiry, that is a standard method of arriving at the factual conclusion as to what that intent or state of mind was—the process of drawing conclusions and inferences from a course of conduct. Of course, what we say in that regard is that when Applicants set out a course of conduct by their descriptions in the Memorials, they painted only part of the picture, and that, before one can draw any inferences in a sound and proper way, one has to consider the whole field—the whole picture; one has to fill in the gaps; one has to put the facts presented by the Applicants into their proper perspective; and only then is it possible to draw the relevant inferences. But, Mr. President, that is a matter of applying the principle to the facts of the particular case. The mere proposition that one can arrive at a conclusion in regard to intent or state of mind by inference from a course of conduct—that is an unassailable statement. Mr. President, this statement, however, proceeds to say "Such characterizations reflect a universally accepted axiom that, in the absence of evidence to the contrary, the predictable consequences of conduct are presumed to be intended". That so-called "universally accepted axiom" is a matter to which we should like to give further attention in this regard.

Here the "axiom" is stated by the Applicants with the qualification "in the absence of evidence to the contrary". As we shall observe, that qualification in the course of time came to be omitted from the Applicants' formulations. One would have expected, in the light of this formulation which we find in the Reply, that Applicants would, in their Reply, indeed have given very serious consideration to all the evidence to the contrary which we had brought in our Counter-Memorial. I quote our comment in the Rejoinder V, in this regard, Mr. President—at page 103. We said there that we brought "evidence to the contrary" in the Counter-Memorial—

> "... to demonstrate that its intent was not such as was sought to be presumed—partly in that its conduct was different from what was alleged, and partly in that a different perspective was cast upon consequences, real and prospective, and their predictability, by a fuller knowledge of background, setting and circumstances".

It was for that purpose, we said, that we brought all the evidence that was set forth in the Counter-Memorial.

Now, Mr. President, instead of systematic consideration of this evidence to the contrary by the Applicants in their Reply or, indeed, in their further presentation in this Court, one finds that in the Reply the Applicants, almost in the same breath, say the following:

> "... so much of the evidence as is adduced by Respondent for the purpose of demonstrating its 'good faith', or that it is 'actuated by an intention ... other than one to promote the interests of the inhabitants', would be immaterial even if it did—as it does not—tend to show such 'good faith', or the absence of such 'intention'." (**IV**, p. 260.)

So what do we find, Mr. President? The Applicants begin by telling us, in the Reply, that they drew a certain inference and a certain conclusion in regard to Respondent's intent, from Respondent's course of conduct, as set forth in the Memorials. We said in the Counter-Memorial that that inference was not a sound one. We brought more evidence; we brought evidence to the contrary, we expanded the whole picture and we said that for that reason the inference was not a sound one. We were not indeed actuated by such an intent as was ascribed to us in the Memorials. We were not actuated by bad faith in that sense.

Now the Applicants come and tell us that so much of the evidence as we brought for the purpose of demonstrating our good faith, or that we are actuated by an intention to promote the interests of the inhabitants, would be immaterial.

So how is one to understand that. That can be understood, Mr. President, only on the basis that the Applicants now no longer—I say "now", that means as from the Reply stage—rely on this allegation, or that they no longer rely solely on the allegation of such an intent or bad faith on the part of the Respondent. They rely on what they call an "objective criterion" for determination of a violation of Article 2, paragraph 2, of the Mandate. The only objective criterion which they suggest is this newly formulated legal norm of non-separation.

As I pointed out before, Mr. President, if such a norm indeed existed and governed the Respondent's obligations the Respondent's intent or good faith would be immaterial. That is so. Then it would be merely a matter of determining whether Respondent's conduct and policies, in fact, involve differentiation or not. Indeed, as the norm was formulated in the Reply, the mere fact of the existence of any differentiation of that kind would have meant a violation of the Mandate, quite independently of good or bad faith, of whether there is an objective to promote material and moral well-being, or of whether the objective is something else.

However, Mr. President, the question arises: if the Applicants really intend to found their case on the existence of such a norm, and such alone, why does the question of intent enter into the Applicants' formulation at all? Why do they persist in making allegations in regard to intent? Where does it fit into the legal picture? If the norm applies, then the intent becomes irrelevant. When it is said to me, that in applying your policies in respect of development and promotion of material and moral well-being, you are not to discriminate on a racial, or a colour, or a tribal, or an ethnic group basis and I do discriminate, then that is sufficient. The fact that I have discriminated in contravention of the norm applying to my conduct in itself establishes a violation. Why then further allegations pertaining to intent or design?

We analysed this conundrum, Mr. President, to the best of our ability in our Rejoinder, **V**, at pages 106-107. We came to the conclusion that, although the Applicants did not expressly say so, they apparently still relied, in the alternative, upon an allegation of intent or bad faith as being a course of action in itself—as being in itself a basis upon which

they could establish a violation of Respondent's obligation under Article 2, paragraph 2, of the Mandate. That was to be seen, although they did not say so, as an alternative to their reliance upon their legal norm, because we could not understand their reference to intent upon any other basis.

We dealt in our Reply with the Applicants' case on the understanding that it rested upon these two bases—firstly, on the norm and then, secondly, in the alternative on—

> ". . . some basis . . . which requires proof of the factual allegation that Respondent's policies are actuated by a motive other than one to promote the interests of the inhabitants of the Territory". (V, p. 108.)

Now we come to the next stage, i.e., these Oral Proceedings, and here the Applicants emphatically tell us their case does not rest at all, or in any respect, on the Respondent's bad faith or intent. I read from what they said according to the verbatim record at page 116, *supra*:

> ". . . the fact undisputedly is that the Applicants do not make an issue, have not sought to make an issue, and do not intend to make an issue of good or bad faith in the premises".

Mr. President, strange as that may seem, if the Applicants had left the matter there, we would have known with reasonable certainty what the case is that we now have to meet. We would have known, notwithstanding all the ambiguity that we found in the pleadings and the apparent shifting of ground involved, that the Applicants now rely solely on the so-called norm of non-differentiation, if we may call it that for short, against which Respondent's conduct should be measured.

But we find, Mr. President, that again in Applicants' formulation of their case during these Oral Proceedings they revert to this question of Respondent's intent which, they say, is to be determined by application of a so-called universally accepted principle that an individual or entity is legally presumed to intend the reasonably foreseeable consequences of his actions.

How, and on what basis of legal relevance this is propounded for the Court's consideration remains, to a large extent, a mystery.

We find in the verbatim record at page 121, *supra*, the following statement:

> "The only sense in which a subjective test of good faith could be relevant to the motives of individuals who, severally and collectively, and from time to time, form the executive, legislative and judicial branches of any government, would be by application of the universally accepted principle that an individual or an entity is legally presumed to intend the reasonably foreseeable consequences of his, or its, actions."

We have the two concepts there: the sense in which a subjective test of good faith could be relevant, and the determination thereof by the application of the universally accepted principle, which I have read. Mr. President, as I have always understood this so-called universally accepted principle, it is an aid in the determination, the factual determination, of a person's, or a body's, intent, or state of mind, or good or bad faith, where that intent, or state of mind, or good or bad faith, is a legally relevant consideration. But the fact that one applies a method

of that kind as an aid in factual enquiry, that can never answer a question as to the legal relevance of that particular concept in a particular case.

To illustrate: where a person is charged with murder intent to kill is a necessary element in the crime which is to be established on the part of the prosecution. The prosecution, for the purposes of establishing intent, avails itself of a process of inference from circumstantial and surrounding evidence. That is a method by which it arrives at proof of intent and it avails itself, as far as may be relevant, of the application of this principle to which my learned friends refer. I shall deal later with the exact method in which the principle is to be applied.

But, Mr. President, the point I am making for the moment is this, that the reason why that process is adopted is that the law, in its formulation of the concept of the crime of murder, makes intent a relevant consideration. That is an aspect which is not touched on in any way by the Applicants when they tell us that they now rely on this objectively applicable norm of non-differentiation and yet they say that, in some way or another, intent, in the sense of the application of this universally accepted principle, is still a relevant consideration. We do not know, legally, why.

I read from a formulation in the verbatim record at page 203, *supra*.

> "The Applicants use, and we submit, appropriately use, the concept of 'intent' in a legal sense but not as a subjective motivation, not as *mens rea*, not to determine whether Respondent has a proper or lofty or illicit purpose in its actions, but in the lawyer's sense of the use of the word which applies the test of an objective determination, judicial or administrative, in respect of the conduct of groups, individuals, or governments, and which rests upon the universally accepted principle that an individual, or an entity, is presumed to intend the foreseeable and necessary consequences of his, or its, actions."

Again, Mr. President, no answer is given to the question I have mentioned. We simply hear of a "lawyer's sense of the use of the word" intent "which applies the test of an objective determination".

In the verbatim record at page 204, *supra*, we find this statement in the argument of my learned friend:

> "... references by the Applicants to Respondent's 'intent' or purpose do not refer to a subjective motivation of good or bad faith, but to an objectively determinable inference, which may be drawn from conduct, on the basis of the universally applicable principle that a person or an entity is presumed to intend the foreseeable and necessary consequences of his or its actions."

Now, Mr. President, apart from the fact that we are still completely in the dark as to why it is said that intent, even in this particular sense ascribed to the term, is a relevant consideration, a feature of these formulations is that they drop the qualification which we initially found in the Reply—the qualification of "in the absence of evidence to the contrary".

We find further that the Applicants in this regard speak of a legal presumption; an individual or an entity is legally presumed to intend the consequences of his actions.

Why do we now find, Mr. President, this reliance upon the so-called presumption as being apparently something absolute, something irre-

buttable? One can only surmise that the Applicants have realized the inconsistency of the attitude which they took up in the Reply where they, on the one hand, as I have pointed out, admitted that evidence to the contrary could destroy any inference raised by the application of the foreseeable consequences rule; and, on the other hand, they categorically stated that all evidence brought by Respondent to prove the contrary, namely good faith on its part, has to be regarded as being entirely irrelevant.

That inconsistent attitude they adopted in the Reply. It seems that they are trying to get away from it now, and they attempt to do so in a manner which still cannot admit the relevancy of the evidence which we tendered in our Counter-Memorial and again in our Rejoinder. They do so on a basis which would maintain their submission of irrelevancy of that evidence, and they now seem to tend in the direction of saying that this presumption is not only a legal presumption but also a conclusive or irrebuttable presumption.

It would seem, therefore, Mr. President, that the basic difference between the Parties in this regard, i.e., in regard to this question of intent, is the following. According to the Applicants the Respondent must be legally, and apparently conclusively, deemed to have intended the consequences of its acts if such acts were reasonably foreseeable, no matter what Respondent's actual intent might have been. That seems to be the distinction which they are trying to draw between a so-called subjective intent and an objective intent in the lawyer's sense of the term.

We, on the other hand, Mr. President, while we do not dispute that so-called objective criteria may be applied in order to assist in ascertaining intent, contend that in the final analysis regard should be had to all relevant evidence, in order to determine Respondent's actual intent, in so far as that intent is a relevant consideration. And we submit that the only basis for adjudication is indeed to determine that intent relative to the question of the objective, or the purpose, of Respondent's policies and legislative and administrative actions.

We submit, Mr. President, that this suggested distinction between a subjective intent and an objective intent is a complete fallacy. There is only one concept known as intent, or state of mind, or good or bad faith, all being various facets of the same concept of intent, and I shall, therefore, use the word "intent" as signifying all those. Intent is a state of mind; it is a judicially determinable fact; it is a fact which can be determined by a factual inquiry such as is indulged in for the purposes of determining any fact so far as it may be relevant in legal proceedings. But there are various ways and means, various techniques, whereby one can arrive at a conclusion as to intent.

I suppose it is correct to say that seen from the point of view of the person whose state of mind is in issue, his intent can be said to be a subjective concept. When we say that, we have in mind this type of distinction. A person's conduct in ordinary law can be tested against objective criteria, such as, what a reasonable man would have done in certain circumstances. When his conduct falls short of the objectively prescribed criteria, prescribed by law, then he can be said to be guilty of negligence. Therefore, in that sense one speaks of culpa—of a state of mind on the part of a person which falls short of an objective standard. But when for certain purposes it is not sufficient to establish negligence

on the part of a person, when it is necessary to establish an intent, then it is not sufficient to enquire, what would a reasonable person have done in the circumstances? It is not sufficient to apply an objective test. The ultimate fact to be determined is the subjective one—what was subjectively the state of mind of that person? Did he or did he not have the particular required intent? And that is a distinction which is very often drawn in legal terminology in this regard between something subjective and something objective. One can draw it in a different way also. One can say that there are various ways of proving a person's intent. One way is that to which I have referred, namely by drawing inferences from a course of conduct seen in the light of all surrounding circumstances. That is by a process of evaluating what basically amounts to circumstantial evidence. One can also determine a person's intent from what he has said, from what he may have said contemporaneously with his actions, before his actions, subsequent to his actions.

It is another matter, of course, as to what weight should be assigned to the probative value of the particular statements made in particular circumstances. A person can go into a witness box and say that when he did a certain thing or when he said a certain thing his intent was such and such and not so and so. Again, one can possibly use the distinction there between an objective method of arriving at a conclusion and the subjective nature of the evidence given by a person to the effect that such and such was his intent, or is now his intent, or will be his intent, as the case may be.

But, Mr. President, that distinction between subjective and objective relates not to the concept itself. The concept of intent is one and indivisible: it is a state of mind. And there is in law no distinction whatsoever between a so-called subjective intent and an objective intent.

In so far, Mr. President, as the Applicants now wish to assign conclusive effect to this so-called universally accepted principle, that a person is presumed to intend the foreseeable and necessary consequences of his actions, we say that that contention rests on a complete fallacy. The maxim, in so far as it is referred to in legal systems at all, is merely an aid in a factual inquiry. It is nothing more: it has no more value or weight than that of a factual presumption. Very often commentators have even said that presumption is not the right word to use because one should rather speak in terms of a generality, or a general probability, a factor which operates as one of those in a factual inquiry, but as being by no means the only factor to the exclusion of others.

We find, firstly, Mr. President, that in most legal systems—those on the Continent of Europe, for instance—there is no reference, as far as we can find, to the application of a principle of this nature. They do not work with this concept; they do not find it necessary. They do not work with the concept that a man may be presumed to have intended the foreseeable and reasonable consequences of his act.

As far as we know, that is a formulation as an aid in a factual inquiry which is applied only in the English law—the English practice—and in related systems which apply English law and practice in that regard.

Secondly, Mr. President, we find that even in those systems of the latter kind, in which the lawyers expressly employ or apply this concept, there is no question whatsoever of the presumption being either a legal one or an irrebuttable one. As I have said, the maxim imports nothing higher than a rebuttable, factual presumption, or generalization, or

likelihood. That generalization is to the effect that a man may usually be regarded to have intended the natural and probable consequences of his act, but that there may be evidence or other indications leading to a contrary conclusion.

We may imagine a person standing in a building on the side of the street; he looks into a window on the opposite side of the street on the tenth storey of that particular building; he sees somebody standing in the window; he sees somebody else pushing against that person, and he sees that person falling through the window to his death on the street below. Now surely, Mr. President, on application of this maxim as something irrebuttable one would have to say that the person who did the pushing must be presumed to have intended the natural and the legal consequences of his action, and therefore he must be guilty of murder. Such an application of the maxim would mean that it is not open to that person to come into court and to say: "what was seen by this particular witness was only half of the truth; it was only half of the story. What really happened was that we were playing in the room and it was just by accident that I pushed against the other man and that he fell through the window. There was no intent whatsoever on my part either to push him through the window or to send him to his death."

If this maxim were to be applied as an absolute legal, irrebuttable presumption, then it would be impossible for a man to come into court and to give evidence to that effect, or even for some other person to be called out of that room to say "I was there, I was a witness, I saw it all and that is how it happened". That is why Mr. President, that in regard to the English law we find comment. I will give the Court some references to authorities. Glanville Williams, *Criminal Law*, 1957, wrote as follows at page 77:

> "It is often said that a man is presumed to intend the natural consequences of his acts. This maxim, though many judges have been fond of it, contains a serious threat to any rational theory of intention. It is not true in fact that a man necessarily intends the natural consequences of his acts: and it is not true in law that he is compellingly presumed to do so."

The next quotation is from page 78:

> "When a defendant is held guilty of causing damage by negligence, this is because a reasonable man would have foreseen the damage. Now if a reasonable man would have foreseen it, it must be the probable consequence of the defendant's conduct. If it is the probable consequence of his conduct, the defendant, according to the maxim is presumed to have intended it. Thus, all these cases of negligent conduct are turned into cases of intentional conduct. Such a mangling of the concept of intention cannot be admitted."

The next passage comes at page 81:

> "It is now generally agreed, in conformity with this opinion, that the maxim does not represent a fixed principle of law, and that there is no equiparation between probability and intent. This was pointed out by Stephen, although his words for some time had little effect upon the language used by judges. Recently Denning, L.J., said: 'There is no "must" about it; it is only may. Presumption of intention is not a proposition of law but a proposition of ordinary good sense.'"

A further quotation, Mr. President, at page 705, from the same author:

> "We may now revert to the supposed rule that a man is taken to intend the probable consequences of his acts. It has been shown that this maxim has been reduced from the status of a 'must' to that of a 'may' . . . Formerly juries were instructed in terms of the maxim as though it created a presumption of law, rebuttable or even irrebuttable; but it is now clear since cases like *Meade* . . . and *Woolmington* . . . that the maxim does not transfer the persuasive burden in respect of *mens rea* to the accused. Although both those cases turned on homicide, the proposition is a general one. For instance, on a charge of shooting with intent to prevent arrest, where the accused raises the defence of accident, it is for the Crown to prove the intent. As Lord Goddard, C.J., said in *Steane*:
>
> > 'No doubt, if the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction.' Thus the rule turns out to be merely an evidential presumption, a common-sense inference that may be drawn from circumstances. In fact the field of inference is wider than the maxim would indicate."

On the American law we find this comment by Professor Richard M. Wooner. It is a translation from the German (our own translation), from page 109 of Mezger-Schönke *Das ausländische Strafrecht der Gegenwart*, Volume IV.

> "In the case of *Erfolgsdeliktes* [that is, Mr. President, in the case of crimes constituted only when an act has had certain consequences and not by the act itself. For instance, a murder in contrast to the pointing of a fire-arm.] it is inferred, until the contrary is shown, that criminal intent includes the foreseeing of consequences of conduct which experience shows are apt to occur."

The author then proceeds to quote (at p. 109) the following passage in the decision in the *State* v. *Phifer*, 1884, 90 N.C. 721:

> "The legal rules are based upon the presumption that everbody intends the natural, that is regularly occurring or probable consequences of his conduct; the operation of this presumption, however, does not, in fact, involve more than prima facie proof."

The author proceeds to point out that this presumption is one of fact and not of law.

Now, I pointed out, Mr. President, that in continental law no use is made of this formulation at all. In order to illustrate the more straightforward approach to the problem of intent on the continent, it may be sufficient to refer to Van Bemmelen and Van Haltum, *Hand en Leerboek van het Nederlandse Strafrecht* (1953), page 264. The authors there distinguish between two cases, one in which the "doer" or "actor" in fact realized the possibility that his act would result in certain consequences; and the second, in which this possibility was not so realized. In other words, the difference between the intent which the man actually

subjectively had—the contemplation which was in his mind in fact—and the contemplation which a reasonable person may or may not have had in the circumstances. Distinguishing between the case where the actor in fact realized the possibility that his act would result in certain consequences and that where he did not realize that, the authors say—

> "In the last case one can never speak of intent. If the circumstances are such that the non-realization of the possibility is tantamount to gross remissness, then it is a case of negligence." (P. 264.)

Again it is our own translation.

The distinction drawn is this—if it is merely a question that the man ought to have realized that his acts would have certain consequences but did not, in fact, realize it, then he could be guilty of negligence but he could not be said to have had the intent to bring about the consequences of his act. That intent he can only be said to have had if he, in fact, had such a contemplation.

So, Mr. President, at the very most the rule that a man is presumed to intend the reasonable consequences of his act, is a rule of evidence, not a rule of substance of law. The rule is applied merely to raise a prima facie presumption of intent—intent seen as a single and indivisible concept.

But while the Applicants avail themselves of this rule in their effort to show that Respondent acted intentionally or deliberately, they deny that the Respondent is entitled, to adduce evidence—if such evidence should be necessary—to rebut any inference raised by the application of the rule. In other words, they elevate a rebuttable, factual presumption to an irrebuttable legal presumption and they do so also to create a peculiar brand of intent, which they say is "the lawyer's sense of the use of the word" as distinct from "intent" apparently in the ordinary sense of the word. We submit Mr. President, that there is no justification for this distinction between two so-called concepts of "intent" or for the process of elevating this rebuttable, factual presumption to an irrebuttable, legal presumption.

Now, we find, Mr. President, that the Applicants protest against this approach on our part by saying that if Respondent's intent were to be determined otherwise than by applying the legal presumption advocated by them, they would be at a loss to determine what evidence to adduce. We find that stated in the verbatim record at page 121, *supra*, where they say—

> "The Applicants submit that the question at issue is not the subjective motivation of a particular government, or of a group within a government, or of a single official, or of a single department of a government. The only sense in which a subjective test of good faith could be relevant to the motives of individuals who, severally and collectively, and from time to time, from the executive, legislative and judicial branches of any government, would be by application of the universally accepted principle that an individual or an entity is legally presumed to intend the reasonably foreseeable consequences of his, or its, actions."

They go on to say—

> "Any other measure of Respondent's obligations under Article 2 of the Mandate, in terms of good or bad faith, would necessarily

confront this honourable Court, or an administrative supervisory authority, with the task of judging the Mandatory's conscience, rather than its conduct. If such a legal yardstick were to be the measure of Respondent's obligations under Article 2, paragraph 2, of the Mandate, the Applicants themselves would be at a loss to determine what manner of evidence of breach would be relevant, save perhaps explicit and unrepudiated admissions by Respondent's highest officials, that their policies were, indeed, directed toward an illicit purpose."

Mr. President, we submit, with the greatest respect, that this comes strangely from an experienced lawyer. Surely all lawyers know that there are various techniques applicable in such an enquiry. It is essentially an enquiry of fact, and wherever the question of intent on the part of a person or a body or a collection of persons jointly or collectively forming a body, is in issue and is legally relevant, then the Court must embark upon that enquiry as best it can, and both Parties know what types of evidence would be relevant in order to establish that intent.

It is always permissible, and indeed desirable, to revert to proof by circumstantial evidence, that is, by showing all the circumstances of the case, because statements may be made by a particular person or by a particular body, and a question can arise: is that man speaking the truth? Is that body speaking the truth? Is the intent which they had in this particular case actually that which they profess to have had or are they pretending something different from what they really intended?

In order to test a proposition of that kind it is always necessary, of course, to have regard to all surrounding circumstances and to draw inferences from the surrounding circumstances on the question of what the relevant intent must be taken to have been. But that is a far cry from indulging in an artificial enquiry; from saying that we look only at part of the picture; that we apply only the maxim that a man is presumed to have intended the natural and probable consequences of his actions and thereby we arrive at an irrebuttable result. We look at all the surrounding circumstances. If it is proved in a particular case Mr. President, that the accused person stood before the deceased—let us say in a murder case—with a huge stone in his hands, that he lifted the stone and he threw it onto the head of the deceased. If it is proved that he was in his sound and sober senses, that there was nothing wrong with him, that there was *no reason why he could not foresee the natural* and probable consequences of his action—if he should then come and tell the court that he, in fact, did not foresee that that stone was going to kill the deceased he will probably be disbelieved by the court, or by the jury whichever it might be. In ordinary common sense, the court would come to the conclusion that such evidence could not be believed. Therefore, it is always necessary to test whatever a person might say as to his intent, also in the light of surrounding circumstances and the inferences which might flow from those surrounding circumstances. If it could be proved by evidence that this person, to whom I referred in my example, was walking in his sleep, then, of course, a different result would follow. But that would then be one of surrounding circumstances to take into account, in order to decide whether he could or could not have been speaking the truth. Evidence would be relevant to prove whether he had been walking in his sleep previously; whether similar things had happened to him previously in order to test his veracity or his credibility in this particular respect.

But the enquiry, as a whole, would be one of fact and there is no reason —no justification whatsoever—for saying that it is one in which one party or the other might not know what type of evidence to adduce in order to prove any proposition relative to intent.

Therefore, Mr. President, in our submission the Court, in so far as it regards intent as a relevant consideration, will determine the question of Respondent's intent by having regard to all relevant evidence. It will have regard to the weight to be assigned to circumstances; to the possible inferences to be drawn from circumstances. It will have regard, where necessary and where relevant, to statements made by officials, by policy makers, by political leaders of the Respondent. It will have to decide in the light of all the circumstances what particular weight and credibility should be assigned to a particular statement or to a particular piece of circumstantial evidence and in the end it will apply the fundamental principle that, if one reasons by inference and if one is to come to a conclusion by inference, the inference to be arrived at must be a necessary inference in the sense that it is consistent with all the proved relevant facts, and that the proved relevant facts exclude all other reasonable possibilities.

It seems, Mr. President, if we revert to the Applicants' pleadings, that they themselves are aware of the fact that intent can be proved in various ways. They have, indeed, apart from seeking to draw inferences from facts set out in the pleadings, also referred in various places to statements by Respondent's officials, and they have quite obviously quoted those statements for the purpose of showing what was the underlying intent, and how Respondent's policies and practices were to be interpreted as far as their objectives and the underlying intent were concerned. We find, for instance, in the Memorials, **I**, at page 157, a reference to statements made by the South African Minister of Bantu Education in May 1960, and Applicants themselves say they do this for the purpose of giving:

> "A grim insight into the quality of education offered for 'Natives' in the Bantu institutions, as well as the spirit in which it is offered, ..."

Mr. President, quite obviously where they seek to establish the quality of education offered—the spirit in which it is offered—they try to do so through the medium of a particular statement made by a particular official. Again, in the Reply the Applicants cite several passages from different speeches by the Respondent's Prime Minister, on pages 263 **(IV)** and following, and obviously their purpose again is to illustrate what Respondent intends to achieve, in the Applicants' submission, with a policy of separate development. So, the intent which the Applicants seek to derive from these passages must, in some way, in their view be relevant, but, on the other hand, Mr. President, factual information tendered by the Respondent so as to place those extracts in their proper perspective and against their proper background so as to assist in the interpretation of those extracts from speeches, and in order to show that they, in fact, reveal a different intent from that contended for by the Applicants, are treated by them as evidence which is irrelevant. Such information which is tendered towards showing Respondent's good faith, is regarded under Applicants' general formula as entirely irrelevant.

The most striking example, Mr. President, of the Applicants' realiza-

tion of the fact that intent can be proved by direct evidence of a person's state of mind is to be found in their treatment of Respondent's alleged violation of the obligation to respect the international status of the Territory. The Court will recall that the Memorials, I, page 186, have a portion under the heading "The avowed intentions of the Union", and under that heading we find that the Applicants cited extensively from speeches made by Respondent's Prime Minister at that time, in order to prove that it was the Respondent's intention to incorporate the Territory into South Africa. In explaining their introduction of this exposition, the Applicants said in the Memorials at page 186:

> "Piece-meal incorporation amounting to *de facto* annexation is both insidious and elusive. Motive is an important indicator since it sheds light upon the significance of individual actions, which might otherwise seem ambiguous",

and they cite these statements in order to show the intent or the motives for which they contend.

Having dealt with Respondent's so-called avowed intentions, the Applicants then proceeded to set out acts of Respondent which were alleged to be inconsistent with the international status of the Territory. In the introduction of this topic, the Applicants said the following in the Memorials, at I, page 189:

> "The intent of the Union, as described above, is manifest not only from official statements, but it has been given practical effect by, and explains, Union action."

[Public hearing of 23 April 1965]

Mr. President and honourable Members, before the adjournment yesterday we dealt with the Applicants' contentions regarding the concept of intent in so far as that may be relevant to their case on the alleged violation of Article 2, paragraph 2, of the Mandate: intent, that is, on the Respondent's part, as regards its policies.

To round off that argument I may just briefly state the conclusions at which we arrived.

Firstly, we showed, with submission, Mr. President, that Applicants do not explain on what legal basis intent is relevant at all to their contention, now that their contention is said to rest entirely on the modern norms and standards which are advanced by them.

Secondly, we showed that the distinction which they seek to draw between so-called objective and subjective intent is without substance, and that there is only one concept of intent, as known to the lawyer and to the layman.

Thirdly, we showed, Mr. President, with submission, that the so-called presumption that a man intends the natural and probable consequences of his acts is neither an exclusive nor an irrebuttable method of ascertaining intent, but that it is merely a generalization of a rebuttable method of proof which can, in a fit case, provide some aid in the total enquiry as to intent.

Fourthly, we saw that in such a total enquiry as to intent various techniques can be employed and combined and that these can include consideration of direct evidence and statements in regard to intent, as well as the drawing of inferences from conduct and circumstances. We

saw, Mr. President, that it is only in this last respect that this generalization that a man intends the natural and probable consequences of his acts, plays or can play a limited role in a fit case.

We demonstrated further, Mr. President, from the Applicants' own pleadings, that they themselves realize that intent can be proved in various ways and, amongst others, through statements of officials and office-bearers of the body whose intent is in issue. By way of illustration we referred to various statements quoted in the Applicants' pleadings for this purpose, not only in regard to the charge concerning well-being and progress under Article 2, paragraph 2, of the Mandate, but also in regard to the charge of alleged violation of the international status of the Territory, which is brought under Article 2, paragraph 1, of the Mandate. We referred, merely by way of example, to the manner in which intent was treated also in relation to that particular subject.

We shall pursue that aspect of the matter later and demonstrate that, in regard to that charge—the charge of violation of the international status of the Territory—the Applicants have, also, since the commencement of the proceedings considerably changed their attitude about the intent aspect. For the moment I do not wish to pursue that point. I shall come to that when we deal with the other portion of the case, and with that particular charge.

For the moment I wish to deal only with the charge under paragraph 2, of Article 2, and to revert to the legal basis of the Applicants' case in that regard, i.e., with the legal basis thereof as they formulate it now.

On analysis it seems, Mr. President, that the Applicants have clearly come to realize the difficulties involved in basing their case entirely upon the allegations of malicious intent and deliberate oppression on Respondent's part as formulated originally in the Memorials. In the light of our exposition of the full facts in the Counter-Memorial, they have apparently come to realize that their allegations cannot bear examination when the full circle of facts is fully analysed and considered and when all relevant facts are brought into the picture, and consequently they attempt to avoid this difficulty.

They have been doing it as from the Reply stage and they have attempted to do so by two expedients. Firstly, they have been relying on a norm, allegedly capable of exact and objective application, that is, without consideration of the question of intent at all. Secondly, they have sought to reduce the ambit of the enquiry in regard to intent by limiting it through the application of this artificially defined objective test, covered by the so-called presumption that a man intends the natural and probable consequences of his acts.

We shall, Mr. President, demonstrate, with submission, that both these attempted remedies for the difficulties in which the Applicants found themselves, have turned out to be as defective as their original approach.

I revert to this norm, or norms and standards on which the Applicants have sought to place reliance as from the Reply stage with certain variations added thereto, to which I shall refer, in the Oral Proceedings.

We have some difficulty here in the sense that the Applicants, on the one hand, speak in the singular of a "generally accepted international human rights legal norm of non-discrimination or non-separation on the basis of membership of a group, class or race" (p. 260, *supra*): that is what we have, on the one hand—the concept of such a norm expressed in the singular. Then, on the other hand, we find that the Applicants

speak also in the plural of legal norms and standards, on which they say they rely. I must say that to me the distinction between the two, as advanced by the Applicants, is far from clear.

It would seem, from certain expressions used by the Applicants and certain explanations given by them, that legal norms are, according to their contention, the product of standards, i.e., that they are distilled or derived from, amongst others, "political, social and scientific sources and standards". That is a formulation we find in the verbatim record at page 259, *supra*.

But then we still have legal norms in the plural, and this single norm of non-discrimination or non-separation appears to be a common denominator of undefined norms—a common minimum norm which is said to be found in all the relevant legal norms—and which appears to be the ultimate ground upon which the Applicants rely in their reference to norms and standards.

That seems to be one possible explanation of the reference, on the one hand, to norms and standards in the plural and, on the other hand, to this norm in the singular, which, for convenience I shall refer to as a norm of non-differentiation.

On the other hand, Mr. President, from the manner in which Applicants' case is presented, i.e., the reference at times to this norm in the singular, and the reliance upon it in regard to the facts of the case, and, at other times, a reliance in general on undefined norms and standards, generally applicable in modern circumstances—that some reliance is placed on these undefinited norms and standards, as distinct from the reliance placed upon the norm (in the singular) of non-differentiation.

It may be that my learned friend could clear that up for us, and explain whether there are two alternatives involved in his case in this respect, or whether the one is supplementary to the other, or whether there is simply a distillation from the norms and standards (in the plural) to this one single norm—whether it is all part and parcel of the same case. It is not clear to me yet: possibly it will be cleared up in due course.

In the meantime we shall deal with the matter on the assumption that we have two cases, or two aspects of a case, to meet, or possibly two contentions in the alternative—one resting on this single norm of non-differentiation and the other resting, in addition, on norms and standards, undefined, in the plural.

I proceed first, Mr. President, to consider this so-called legal norm of non-discrimination. I shall refer to its history and I will demonstrate, with submission, that, notwithstanding the Applicants' protestations, this norm was first born halfway through the pleadings stage of these proceedings. It came as an afterthought at that stage, designed to meet a particular difficulty with which the Applicants found themselves confronted.

We shall show further, Mr. President, that as a result of the answer which we gave in our Rejoinder to the Applicants' case based on that norm, they have now, in these Oral Proceedings, introduced further changes in their case in that respect. They have been forced to qualify the content of this alleged norm in such a way as either virtually to destroy it, or to make a new case again—a new case which has not been properly canvassed in regard to its factual aspects through the pleadings. I shall explain later, in more detail, what I mean in that regard.

I wish to start with the Applicants' Memorials and point out in what

way they stated the legal basis of their case in regard to Article 2, paragraph 2, at that stage. Right at the outset of their treatment of this subject, the Applicants admitted in the Memorials, **I**, at page 104, that they were—

> "... aware that differences of opinion could arise as to close or doubtful issues concerning the application of the terms of Article 22 of the Covenant and Article 2 of the Mandate".

But they proceeded to contend:

> "In the present case, however, the issues of fact and law, and of the application of law to fact, do not involve conjecture. The violation of the duty to promote 'material and moral well-being and social progress' is beyond argument." (**I**, p. 104.)

Now the question arises, how did the Applicants proceed? How did they propose to proceed beyond the conjectural sphere, where differences of opinion could arise, to the stage of absolute certainty which did not involve conjecture, and brought them to a result where the violation of duty was beyond argument? In other words, Mr. President, what test or tests did they at that stage suggest should be applied in order to arrive at that conclusion? We find part of the answer to the question given in the Memorials immediately, following on these passages, at pages 104-105 **(I)** (I say part of it because there is another part which I will mention later). The passage reads:

> "Any doubt concerning the interpretation and application of Article 2 of the Mandate and Article 22 of the Covenant to this case is resolved in the light of currently accepted standards as reflected in Chapters XI, XII and XIII of the Charter of the United Nations. The Union, by becoming a member of the United Nations, not only must have accepted the validity of the principles contained in the Charter, but by the act of membership, undertook to comply therewith."

The Court will notice that there is no reference here to a particular norm; there is a reference to resolving the doubts concerning interpretation and application of Article 2 in the light of currently accepted standards.

Applicants then proceeded—no doubt because they realized that they were charging Respondent with a breach of the Mandate and not with a violation of any of the obligations of the Charter—as follows in the Memorials at page 105:

> "The above cited Articles of the United Nations Charter are *in pari materia* with Article 2 of the Mandate and Article 22 of the Covenant."

And they proceed to put forward the argument, also at page 105, that these chapters of the United Nations Charter could be used as a guide to the interpretation of the Mandate. I am not concerned with the merits of that argument for the moment; we dealt with that fully in the pleadings. I am merely concerned with an analysis of the way in which the Applicants then put their case.

They purported to find further support for this argument of theirs in the resolution of the Assembly of the League of Nations of 18 April 1946, in which, the Court will recall, it was noted—

"... that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League". (I, p. 106.)

Mr. President, the Applicants accordingly used certain chapters in the United Nations Charter as a basis for formulating these standards, which they called norms, and against which they proceeded to measure the Respondent's policies. I wish to draw attention to this passage in the Memorials at page 107:

"It is submitted that the terms of the second paragraph of Article 2 of the Mandate and Paragraph 1 of Article 22 of the Covenant and their stated purposes, read in the light of the terms and stated purposes of Chapters XI, XII and XIII of the Charter, establish clear and meaningful norms marking the duties of the Mandatory."

The Court will notice, with respect, the emphasis placed in this passage on the stated purposes both of Article 2 of the Mandate and of paragraph 1 of Article 22 of the Covenant, and also of Chapters XI, XII and XIII of the Charter.

Having quoted from Articles 73 and 76 of the Charter as being relevant provisions of Chapters XI, XII and XIII, the Applicants continue to say the following in regard to the content and nature of the clear and meaningful norms which, they contended, were established by these provisions:

"In accordance with these legal norms, the Mandatory's duties to safeguard and promote the 'material and moral well-being', the 'social progress' and the 'development' of the people of the Territory must reasonably be construed to include": (I, p. 107.)

I pause there with this quotation for the moment. There follow eight numbered paragraphs, in which, to use the Applicants' term, "duties" of the Respondent are set out. This, then, was the distillation of clear and meaningful norms from the material to which I have referred, and to which the Memorials referred at that stage. And it is interesting to read, in retrospect, how these clear and meaningful norms, also called "duties", were formulated. That we find at pages 107-108 (I) of the Memorials. They read as follows:

"(1) Economic advancement of the population of the Territory—and notably of the 'Natives' who constitute the preponderant part of the total population in agriculture and industry;

(2) Rights and opportunities of members of the population employed as laborers in agriculture or industry;

(3) Political advancement of such persons through rights of suffrage, progressively increasing participation in the processes of government, development of self-government and free political institutions;

(4) Security of such persons and their protection against arbitrary mistreatment and abuse;

(5) Equal rights and opportunities for such persons in respect of home and residence, and their just and non-discriminatory treatment;

(6) Protection of basic human rights and fundamental freedoms of such persons;

(7) Educational advancement of such persons;

(8) Social development of such persons, based upon self-respect and civilized recognition of their worth and dignity as human beings."

Mr. President, it will immediately become evident that the nature of these clear and meaningful norms, or duties, is poles apart from that of the alleged norm of non-differentiation now relied upon by the Applicants, or relied upon by them as from the Reply stage. We find that in the whole of this list which I have read out to the Court, there is virtually no reference to a question of method. The formulation relates in each instance to an aim, to a result to be achieved, to a purpose; in other words, there is a linking up with the language "their stated purposes" used by the Applicants themselves at page 107 of the Memorials. The only part of the formulation which could in some measure be said to relate to questions of method is contained in No. (3) and No. (5) on the list. In No. (3) we have the words "Political advancement of such persons through rights of suffrage". In other words, a specific method is indicated—it must be through rights of suffrage. And then in No. (5) it is said that there must be "Equal rights and opportunities for such persons in respect of home and residence, and their just and non-discriminatory treatment". That is the nearest that the Applicants came in these formulations to questions of method.

For the rest we have, for instance, "Economic advancement of the population", with further detail following on that, but nothing indicating how that economic advancement is to be achieved; certainly nothing, Mr. President, in that respect or in the case of any of these other duties as here formulated, indicating that there is to be a method of non-separation, which has general application and covers this whole field.

We have, in No. (7), "Educational advancement of such persons"—nothing to say that everybody must be in the same schools, or that these must not be separate schools or the like—simply "educational advancement of such persons".

Therefore, Mr. President, it appears on analysis, even allowing for this limited extent to which there was a reference to questions of method, namely rights of suffrage and equal rights and opportunities, there was nothing in the Memorials which indicated that the Applicants were relying upon a contention that there was to be an abstention from any form of differentiation between different national and ethnic groups in the Territory.

The formulation, therefore, concentrated on the objectives, on the purposes to be attained, and left the whole question of method to the Respondent's discretion. We contended in that regard, in the Counter-Memorial, Mr. President, that the clear and meaningful norms, or duties, in essence amounted to no more than matters to which it could, with some qualifications, be said that Respondent ought to have regard as ultimate aims in exercising its discretionary functions under Article 2 of the Mandate.

Our comment in a portion which I should like to quote, is to be found in the Counter-Memorial, **II**, at page 397. We said there:

"... the duty to promote the material and moral well-being and social progress of the inhabitants cannot be split up into a number of different, self-contained fragments, but is in its nature indivisible. Although Respondent is in general agreement that the specific "clear

> and meaningful norms" relied upon by Applicants, can, on the whole, be said to be matters to which regard ought to be had in the exercise of the Mandate, it must be kept in mind that they represent ultimate aims, which in certain circumstances or at certain stages of development may be inconsistent or even irreconcilable. It is therefore artificial, in Respondent's submission, to divide Respondent's duty in terms of Article 2 of the Mandate into a number of different obligations and then to suggest, expressly or by implication, that Respondent is obliged to attempt to comply with all these obligations to the same degree at the same time."

That was our comment at the time. In other words, we accepted that these, seen as ultimate aims, were matters to which, in general, regard ought to be had by a Mandatory exercising a discretionary function, but subject to the qualification which I have just mentioned, namely that all of them could not be advanced simultaneously to the same degree because to some extent they would be conflicting when it came to practical application, and, also, of course, subject to the qualification that questions of method to be pursued were matters within the discretion of the Mandatory.

In regard to the two instances to which I referred where the Applicants did, to some extent, refer to matters of method—the one about political advancement "through rights of suffrage" and the other about "equal rights and opportunities for such persons"—we contended that, even to that extent, the Applicants went beyond the scope and the effect of the provisions of the Mandate, i.e., that even in regard to those matters of method the choice was one within the Respondent's discretion.

We said the following in regard to the point of development of political advancement through rights of suffrage at page 398 of the Counter-Memorial **(II)**:

> "... Neither in the Mandate, nor in the Charter, is there any provision requiring that the political advancement of the inhabitants of dependent territories should necessarily be promoted 'through rights of suffrage'. Whereas Respondent admits that it is under a duty *inter alia* to promote the political advancement of the inhabitants of the Territory, it is submitted that the method to be adopted in this regard rests in its own discretion, which is to be exercised by applying policies 'as may be appropriate to the particular circumstances of [the] territory and its peoples'."

Those last words are, of course, a quotation from, I think, Article 73 of the Charter.

Respondent proceeded to say that while it was "in no way opposed to the idea of suffrage for all or any peoples in appropriate circumstances", it did not consider that provision for such rights in one integrated political entity was the only, or the best, method of achieving political advancement in all cases, and that it was satisfied that "it would certainly not be the best method for the peoples of South West Africa". That is what we said in the Counter-Memorial, **II**, page 398.

In other words, there was no objection at all to the principle of political advancement through this method of "rights of suffrage"—no difficulty about that at all in appropriate circumstances. But, the qualification was that the suggestion that that was to happen in South West Africa through the medium of one integrated, political system concerned

a question of method with which Respondent was definitely not in agreement.

We pointed out further in the Counter-Memorial that even in cases where Respondent was in full agreement with the duties, or the so-called norms, described by the Applicants, there was quite clearly room for differences as to the best methods which could be applied to give effect to the ideas expressed therein. And we illustrated that point particularly with reference to duty number (5) on the list, the one about "Equal rights and opportunities ... in respect of home and residence and their just and non-discriminatory treatment". We answered that proposition as follows in the Counter-Memorial, **II,** at page 398—

> "Respondent is in entire accord with this proposition, although it is evident that differences could arise as to the best methods of giving effect to the ideal expressed therein. Respondent must stress that in its view the expression 'equal rights and opportunities' is not to be interpreted to mean 'indentical rights and opportunities'."

This is again, Mr. President, a question of difference of method in seeking to attain an ideal which is common cause. In this regard we referred to a passage in the judgment of the Permanent Court in the *Minority Schools in Albania* case. I quote the following from the passage as appearing in the Counter-Memorial, **II,** page 398:

> "... equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.
>
> It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact ..."

Mr. President, we may, then, summarize what we found in the Memorials and how we reacted to it in the Counter-Memorial. The clear and meaningful norms were so formulated that they indicated objectives. We stressed in our reply thereto in the Counter-Memorial that those objectives, in so far as they were acceptable—and they were, on the whole, entirely acceptable as objectives, subject to the qualifications I have mentioned—allowed of a wide variety of methods by which we could seek to achieve them: it did not mean, in particular, that everybody was to be treated identically, in all respects, in the process of promotion to the utmost.

This, then, was the position at which the Parties stood at the end of the Counter-Memorial before there came the switch to this general norm of non-differentiation in the Reply. First of all, let us analyse whether the Applicants in any way intended to indicate in the Memorials that these clear and meaningful norms were intended to have a fixed or a definite content capable of exact application to the facts of each case, or to the policies applied by the Respondent, without regard to questions of discretion or of method or of good or bad faith.

I submit, Mr. President, that when we analyse the position, it seems quite clear that the Applicants did not, at that stage, intend to suggest anything of the kind—to suggest a full fetter on the discretion of the Respondent in regard to the attainment of the ideals. They described these norms as "legal norms" at page 107 **(I)** of the Memorials, but immediately preceding the term "legal norms", they used the expression

"clear and meaningful norms". And, indeed, they indicated that the words were to be regarded virtually as a paraphrase, or the equivalent, of the "clear and meaningful norms". Then, at page 104 (I) of the Memorials, the Applicants speak of:

> " . . . currently accepted standards as reflected in Chapters XI, XII and XIII of the Charter of the United Nations".

These, Mr. President, are the self-same terms and stated purposes as those which, according to the Applicants' submission at page 107 of the Memorials, assist in establishing the "clear and meaningful norms" or the "legal norms".

We see, therefore, that we have so-called "clear and meaningful norms" and that they are also called "legal norms" but that they were not intended to be anything more than the standards and the purposes mentioned in Chapters XI, XII and XIII of the Charter of the United Nations, and more particularly in sections 73 and 76 thereof.

The other reason why this is perfectly clear, Mr. President, arises from the fact that the Applicants did not, in their Memorials, rely only on these "clear and meaningful norms" in support of their proposition that the violation of duty on the Mandatory's part went beyond the conjectural sphere and was, indeed, beyond argument. They proceeded, after stating these norms, to indicate that, in fact, the policies pursued by the Respondent amounted to a deliberate system of oppression of a certain portion of the population. They said that not only did the Respondent fail in its duty to promote to the utmost, but that it made no significant effort whatever to do so. And they went on to use the expressions to which I referred before, indicating a deliberate and systematic course of conduct on the part of the Respondent; in other words, an attitude of bad faith as far as the prescribed objectives of the Mandate were concerned—an attitude, not of seeking to achieve the prescribed objectives, but of seeking to achieve or pursue an ulterior objective. That, then, was the basis upon which the Applicants sought to establish, in the ultimate result, that the violation of duty could be said to be beyond argument. The norms themselves and by themselves, as the Court will observe from this analysis, could never have brought them to that result. The norms merely split up the objectives into several parts and such objectives remained objectives which could be pursued through the exercise of the Mandatory's discretion.

Be that as it may, Mr. President, in the Counter-Memorial the Respondent showed that these various norms which the Applicants sought to apply in the Memorials, did not, even if they existed, materially affect the discretionary nature of the Respondent's powers under the Mandate, and that due application of the Respondent's discretion led to practical results which were opposed to those desired by the Applicants.

In the Counter-Memorial, Mr. President, we also dealt very fully with all relevant facts bearing on the question of the real intent of the Respondent Government in regard to the policies applied to the various population groups, and we demonstrated that the intent and purposes and objectives were not oppressive of any portion of the population, as had been alleged by the Applicants, but that they were, in fact, objectives aimed at the upliftment of all the population groups and at bringing them all to a point of self-determination and self-realization which would be fair and just in the circumstances, having regard to

conflicting interests and to the necessity of bringing about a state of equilibrium, as mentioned in the judgment of the Permanent Court in the *Minority Schools in Albania* case.

It is against this background, Mr. President, that the significance of the new norm, as formulated in the Reply, must be viewed. In the Reply, **IV**, at p. 493, we find the norm defined by the Applicants as follows:

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

One sees at once, Mr. President, the essential difference in character between this norm and the norms, or standards, as presented in the Memorials. The norm in the Reply is given the character of a precise prescription of what the Respondent may and may not do in the exercise of the Mandate. It is a prescription against which the Respondent's conduct can be tested objectively because the prescription relates to a matter of method of attaining the prescribed aims—a question of method which covers the whole field. Throughout the whole field of advancement—political advancement, economic advancement, educational advancement—it is sought to prescribe a method which is to be applied, and it immediately becomes clear that it contains a concept, which was certainly not present in any of those meaningful norms and standards suggested in the Memorials.

The Applicants go on in the Reply, **IV**, at page 493, to say that this norm gives an "objective content to Article 2, paragraph 2, of the Mandate". In other words, the norm is presented as one which defines aspects of Respondent's obligations in terms as definite as those contained in Articles 3 to 5 of the Mandate. It is capable of ready application to the facts of a particular situation, as objectively and without reference to the question of motive, purpose, or intent, as is the position under Articles 3 to 5 of the Mandate. We gave an analysis on that point in the Rejoinder, **V**, especially at pages 166-167.

We pointed out in the Rejoinder, **V**, page 119, that if there existed such a norm as defined in the Reply, and as I have just read out, and if that norm had formed a part of the Mandate, then:

> ". . . it would have the consequence that Respondent's admitted policies of differentiation would constitute a contravention of the Mandate even if the Court were to hold that such policies were intended to enure, and did in fact enure, to the benefit of the population as a whole".

That is quite obvious, Mr. President, from the unqualified way in which this norm was stated in the Reply, in terms of the definition which I have just read out.

It, therefore, seems clear that the norms of the Memorials were not of the same kind as this "norm of non-discrimination or non-separation", and that is the reason why we can, with submission, say with every

justification that Applicants have indeed introduced a new cause of action in the Reply—something which was neither expressly, nor implicitly contained in the Applicants' case, as formulated initially in the Memorials. We deal fully with this subject in the Rejoinder, **V**, page 105.

Now, Mr. President, my learned friend, Mr. Gross, expressed surprise at our submission that a new cause of action was involved. I refer to the verbatim record, at page 253, *supra*, where he stated:

> "The only 'cause of action' involved in the present proceedings, ... in the view of the Applicants, is that embodied in their Submissions Nos. 1 through 9, and the Prayer for Relief, all of which are set out in the Memorials at **I**, pages 197 and 198. That has been, and remains, the 'cause of action'."

Mr. President, it may be that my learned friend and we are not *ad idem* as to the meaning of the expression "cause of action". As we know it in our practice, the expression refers to all those elements which a party has to prove in order to establish his case, i.e., to show that he is entitled to the relief which he claims, or, as in this case, that Applicants' submissions are well-founded. In other words, there is a complete distinction between the cause of action, on the one hand, and the relief claimed, on the other hand—the submissions, or prayers, as we call them in our practice, or prayers for relief. The cause of action is that which has to justify the prayer for relief, or the submission, and it is in that sense that we say that a new cause of action has been substituted. It is a setting out of the factual allegations which, upon an application of the law to the facts, would entitle a litigant to the relief which he claims by way of his submissions, or his prayer for relief.

It needs no argument, Mr. President, to show that submissions, or prayers for relief, may be based upon various grounds. They may be based upon alternative grounds or, as has happened here, in our submission, one may start off by putting forward one ground for the prayer for relief and then switch over completely from that to an entirely different one—that, we submit, is what has happened here. The mere fact, therefore, that the prayers for relief, or the submissions, remain the same, is no proof at all that there has been no change in the cause of action.

On the question whether the Reply in fact introduced a new element in the shape of this alleged norm of non-differentiation, the Applicants' argument is, in our submission, anything but clear. If we analyse what they say in the verbatim record of 24 March, at page 253, *supra*, then the argument seems to amount, in a nutshell, to this: our submission as to a change of cause of action is unjustified because the Applicants have in the Reply "elaborated certain contents and sources of the suggested norms". That is the way in which they represent it now.

They go on to say that their "reference to the terms and purposes of Chapters XI, XII and XIII of the United Nations Charter was not, of course, intended to imply that these ... [norms] and purposes [i.e., those set out at pages 107-108 **(I)** of the Memorials] marked the full measure and extent of the legal norms applicable to the Covenant and relevant to the interpretation of the Mandate" (p. 253, *supra*).

Mr. President, it is not nearly as easy as that for the Applicants. It is not merely a matter of elaborating certain contents and sources of the

suggested norms, nor of contrasting a "full measure and extent of the legal norms" with a lesser "measure and extent". It is a matter of suggesting and advancing an entirely different type of norm. As I have stressed, it is a norm which covers the whole field of the Mandatory's endeavours to promote to the utmost, and prescribes to it a method of action which it is to apply in all its actions in seeking to promote to the utmost. It is something which imposes a "must" upon it and which takes away its discretion in that regard. And it is, in these respects, completely different and completely new, as compared with the formulation of the "meaningful norms and standards" at the Memorials stage.

My learned friend also stated:

> "*(a)* an international ... norm does exist which may fairly be described as a norm prohibiting official governmental allocation of status, rights, duties and privileges upon the basis of membership of a group, class or race, without regard to individual merits, capacity or quality;
> *(b)* that such legal norm is applicable to, and determinative of, Respondent's obligations in terms of Article 2, paragraph 2, of the Mandate;" (p. 267, *supra*).

Here, in the Oral Proceedings also, Mr. President, my learned friend makes it clear that the norm, as so framed, prohibits certain conduct: in other words, it is a rule which deprives Respondent of its discretionary powers on questions of method, and, as I have said, it extends over the whole field of endeavour to promote to the utmost.

This is also, as I have pointed out, the effect of the rule as it appeared, on analysis, to be stated in the Reply, and there can, therefore, be no doubt at all that the rule, as introduced at the Reply stage, was an entirely new one, whatever the reason may have been for that change.

The next point of importance to which I wish to proceed is the fact that there has been a further change in the oral argument in regard to the Applicants' case on that norm. They have now found it necessary to qualify that norm as originally defined in the Reply, and to say that it is not to be taken as an absolute one which must be applied in all circumstances. In other words, Mr. President, it is now no longer possible to say, as we did in our Rejoinder, that the Respondent's admitted policies of differentiation would necessarily, and *per se*, constitute a contravention of this norm. We said there—

> "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" (V, p. 119).

The norm as originally formulated in the Reply was an unqualified one. It applied to all forms of differentiation without exception, differentiation on the basis of group, race, colour, as the case might be. There was no qualification of that proposition, and, therefore, we could say, on analysis, and say correctly, in our submission, that Respondent's conduct would be unlawful for contravention of this norm even if its policies were, in fact, intended to enure and did, in fact, enure to the benefit of the population as a whole.

Now, Mr. President, what qualification is it that the Applicants have sought to introduce in their oral argument? It is not clearly developed, nor stated in detail, nor analysed in regard to its implications, but it

seems to amount to this: that in some instances differentiation on the basis of groups is permissible, and that those instances are such as could be described as group protection. Thus the Applicants say according to the verbatim record at page 262, *supra*:

> "The question of differentiation as such does not arise; if it did, the minorities treaties themselves would be subject of attack, which they clearly cannot be. What is at issue here is, as has been said, the official governmental policy of allotting rights, duties, burdens, etc., upon the basis of membership in groups."

The Applicants also proceeded to say, according to the same verbatim record, at page 263, *supra*:

> "... the concept of genuine 'group protection' for those who desired and required it—protection as distinguished from coercion",

was and is widely accepted.

They say, in fact, Mr. President, that the concept of group protection, and the norm of non-discrimination and non-separation, are complementary. That we find in the verbatim record at page 263, *supra*. In other words, this concept is now to be read into the norm as a qualifying factor. There is in general to be no differentiation on the basis of group, tribe, race or colour, but, as an exception, there is to be allowed, apparently, differentiation for the purpose of group protection. I do not quite know which phrase to use—"for the purpose of", or "having that effect"—the Applicants did not say.

Mr. President, in our submission, this qualification strikes at the very heart of the Applicants' norm of non-differentiation as advanced in this case, and having regard to the purposes for which it is advanced. The purpose of bringing that norm into the case, the Court will recall, was to have something by which Respondent's conduct could be measured objectively so as to avoid having to establish the malicious intent about which the Applicants found themselves to be in difficulty. They consequently had to find something, by which they could objectively, i.e., without bringing anything in the nature of intent or state of mind into the picture, say the Respondent's conduct constituted a violation of the Mandate. When we look at this qualification which they now introduce, and take it to its logical conclusion, it demonstrates, in our submission, nothing less than that there is a discretionary power vested in the Respondent as to the circumstances and the considerations which justify group differentiation: in other words, that, by this qualification, the Applicants have brought back the discretion which they sought to remove in the first instance.

Mr. President, let us briefly analyse the Applicants' statement that genuine group protection is permissible for those who desire and require it. Who decides what measure of protection is necessary? Who decides on the methods to be adopted in order to achieve protection? And precisely what, Mr. President, does the concept of protection include? Those are questions which arise. What is the position where a group desires protection without possibly requiring it, e.g., if a group says "I want this protection" but other people think that they do not require it, or that they have no just claim to it. Who decides whether differentiation is required or necessary as a protective measure? What is the position where a group requires protection but is, because of its state of development,

state of disorganization, or similar reasons, unable to give proper expression to its specific needs? Who decides in cases where a group might require protection, but that group does not think that it needs protection? Mr. President, what test or norm must be applied by the one who has to decide such questions as I have just mentioned? The Applicants have not dealt with that at all. They have not said who or what prescribes to the Mandatory what to decide in cases of this kind.

The only logical, the only possible answer, in our submission, which could be given to questions of this kind, is the general one, namely that necessary decisions fall within the competence of the discretionary powers vested in the governing body. In the case before the Court, it is the Respondent Government. We do not have to go through this process of saying that there is a norm that you should not differentiate, but that you may have exceptions to the norm according to your discretion. The whole matter is entrusted to the discretion of the government concerned. That is the pure and simple answer to this whole situation, and it leads my learned friend out of all of his difficulties. It leads him out of the difficulty of attempting to formulate a prohibition for the Mandatory, for as soon as he formulates it, he lands himself in such difficulties that he has to qualify, and when he qualifies, he qualifies to such an extent that he is right back in the discretionary sphere of the Mandatory's powers.

Mr. President, another aspect of this distinction, or qualification, calls for attention, and that is this: how can one distinguish between the two concepts of protection, which is allowed, and coercion, which is not allowed. How can they be said to be exclusive concepts? Clearly they are not. As soon as I have a legislative measure which I consider to be necessary in order to protect a certain group, surely that measure, in order to achieve its purpose, must have certain coercive aspects. It could be coercive as far as that particular group is concerned, or, at least it could be coercive, and it must necessarily be coercive as far as other groups are concerned which do not share that protection. When I say that Natives alone are entitled to own land in a certain area, then I coerce other parties—other persons—who might be interested in buying land in that area, for I make it impossible for them to do so. By coercion I keep people separate, but I do so for the purpose of protection. So how are those concepts to be regarded as mutually exclusive? I simply do not follow that. I do not follow, Mr. President, how the Court decides whether a particular measure is to be regarded as protection, or as coercion, when it carries within itself both of these aspects.

Another question arises with which my learned friend has not dealt: can protection, according to his norm, be extended to underdeveloped groups only, or also to a more developed group such as—let us take as an example—the European or white group in South West Africa, a group whose presence is necessary and desirable for the economic advancement of the Territory? Suppose a Mandatory in its discretion decides that such a group's presence is necessary for that particular purpose and suppose that is a sound decision, is the Mandatory then allowed to apply measures to protect the interests of that particular group also, in so far as it may be necessary, against possible encroachments upon its domain from the side of less developed and more numerous populations? Is that possibility included in the norm, or is it not, and if it is not included in the norm, on what basis of justice or modern standards or ethics or anything on which my learned friends relies for determining his norm is that

exclusion to be justified? We just do not know. Mr. President, the position is either that these matters are, as we say, all to be left entirely to the discretion of the mandatory government—i.e., the Mandatory is to decide in its discretion, honestly, what to do in these cases, and the only basis upon which the Court tests it is whether it is honest in its decisions—or else the Court would have to undertake this impossible task of analysing measure for measure and of determining in each case: is this a case of protection, or is it a case of coercion? And the Court would somehow have to find answers to the various questions I have mentioned in applying that test.

Mr. President, this brings me back to the fact I mentioned earlier, namely that if this is to be the enquiry which this Court has to conduct, then the Court is being asked at this late stage of the proceedings—after all the pleadings have been closed only at the oral stage of the proceedings—to undertake a completely new canvassing of the facts, because every measure, every policy, every practice involved would have to be tested according to this new criterion: it is something to which no attention at all was given anywhere in the pleading stages. In each instance in the case of the provisions of any particular Statute, we shall have to analyse the surrounding circumstances, the facts, the background, and ask: can it be said to have been a measure for protection, or must it be said to be a measure of coercion?

Mr. President, as I have said, the question is not merely a legal one; it requires an appreciation of facts, and, in order to determine a question of that kind, it requires that the relevant facts should be properly brought before the Court. Nobody has attempted to bring facts bearing upon that question before the Court, simply because there was no allegation of this kind before; there was no charge formulated on this basis. If the Court should, therefore, come to the conclusion that this is the nature of the enquiry to be conducted by it, the Court should conclude that after consideration of this legal argument. It seems that the whole position would have to be reconsidered. One would have to see whether leave should be given to the Applicants to amend their pleadings so as to introduce this charge, and, also, whether leave should be given to the Respondent to reopen its pleadings in order to deal with the facts and aspects of the matter in this regard. That is the logical conclusion in this respect to which the Applicants' contentions lead us. But in truth, Mr. President, I submit that this is merely a further demonstration that the whole of this contention of the Applicants as a matter of law is entirely without substance, and that there is no justification whatsoever for finding that such a vague norm exists—a norm which is incapable of exact or intelligibly precise formulation on any known principle of interpretation or on any application of the normal sources from which legal obligations and legal norms are derived. The analysis and review of the history of this norm, and of the qualifications now introduced into it serve, in our submission, to confirm that the matter is one to be left entirely to the discretion of the Mandatory; that that is how it was intended by the authors of this system; that that is the ordinary, legal effect of the instrument; and that no interpretation or any other process can introduce a qualification of this kind into the legal approach to the matter.

Now, Mr. President, in view of this change in the Applicants' case, it may be necessary—I refer to it in passing—to be explicit about a particular point to which the Applicants referred in these Oral Proceed-

ings as being an admission on our part. My learned friend, Mr. Gross, on behalf of the Applicants stated in the verbatim record, page 261, *supra*:

> "It should be noted that Respondent has conceded that this basic and minimum international standard 'would, if it existed, provide an objective criterion for measuring Respondent's policies'. [He referred to the Rejoinder, V, page 165. He proceeded:] It also is conceded by Respondent that if the Mandate contains such a minimum basic standard, then, again in Respondent's words, 'Respondent's admitted policies of differentiation would constitute a contravention of the Mandate'."

Now, Mr. President, it will be quite evident that these concessions on our part related to the norm in its absolute form, as it was stated in the Reply. Indeed, in this last passage from the Rejoinder, quoted in part by the Applicants in the passage I have just read, there followed immediately the following words which I read out to the Court earlier this morning, namely "... 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" (V, p. 119). These words were omitted from the Applicants' quotation, and the Applicants in effect, in these statements to the Court, suggest that this extract from the Rejoinder, this concession on our part, would still be applicable also to the norm as amended in these Oral Proceedings. Now that, emphatically, Mr. President, is not the case. We do not concede that our policies contravene this new "protection, not compulsion" formula. That would involve an entirely new enquiry, as I have said, if it were to be undertaken in every case. In general, Mr. President, if we have regard to the underlying considerations of fairness and justice—which, it would seem, compelled my learned friend to introduce this "protection, not compulsion" formula—then we submit that our policies comply in every respect with those underlying ideas, those underlying concepts, of fairness and justice. It is especially because of considerations of protection, fairly applied in the circumstances of the Territory, that it has been found necessary to have differentiation; but we do not see the logic of saying that it must be protection, not compulsion; we do not see any logical possibility of keeping those two separate as concepts.

Mr. President, I proceed to consider the Applicants' contention regarding the so-called norm of non-differentiation from another angle, which, in our submission, independently demonstrates its untenability.

In the Rejoinder, V, at pages 123-127, we showed that—

> "... the mandate system, by its very terms as well as its underlying philosophy, according to the contemplation of its authors, the policy of the Permanent Mandates Commission, and the practical application of the system by Mandatory Powers, permitted and indeed required differentiation among various ethnic, linguistic or cultural groups, and, consequently, among their individual members, on the very basis of membership in such a group". (V, p. 127.)

That was a conclusion stated after the subject had been reviewed.

Mr. President, it stands to reason, accepting for the moment the correctness of that submission (I shall deal with the argument in support of it in a moment) that not only would this norm contended for by the Applicants which prohibits such differentiation, first, in an unqualified way, as stated in the Reply, and now, with qualifications, as stated in the oral arguments, mean the addition of such a norm to what was agreed

upon in the mandates system, but it would also, to a very large extent, be a complete reversal of concepts which went into the mandates system as legal norms binding upon the Mandatory. That appears very clearly from the material to which we refer in the pleadings in support of the conclusion which I have just read out.

We pointed out in the Rejoinder, V, pages 123-124, that the prevalent philosophy, during and after the First World War, placed more emphasis on the right of national groups of self-realization than has been current in certain spheres of the international scene in more recent times.

We pointed out that this philosophy was effectuated, amongst others, by the creation of national States out of the remnants of the German, Austro-Hungarian and Ottoman Empires, as well as by the minorities provisions. I should like to refer the Court in this regard to pages 123-124 of the Rejoinder (V).

I mention only some aspects of our treatment of the subject. I am not going into it in detail, as it is set out in the Rejoinder.

We quote, for instance, from the 14 Points of President Wilson, Point 9 in which he set out the aim of "A readjustment of the frontiers of Italy 'along clearly recognizable lines of *nationality*' " (italics added) (p. 123); then Point 10—"The freest opportunity of *autonomous development* to the *peoples* of Austria-Hungary, which it was not intended to destroy" (italics added) (p. 123); next in Point 12—" 'undoubted security of life and an absolutely unmolested opportunity of *autonomous development*' to other *nationalities* now under Turkish rule" (italics added).

We refer to a summary of the principles, as given by President Wilson himself, reading—

> "An evident principle runs through [the Fourteen Points]... It is the principle of justice to all *peoples* and *nationalities, and their right* to live on equal terms of liberty and safety with one another, whether they be strong or weak." (Italics added.) (V, p. 123.)

Then, on 11 February 1918, President Wilson laid down four principles as essential to permanent peace, the fourth of which read:

> "All *well-defined national elements* shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism." (Italics added.) *(Ibid.)*

We proceed, Mr. President, to refer to provisions of the various minorities treaties, making it clear that the solution adopted with regard to minorities was, in keeping with the times—"... not to encourage their assimilation with the majority but rather to *protect their existence as separate groups*". (Italics added.) *(Ibid.*, p. 124.) This was the background to the large number of treaties. We indicate, for instance, provisions relating to the protection of minorities as groups in regard to matters such as the use of their language, the establishment of charitable, social, religious and educational institutions, and the provision of facilities by the State for those purposes.

One of these provisions we quoted, read as follows:

> "In any town or district where a considerable number of a linguistic minority was resident, adequate facilities were to be provided by the State to ensure that in primary schools, instruction should be given to the children of such nationals through the medium of their own language. In addition provisions were included for the

equitable appropriation of public funds by the state, municipality or other budget, for the educational, religious or charitable institutions of minorities in towns and districts where a considerable proportion of the residents belonged to racial, religious or linguistic minorities." *(Ibid.)*

It is obvious, Mr. President, that in these cases the protection is on the basis of the groups. The principle of equality was applied as between the groups—the majority groups and the minority groups—and that necessarily involves a differentiation in the treatment of these respective groups and also in the treatment of the individuals comprised in the groups. That differentiation proceeds on the very basis of membership in such a group.

It was in that context that the Permanent Court commented—in the passage I read out to this Court this morning—on the difference between equality in fact and equality in law in cases of treatment of this kind, in which the aim of equality may, in fact, make it necessary to have different treatment in order to attain a result which establishes an equilibrium between different interests.

Mr. President, we refer further to a comment by Sir Hersch Lauterpacht, which I do not want to read out to the Court now, on a certain change in philosophy in some quarters in regard to the protection of the nationality rights of minorities, which he regarded to a certain extent, as a pity.

At that stage what we wanted to stress was the philosophy or the approach of the time. It was in those times and as part of that same philosophy that the mandates system was born, and so it is quite natural to find that the mandates themselves showed effects of such philosophy, coupled with the concept of trusteeship. The mandates system not only contemplated, but it also required the application of principles of differentiation among various groups.

We find that in the very concept embodied in the introductory paragraph of Article 22. Some peoples were to be regarded as "peoples not yet able to stand by themselves" and they were to be entrusted to the tutelage of other peoples called "advanced nations". Different types of mandates were to be created, *inter alia* (I quote from Article 22, paragraph 3), "according to the stage of development of the people".

The provisions of the various mandates themselves require differentiation. In the A mandates there were provisions, similar to those regarding minorities, relating to protection of national groups regarding language, education, religion and social rights, and so forth. We give the references in the Rejoinder, **V**, at page 123.

In the B and C mandates the emphasis was more on trusteeship, and on protection of the Natives against abuses, such as those regarding liquor, militarization, Native land, and so forth. And those provisions, of necessity, also involved differentiation. We find, Mr. President, that Article 22 already begins to indicate, expressly, the necessity for such differentiation. In paragraph 5 of Article 22 of the Covenant, with reference to the B mandate, it is provided that the mandatory must be responsible for the administration of the territory under certain conditions. One of those conditions read:

". . . the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of the territory, . . .".

In Article 22, therefore, the authors of the Covenant, with full knowledge of the fact that there were other inhabitants than Natives in some of these mandated territories, already provided for a certain prohibition to apply only in the case of Natives.

We find in paragraph 6, regarding C mandates, that there is a reference back to all the conditions set out in the previous paragraph, and that reference back reads "subject to the safeguards above mentioned in the interests of the indigenous population", again indicating that all these various matters referred to in paragraph 5—the administration, the guarantee of freedom of conscience and religion, the prohibition of abuses such as slave trade, arms traffic and liquor traffic, and so forth—were all regarded as differential provisions intended to safeguard the interests of the indigenous population.

Then, when we come to the Mandate for South West Africa, being typical of C mandates in these particular respects, we find that in Article 3 the last sentence reads "The supply of intoxicating spirits and beverages to the natives shall be prohibited". Article 4 contains the prohibition against the military training of the Natives otherwise than for certain purposes. So there again the contemplation of differentiation finds clear expression. The Articles impose an obligation upon the Mandatory to see to it that such differentiation shall occur.

In the B mandates one further finds, Mr. President, certain provisions in regard to Native land, operating as protection in that regard. We refer to that at this page (p. 125) in the Rejoinder **(V)**, and that refers back to our references in the Counter-Memorial.

We next pointed out, Mr. President, that quite apart from these provisions in the mandates system itself, the Permanent Mandates Commission, in its supervision of the application of the system, very clearly showed its appreciation of the necessity for differentiation between various population groups and members of such groups, on the very basis of membership in groups. I should like to refer the Court to the Counter-Memorial, **II**, pages 417-418, where we cite some relevant excerpts from the records and the minutes of the Permanent Mandates Commission.

At page 417 we cite an extract from the minutes for 1937, where the chairman remarked that—

> "... South West Africa differed from other parts of tropical Africa in the striking inequalities that existed between the physical and moral capacity and potentialities of the different races living there. The principal cause was no doubt to be found in the past history of the territory—that was to say, in the dispersals and wars of the past. That inequality called for great elasticity in the native administration and the adoption of different rules for the various tribes to which they were applied."

At the same page we cite some further random extracts, one from the 1922 minutes in which the Commission expressed the hope "that the primitive organisation in tribes may be maintained unaltered wherever it ... exists".

In 1923 Mr. Yanaghita expressed the view that—

> "... the mandatory Governments are to be commended on their adoption of the principle of maintaining the former organisation of the tribes, and of recognising the power of the chiefs up to a certain point".

In 1924 the Commission expressed the "opinion that the soundness of the views which have prompted the Administration [that is, in South West Africa], to adopt a system of segregation of natives in reserves will" lead to certain further steps. But I emphasize the phrase "the soundness of the views which have prompted the Administration to adopt a system of segregation of natives in reserves".

In 1937 Mlle Dannevig said that she "agreed that great precaution should be exercised as regards interference with Native customs".

Mr. President, with respect, it is perfectly clear that the necessity for differentiation was contemplated and was intended.

We refer in the Rejoinder, **V**, at pages 125-126, also to an aspect of the questionnaire which was prepared by the Commission for the consideration of the mandatory powers, and to which the latter had to reply in their annual reports. Article 11 of this questionnaire read as follows—I am quoting from page 126—

> "What are, generally speaking, the measures adopted to ensure the moral, social and material welfare of *the natives*? (Measures to maintain the interests, rights and *customs* of *the natives*, their participation in public service, native tribunals, etc.)" (Italics added.)

We submit Mr. President, it was in the nature of things quite impossible to adopt appropriate measures to maintain the interests, rights and customs of the Natives in South West Africa or in many of the other mandated territories without differentiating between the various groups and between the members of the groups on the basis of membership in that group.

Mr. President, in the Counter-Memorial, **II**, at pages 414-416, and again in the Rejoinder, **V**, at page 126, we also deal with the fact that the authors of the Mandate had full knowledge of the fact that policies of differentiation between the various groups were being applied in South Africa itself at the time. In the discussions which led up to the granting of the Mandate to the Respondent, there was a considerable measure of reference to these Native policies, and at the time the argument was advanced by General Smuts and also by certain other commentators, that it was desirable that the same Native policies as in South Africa should be applied in South West Africa. That appears very clearly from the references which we give in the Counter-Memorial, **II**, at pages 414-416, and I need not read them out to the Court.

Mr. President, we also refer to the fact in the Rejoinder, **V**, pages 126-127, that in other mandatory and colonial territories, various policies of differentiation were applied, and I should like to read a portion from the Rejoinder on that point. We refer back to the way in which we dealt with this subject in the Counter-Memorial and we say at page 126 of the Rejoinder **(V)**:

> "In accordance with the generally prevalent philosophy of maintaining the identity of separate national, linguistic and cultural groups, and of guardianship and trusteeship of less-developed peoples, other Mandatories also applied policies involving various forms and degrees of differentiation. This may be seen for instance in the policy of indirect rule, which has been defined as follows:

[And then follows a quotation from Lord Hailey in his *African Survey* of 1938.]

> 'It insists that [it being the policy of indirect rule], if the native authorities are to become not only a part of the machinery of government but a living part of it, the political energies and ability of the people must be directed to the preservation and development of their own institutions; the native authority selected for recognition by government must therefore be that which according to tribal tradition and usage has in the past regulated the affairs of each unit of native society; it is equally important that it should be that which the people of to-day are willing to recognize and obey. But the objective is not merely the utilization of native authorities as instruments of local government; native administration is conceived as a means of trying to graft our higher civilization upon the soundly rooted native stock ... moulding it and establishing it into lines consonant with modern ideas and higher standards'."

That was an expression given to the concept of indirect rule at the time, the time being in the 1930s. But, Mr. President, I may perhaps read further from the Rejoinder, at page 127:

> "It will be apparent that this policy of indirect rule necessarily involved differentiation regarding the various Native groups within a territory, *inter se* as well as in relation to the more developed groups such as Europeans or Asians. As noted in the *Counter-Memorial*, one finds that indirect rule was practised in each of the three British Mandated territories, Tanganyika, British Cameroons, and British Togoland. And, although not by that name, the principles underlying the policy were applied also in each of the other three African Mandated territories, Ruanda-Urundi, French Cameroons and French Togoland. Similarly the policy found application, under its name or by way of its underlying principles, in a large number of other territories. In keeping with this approach, there was up to World War II no participation by Africans in the central legislative and executive organs of any of the Mandated territories, as was also shown in the *Counter-Memorial*."

We point out further, Mr. President—I am still reading from page 127—

> "In pursuance of, or in addition, the policy and principles of indirect rule, differentiation as between members of various population groups was practised in other Mandated territories (and other territories) in Africa in a spirit of guardianship, trusteeship and paternalism, also in regard to legal systems, land tenure, residential facilities, aspects of economic policy, control of population movement, education, and other aspects of government."

And we refer to all the passages in the Counter-Memorial which give the authorities and quotations to substantiate that statement.

That then, Mr. President, is the setting for, and the background to, the mandates system—that was the philosophy which applied at the time when the system was agreed upon—that was the philosophy which went into its application over all the years. Incidentally, we know that the Applicant countries, Ethiopia and Liberia, were Members of the League of Nations but, as far as we are aware, there is nothing whatsoever on record to indicate that they, at any time, raised any objection to policies of differentiation applied in South West Africa or indeed in any other mandated territories.

That was the policy, not only contemplated by the authors of the mandates system, but in many respects expressly required of a Mandatory. Some of the express provisions of the mandates system required the Mandatory to apply differentiation while others very obviously contemplated and expected that such differentiation would be applied.

Therefore, Mr. President, to introduce now the norm of non-differentiation contended for by the Applicants, especially in its unqualified form, as it was originally stated in the Reply, would, as I have said, entail not only some addition to—some incorporation of something extra into—the mandates system—but also a dramatic reversal of some of the basic principles which were enshrined in the mandate. And the Applicants, Mr. President, on that unqualified basis upon which they stated their norm in the Reply, would, I submit, be at a loss to say now what happens to this prohibition against the supply of liquor to the Native population—is it to stand or is it not to stand? Is it operative or is it not operative? And the same applies with regard to the other provisions.

Mr. President, it may well be that it was by reason of this argument—this demonstration—on our part, or for other reasons as well, that the Applicants have now sought to introduce the qualification into their norm by including this protection, not compulsion, formula.

I have already demonstrated, Mr. President, that the protection idea and the compulsion idea are not mutually exclusive and this appears with particular clarity from some of these provisions to which I have just referred. So, for instance, the mandate provision regarding intoxicating liquor, regarding Native land and regarding traffic in arms and ammunition, although all of them were intended for the protection of the Natives, clearly involve compulsion and they involve compulsion both in respect of the Natives and in respect of other groups. A Native is not allowed to purchase intoxicating liquor however much he may want to purchase it; that is compulsion upon him, not protection only; it may serve the purpose of protection but it entails compulsion. Conversely, the members of the other groups were not permitted to sell liquor to the Natives however pleasant and profitable that might have been to them or might have appeared to them. They were not even allowed to give liquor to the Natives. And the same considerations would doubtless apply to the sale of arms and ammunition, to protection in regard to Native land, and so forth. The compulsion element applies both in respect of the Natives and in respect of the other elements of the population.

In regard to the minorities treaties to which we have referred and from the provisions of which I have read extracts to the Court, there again it will be evident that those provisions necessarily entailed a measure of compulsion. The majority was compelled to tolerate the institutions of the minority whether the majority liked it or not—the majority was compelled even to expend public funds for the maintenance of those institutions of the minority, and the majority was prevented by compulsion from sharing in those amenities—the amenities specially provided for the minority.

So, Mr. President, again one has demonstration of the impossibility of applying this criterion of "protection, not compulsion", and of keeping the two concepts separate. It is, therefore, Mr. President, apparent that even on this revised formulation of the Applicants, the acceptance of the Applicants' norm would still involve a reversal of some of the basic principles of the mandates system. There would still, according to their

contention, be a general prohibition against differentiation on a group basis but subject only to the exception of "protection, not compulsion".

The Applicants do not show, Mr. President, when and by what legal process such a complete reversal came about—how something which was right throughout the mandates system, something which was legally required of the mandatory, now becomes wrong—something which, as a matter of law, is not permitted to the Mandatory at all. This aspect again demonstrates a matter to which I referred before, and that is the distinction between the situation we have here and the situation in the *Brown* case in America on the question of public education—a case to which my learned friend referred and upon which he relies very heavily. In the *Brown* case we have a legal norm which requires the equal protection of the laws for everybody; that norm remained unaltered all the time. The norm did not contain any prescription of method by which equality was to be attained. It did not say that there was to be segregation or integration between members of various racial groups, in schools, in other institutions or in residential facilities or what-have-you. Such details were to be determined by a process of application—the norm—it simply stated this principle of equality: equal protection of the laws. As a matter of application the Court found in 1950 that facts had changed whereas a differential system could be regarded as being adequate compliance with the norm in former years and in the circumstances which then obtained, a differential system in the particular circumstances of America especially in the light of the development of public education in America, and having regard to the view which the Court took of the psychological situation, could no longer comply with the norm, and, therefore, the Court gave judgment accordingly. It gave effect to its consideration of an altered circumstance of fact, and there was no need for it to import any change or alteration into the legal norm at all. The legal norm remains the same, but the facts have changed. The result of application of the norm to the facts is now a different one from what it was before.

In regard to South West Africa we have an entirely different position. We have the position that the very norm, as embodied in the Mandate itself and in the mandates system, contains within itself certain provisions which required differentiation, which required it of the Mandatory and, in other respects, contemplated and expected it of the Mandatory. Therefore, Mr. President, in order to arrive at this completely opposite result, for which the Applicants now contend, there would have had to be a change in the norm itself. That is the major difference between this case and the *Brown* case, and the Applicants have not been able to show any recognized legal process by which a change in the norm itself could have come about. It may well be that in certain quarters it is thought that the underlying philosophy which went into that norm has become antiquated, and that that ought to be changed and reversed. That may well be the view held by certain persons. It is quite obviously a matter on which there could be differences of opinion, in so far as application to particular circumstances is concerned, but that is no basis, Mr. President, for coming to this Court and saying to the Court that it must now regard the norm as having changed. There is no legal principle or process, to my knowledge, which would justify such a conclusion.

Mr. President, in regard to our attitude in the Rejoinder concerning the norm as formulated in the Reply, the Applicants said the following in the oral argument:

> "... although Respondent refers to this basic minimum standard as a 'so-called' or as an 'alleged' norm, no serious attempt is made by Respondent to deny the existence *per se* of the standards relied upon by Applicants. Rather, Respondent appears to content itself with attempting to demonstrate that the norm which we have labelled non-discrimination or non-separation does not exist *as part of the Mandate.*" (P. 261, *supra.*)

When we analyse this contention, Mr. President, it would seem to comprise two independent submissions. The first one is that Respondent assertedly did not dispute that there existed a legal norm, as defined by Applicants, existing independently of the Mandate. The second is that Respondent assertedly did not dispute the existence of a generally accepted international standard, whatever its legal effect might be, possessing the content of Applicants' alleged norm. Those seem to be the two elements comprised in this contention—that we did not deny the existence of a norm outside of the Mandate, nor of the existence of a standard outside of the Mandate. In our submission, in both respects the Applicants attribute to us something which is not justified, as will be shown.

As far as the existence of a legal norm, arising outside the Mandate is concerned, we said in our Rejoinder, **V**, page 140, that this Court would not have jurisdiction to adjudicate upon alleged breaches of such a norm. The proposition is perfectly clear: the Court is asked to adjudicate on the interpretation and application of the provisions of the Mandate, not upon the interpretation or the application of any norm existing independently of the Mandate, or alleged to have come into existence independently of the Mandate.

Secondly, we said that, in any event, none of the recognized sources of international law had—

> "... given rise to any 'norm of non-discrimination or non-separation' as defined by Applicants, which would entail that *any* differentiation on the basis of group membership, however beneficial such differentiation might be in intent or application, would be illegal". (**V**, p. 140.)

We made it perfectly clear, Mr. President, that, in our submission, no such unqualified norm had arisen through legal processes of which we were aware. Now, the correctness of that attitude on our part is borne out by the very fact that the Applicants have found it necessary in these Oral Proceedings to qualify, or amend, the norm, as originally propounded. Moreover, Mr. President, we showed that no such norm became binding on the Respondent by Respondent's consent to any convention. We indicated that the large number of the conventions, resolutions, and so on, referred to by the Applicants were matters to which the Respondent was never said to be a party, and to which, in fact, the Respondent never was a party. Only two instruments fell to which the Respondent had been a party, to be specially considered in this regard. One was the United Nations Charter, and the other was the Constitution of the International Labour Organisation. We dealt with these in the Rejoinder, **V**, pages 130-133, where we indicated that the provisions of those instruments were not such that it could be said that Respondent had ever consented to a norm, as was propounded and advanced by the Applicants.

As regards other possible sources of law, we pointed out that, even if it might be possible to say that a norm, as relied upon by the Applicants, *had* evolved over the past years in international society generally, or as between certain States, then such a norm would not be binding on Respondent, inasmuch as the basic principles of international law involve that legal rules are not enforceable against States which, during the period of the coming into general acceptance of the rules in question, openly and consistently made known their dissent therefrom. That we deal with in the Rejoinder, V, pages 140-141, and reference was made to authority for this proposition, namely the *Fisheries* case, and an article by the honourable Member of the Court, Sir Gerald Fitzmaurice. The rule is, in other words, that if a new rule of international law comes about over a certain period of time, it is not binding upon a State which openly and consistently made known its dissent from it. This principle, Mr. President, would be of equal application to the Applicants' amended norm to the extent to which it may still be said to embody an objectively determinable obligation, which ties the hands of the Mandatory as far as questions of method in this regard are concerned.

Let me make it clear, Mr. President, that we see in this norm, which Applicants attempt to foist upon us, a prescription of a method of dealing with difficult situations with a view to achieving generally desired objectives and principles—objectives and principles desired and subscribed to by the Respondent Government, as much as by anybody else. The essential difference, however, between the Respondent Government and others, in this respect, centres upon questions of method, and, in so far as there may have been attempts to formulate a legal norm by convention between certain States, dealing with such questions of method and prescribing a method for indiscriminate application wherever a problem of this sort may arise, Respondent has consistently made known its dissent from such attempts. That does not mean that any of the underlying ideas of equity, morality, justice, human values, human rights, and so forth, which underlie the attempts to formulate a norm of this kind, are not agreed to or shared by the Respondent. The very opposite applies. The difference is essentially a difference of method, and we submit very clearly that by no process of law has any legal norm come into existence which binds the Respondent as far as that question of method is concerned.

The next question which arises, Mr. President, is have the Applicants established, independently of this norm of non-separation, the existence of any generally accepted canons of good government? As I indicated before, it is not clear to us whether the Applicants' case rests entirely on this norm as being a distillation from all the other norms and standards upon which they rely, or whether they also rely upon generally accepted standards existing independently of this particular norm. We shall deal with the matter further on the assumption that they do rely independently, or additionally, or in the alternative on such undefined general standards, or canons, or good government, and we shall enquire to what extent they exist and can be said to assist the Applicants' case, and what their content is.

Mr. President, in the course of indicating what they conceive to be legal norms, as distinct from generally accepted standards, the Applicants said the following:

"Legal principles and norms ... are of course derived from and re-

flect generally accepted standards of social behaviour." (P. 258, *supra*.)

The Applicants proceeded to argue that, while courts of law accord greater weight to some sources of law than others, there is, nevertheless, such a close relationship between the Applicants' legal norms and standards that the Court cannot make a conceptual distinction between them. Thus the Applicants said, in the verbatim record at page 258, *supra*: "... it is true that some sources of the law are ... accorded greater weight than others, ...", but later on the same page they said:

> "It is not in the nature of the judicial process that courts make a conceptual distinction between legal norms on the one hand and standards on the other, from which such legal norms are derived and which they reflect."

In the same record, at page 247, *supra*, the Applicants told us that "the standards... are of... a political, moral and scientific character", and the Applicants further contended that these legal norms and standards are said to enjoy universal acceptance.

Now, Mr. President, in considering those contentions we would first like to refer to what we submit is an entirely illogical distinction which is drawn in this respect by the Applicants regarding the application of their standards and norms to this case. In order to prove universal acceptance of these standards, the Applicants refer, amongst others, to the views, I emphasize the word views, of the governments of various States, and they also rely on so-called standards laid down by United Nations agencies. They did so in the Reply, and they did so again in these Oral Proceedings. In the latter respect I can refer to the verbatim record at page 247, *supra*. But it is curious to note, Mr. President, that whilst the Applicants refer to views of various governments for the purpose of establishing their norms or standards, they entirely deny the relevance of the "practices or policies" of governments in this respect. They deny the relevance of the "practices or policies" of, "any sovereign State or society other than that which is [the] subject of complaint in the cases at bar". These were the words which they used according to the verbatim record at page 119, *supra*.

In other words, they ask the Court to find generally accepted standards and norms of universal application and acceptance, of universal acceptance, that is the phrase used by them, as norms which ought to govern also the Respondent's conduct in this case, but in order to arrive at those, and in order to establish that they are generally or universally accepted, they refer only to the views of States and they say that the practices or policies of States are entirely irrelevant.

Now we naturally accept, Mr. President, that the Court is not called upon to pass judgment on the policies or practices of other governments, but it is very difficult to appreciate the Applicants' argument that the views of the other governments are important even to the extent of creating standards which have legal force, and that the practices or policies of governments are irrelevant matters. This is the Applicants' attitude, and admits of no doubt. I refer to the verbatim record of 18 March, at page 119, *supra*, where they said the following:

> "The Applicants are aware, and do not suggest otherwise, that decisions of domestic tribunals are peculiarly suited to, and reflect, conditions and traditions particular to their own societies. Such

> conditions and traditions may be multi-cultural, multi-lingual, or multi-racial, or mono-cultural, mono-lingual, or mono-racial, or all or any of these, and more, in combination. The Applicants do not intend to comment upon, nor do they believe that this honourable Court would wish to enquire into, much less pass upon, practices or policies which regulate the affairs of any sovereign State or society other than that which is subject of complaint in the cases at bar."

They continued, Mr. President (p. 120):

> "Whether Canada or India, merely as random examples, are or are not multi-racial or mono-cultural societies, or whether they maintain or should maintain or should not maintain, for example, separate schools for separate cultural or linguistic groups is unknown to the Applicants and is none of their concern."

And the same attitude we find elsewhere. We find that in the Reply the Applicant set out certain propositions regarding education which, they said, had been "determined" (that was the word they used), by political organs of the United Nations. That is in the Reply, **IV,** at page 398. These determinations were also described as "standards", in the Reply at page 399, or as "United Nations' requirements"—these were the very words used by the Applicants themselves in the Reply at page 401, paragraph *(b)*. And it was the Applicants' theme that all, or many, States had complied with such "requirements", but not the Respondent, of course. We answered in our Rejoinder, **VI,** page 161, that the Respondent was not obliged to comply with the said "requirements". We said that, *inter alia*. Now in these Oral Proceedings my learned friend, Mr. Gross, refers to that answer on our part relating to "requirements", and he described the word "requirements" as "... this is the characterisation in the Rejoinder". He said that, according to the verbatim record at page 266, *supra*. He seems to have forgotten, Mr. President, that the Applicants themselves, as I have just demonstrated, used that expression. And he then proceeds as follows, according to the same page of the verbatim record:

> "The implication that Respondent has adduced seems to be that the United Nations findings or conclusions to which I have referred are asserted by the Applicants to impose specific legal requirements. This is gratuitous interpretation on Respondent's part. The Reply makes it explicitly clear that the conclusions of the United Nations agencies are referred to as indicative of 'the purposes and principles of administration of dependent territories'."

Mr. President, in our Rejoinder, **VI,** page 161, we stated that we would not attempt to establish to what extent various States have complied with "requirements" which had been laid down by United Nations organs. And we also stated that we had doubts as to the propriety of any such an enquiry on the Respondent's part. We stated in that regard, in the Rejoinder, **VI,** page 161, that—

> "inquiry by it [that is by Respondent] as to compliance or otherwise by other Governments with requirements or standards which have been laid down by United Nations organs in respect of territories administered by such Governments must be open to serious doubt".

Now it is quite obvious what we intended to convey in this passage,

namely that it would be an invidious task to establish whether, and to what extent, other governments had complied with what the United Nations organs required them to do. That was what we described as what would be an invidious task on our part. Now we find, Mr. President, that the Applicants have seized on this passage to repeat their view that "policies or practices" in territories, other than South West Africa, are no concern of the Court. Thus they say "The Applicants fully concur". (This is in the verbatim record at p. 266, *supra*.) I break off there for a moment. What they purport to concur in is this statement by the Respondent which I have just read regarding the propriety of examining other States' compliance with "United Nations requirements". And they then say that, in their submission:

> "... this honourable Court may not appropriately be requested to consider, or pass upon, or enquire into, policies or practices regulating the affairs of any State, territory or society other than the territory in question in this proceeding. It has not been, and it is not now, the intention of the Applicants to suggest otherwise, and that of course was not the purpose for which reference was made in the Reply to the findings of the United Nations agencies."

Now, Mr. President, this attitude on the part of the Applicants is a very curious and a most illogical one, in our submission, and it shows up, at the same time the artificiality and the untenability of their contentions regarding so-called norms and standards. To begin with, Mr. President, it is hardly logical for the Applicants to rely on the views of governments as to the basis of their norms, but to argue at the same time, that such governments' policies are irrelevant. If we may use the Applicants' example again—a random example of Canada or India—it does not seem to us to make sense to say that it is quite irrelevant whether Canada or India has separate schools for separate cultural or linguistic groups, or whether those countries should or should not have separate schools (that is what they said in the verbatim record at p. 120, *supra*), and, furthermore, that such matters are none of the Applicants' concern, but to say, on the other hand, that Respondent should be condemned purely because it does not comply with the views of such Governments—no matter on what grounds, or motivations, or in what circumstances such views were arrived at in a particular country.

Norms and standards are, therefore, according to the Applicants to be determined with reference to what certain countries have said, say, about South West Africa or about policies in South Africa (that is the tenor of most of the statements they quoted), without any reference to the question of the state of knowledge of the particular speaker of the subject he was talking about; of the factual premise which he had in mind when he made the particular statement; of his sources of information; or of the particular reason why he made the particular statement on the particular occasion. Views of countries, the Applicants say, are to be determinative of the norms or the standards to be applied by the Respondent and to be enforced upon it by this Court, but not the actual practices of governments in relation to similar problems to those confronting the Respondent.

It is furthermore, Mr. President, not merely a question of the argument being an illogical one. What is more serious is this. They are saying, in effect, that the Court must accept, and act on, the views of governments

without conducting an enquiry of its own in regard thereto—in other words, the Court must blindly adopt the views expressed by these others. It must be this very expression of the views of the others that must be the basis on which the Court is to conclude that these standards exist in modern society. Those standards are now to be applied by the Court. That is what the contention amounts to.

Furthermore, their attitude is also that the Court must adopt the *findings of, or the standards laid down, by United Nations agencies*, and again, Mr. President, without any enquiry into the conditions and circumstances of the particular countries with reference to which those findings were made, and those standards were laid down, because enquiry into what happens in those countries, into the practices of such countries there, into the factual conditions there, is taboo. All that this Court is to consider is what representatives of other countries said and what was said and found by organs of the United Nations. This also, Mr. President, is tantamount to saying that the Court must blindly adopt standards laid down by others. In effect, therefore, this Court must abdicate its functions in favour of the conclusions arrived at, and the views expressed, by extraneous bodies.

[Public hearing of 26 April 1965]

Mr. President and honourable Members, in the argument submitted to the Court so far on the question of the legal basis for adjudication upon the provisions of Article 2, paragraph 2, we submit that we have established the following proposition.

Firstly, that the Court can adjudge on alleged contravention of Article 2, paragraph 2, if at all, only on the basis of a determination of good or bad faith, in the sense of pursuing an authorized or an unauthorized purpose, or objective.

Secondly, that this question falls to be determined by enquiring into and weighing up all the relevant facts.

Thirdly, that the Applicants' attempts to rely on an objective legal norm have failed.

In that regard we have pointed out that in their attempts to establish such a norm the Applicants have been forced to amend their own formulation of the suggested norm in such a way that the discretionary element in the Respondent's powers is, indeed, not eliminated. For that reason alone they have failed to establish an objective legal norm as they set out to do.

More important than that, Mr. President, they have been unable, in our submission, to show that such a norm has, by any known and accepted principle of law, come into existence so as to be legally enforceable against the Respondent at all and, in particular, so as to form part of the Mandate.

The reasons we have given why there has not been established any legal basis for the alleged norm of non-differentiation apply, in our submission, equally to undefined legal norms, or undefined current standards, which allegedly possess legal effect; in other words, to any suggested legal rules imposing obligations on Respondent concerning the methods to be employed in administering the Territory.

We submit not only that the particular norm of non-differentiation has not been established, but also that no other norms or standards possessing

legal effect, as legal rules, and having any bearing whatsoever on the manner of administering the Territory have been established.

However, Mr. President, to say that there cannot be any legally effective, or enforceable, norms or standards does not in our submission mean, and does not in logic mean, that there do not exist any standards which, although they lack in legal effect, are nevertheless widely accepted, or applied, in practice. In principle and in practice one does find many practices, policies, or theories of government, applied by States, or advanced or propagated by politicians, experts, scientists, moralists, or the like, but which nevertheless do not possess any legal force in international law.

Indeed, Mr. President, one finds this basic distinction in all spheres of life. Many canons of behaviour are not legally enforceable but derive their effect, if any, from moral or persuasive considerations. For the sake of convenience, we drew a distinction in our Rejoinder, V, at pages 166-167, between these two concepts: on the one hand, norms or standards which possess legal effect and, on the other hand, norms, canons or standards which do not possess such legal effect. For purposes of convenience we called those of the first class, norms, and those of the second class, standards. The terminology in itself, Mr. President, is, of course, not important, the importance lies in the distinction as to concept. We could as easily have used the term legal rules, on the one hand, as against non-legal precepts, on the other. For the sake of convenience, we spoke of norms to indicate binding legal rules, and of standards to indicate the other kind of precepts which have no binding force in law.

Consequently, Mr. President, when a particular rule, or canon is in issue, the determination of the question whether it constitutes a norm or a standard, in our usage of the terms, really involves an enquiry whether or not it qualifies as a rule or principle of international law, to be applied by this Court in terms of Article 38 of the Statute. That is really what it amounts to.

If it is a norm, according to this usage of terms, it must qualify as a rule, or principle, of international law, in one of the methods envisaged in Article 38 of the Statute. If not, it can, at most, be a standard.

Mr. President, we would have thought that this distinction between, on the one hand, rules which possess legal effect, and, on the other, those which do not, was an elemental and a fundamental one. Yet we find that the Applicants refer in their argument to such a distinction as being "quite unrealistic". That was the phrase used in the verbatim record at page 258, *supra*. They said further, at the same page:

> "Legal principles and norms, as has been said, are of course derived from and reflect generally accepted standards of social behaviour. As I have said, experience is the life of the law. Standards are the sources from which the law derives its application to the human condition."

They said, further:

> "It is not in the nature of the judicial process that courts make a conceptual distinction between legal norms on the one hand and standards on the other, from which such legal norms are derived and which they reflect."

Mr. President, it is of course a fundamental consideration that the only sources of international law which can be applied by this Court are

those laid down by Article 38 of the Statute, namely conventions, international custom, as evidence of general principles accepted as law, and, thirdly, the general principles of law recognized by civilized nations. So, if a standard has attained the status of a legal norm in terms of this Article, the Respondent, for convenience, calls it a norm. If it has not, we call it a standard.

In the Applicants' argument under review they apparently attempt to establish a further source, or sources, of law, not recognized in Article 38 of the Statute. Or, alternatively, their contention means that this Court is entitled to apply any standard of behaviour or conduct it sees fit, whether or not such a standard falls under Article 38 of the Statute.

Needless to say, Mr. President, the Applicants have been unable to produce any authority, and we have been unable to find any which would afford any support for such a proposition, as I shall demonstrate more in a moment. In principle it cannot in any way be justified, either the legal precept is one of those contemplated in Article 38 of the Statute, or that precept is not a legal precept at all.

It follows then, Mr. President, in our submission, that there exists a clear and a well-recognized distinction between what we call norms and standards, that is, as matters of concept, apart from the question of terminology. The Applicants' denial of the validity of this distinction, in so far as the denial is comprehensible at all, must, in our submission, therefore also fail.

In their attempted rebuttal of this distinction which we draw, the Applicants referred to certain judicial decisions, about which they said the following:

> "... Applicants refer to judicial decisions in which concepts of the sort described by Respondent as standards have been applied, not for the purpose of showing good or bad faith, but rather for the purpose of measuring and limiting the discretionary powers of governmental authorities on the basis of objectively ascertained and determinable standards." (P. 258, *supra*.)

Mr. President, in our submission, this whole line of argument displays a basic confusion of thought on the part of the Applicants, which becomes all the more apparent when we have regard to the actual decisions to which they refer.

The distinction between norms and standards, in the way in which we draw it—in the way in which we use these terms—does not lie in the content of the canons, or precepts, concerned; it lies in their legal effect. We expressly stated this in the Rejoinder, V, at page 167, and this the Applicants indeed acknowledge, according to the verbatim record at page 258, *supra*.

The dispute between the Parties may, therefore, be said to relate to the method, or procedure, or the principle, whereby a rule, or a canon, attains the status of a legally enforceable rule of law, rather than as a theory, or a canon, of a purely moral, political, or scientific nature, or the like. Consequently it cannot avail the Applicants to point to the fact that courts have applied precepts of the same content as, or analogous to, those which are under consideration here. The important question is on what legal basis did the courts apply those precepts.

The Applicants, in order to establish their argument, would have to go so far as to show that these rules attained their legal character by some

method other than that contemplated in Article 38 of the Statute: in other words, that they were applied as principles of law by courts merely because they were standards—to use our terminology—despite the fact that they had not been given legal force by any of the processes contemplated in Article 38. That is what the Applicants would have to establish by these authorities and, needless to say, they have failed to do so.

If we consider first of all the decision in the *Corfu Channel* case, referred to by my learned friends in the verbatim record at page 258, *supra*, we find, Mr. President, that what the Court applied there were general principles of international law, principles falling either under paragraph *(b)* or paragraph *(c)* of subsection (1) of Article 38: in other words, as being either international custom, accepted as law, or general principles of law recognized by civilized nations. The very passages from the Judgment and the opinions quoted by my learned friends show that the Court was dealing with the question whether certain conduct could or could not be said to constitute, in law, an international delinquency. That was the question before the Court; the Court did not determine whether standards not possessing the force of law could provide an answer to the question before it. The Court had to decide what principles of law had received acceptance under either of the two paragraphs of Article 38 (1) to which I have referred.

Secondly, in the case of *Louisiana ex rel. Francis* v. *Resweber*, quoted at the same page of the verbatim record, the American Supreme Court applied the provisions of the United States Constitution. The particular requirement of the Constitution applied in that case was that of due process, and the standards of decency referred to by the Court in applying that requirement of the Constitution related merely to the question of application, in other words, of evaluation of the facts to which this requirement of the Constitution had to be applied in the particular case.

Then, Mr. President, my learned friends placed particular reliance on a number of decisions in regard to the principles of "denial of justice". They are referred to in the verbatim record at pages 254-255, and at page 259, *supra*. These principles, in our submission, quite clearly arose from custom accepted as law, or, in some instances, also from specific conventions, or, in some instances, from a combination of these. In this regard we may point out in passing that the content of the relevant rules is also wrongly stated by the Applicants. But, inasmuch as the present inquiry relates to the method or the principle by which a rule attains the status of a rule of law, and not to the question of content, I shall not at the moment pursue that matter, I shall return to it at a later stage. All I wish to point out at the moment is that these judicial authorities, relied upon by the Applicants and referred to by them in this regard, do not support them in the least. In each case what the Court applied was something which the law required it to apply, the law being either customary law accepted as binding, general principles of international law accepted as binding, general principles applied by civilized nations, or principles laid down or agreed upon in conventions, or, finally, principles laid down in a particular Statute which the particular Court had to apply.

Apart from these judicial authorities the Applicants also referred to certain statements by Professor Quincy Wright, and they said in this regard, in the verbatim record at page 255, *supra*:

"... the concept of standards capable of guiding policy and action

in the mandated territories, and providing a basis upon which the conduct of the mandatory might be judged, has been analysed in some detail by ... Professor Wright ...".

Now, Mr. President, in the Rejoinder, V, at pages 168-169, we dealt with a similar argument which had been raised in the Reply. That argument had been to the effect that the Permanent Mandates Commission had established certain norms and standards, capable of serving as objective yardsticks, to be applied by the Court in adjudging Respondent's policies. In the Rejoinder we pointed out in that regard that the Permanent Mandates Commission had a twofold function: one of supervision, on the one hand, and one of co-operation with mandatories, on the other. And we pointed out that the same Professor Wright, in the same work referred to by the Applicants, drew this distinction in a passage which we quote in the Rejoinder, V, at page 169. It reads as follows:

"In supervising the mandates [that is the first of these two functions] the Commission has felt obliged to limit its criticism by law. It does not censure the mandatory unless the latter's orders or their application are in definite conflict with the mandate or other authoritative text, but if such a conflict is reported by the Commission and the report is adopted by the Council the mandatory is bound to recognize it. It becomes an authoritative interpretation of the latter's obligations ...

In co-operating with the mandatories, however [that is the other aspect of the function], though the League's powers are more limited, the scope of its suggestions is infinitely wider. It has not considered itself limited by authoritative documents but has formulated standards of good administration from the widest sources, and suggested whatever practical steps it deems expedient to give them effect. Such suggestions, however, even when indorsed by the Council, never have more than the character of advice. The mandatory is free to differ from them, though if based on an adequate understanding of the situation he will do well to consider them."

We further emphasize in the Rejoinder, Mr. President—V, at pages 169-170—that in exercising its functions, and particularly this last-mentioned function of co-operating with the Mandatories, the Permanent Mandates Commission could not, and in fact did not, purport to create legal rules binding on Mandatories. This appears very clearly from the work of Professor Wright himself, and, in particular, from this passage I have just read.

In addition to other references which we give in the Rejoinder we may also, respectfully, invite the Court's attention to a further passage in Wright, the same work, at page 220, which reads as follows:

"The Commission ... has found it necessary to establish certain standards for its own use in full realization that these are in no sense binding but subject to modification by experience." *(Mandates Under the League of Nations.)*

Mr. President, one would say, with submission and respect, that that is, after all, the very essence of the concept of a standard as opposed to a norm. A standard is, from its very nature, something of the nature of current theory—a current point of view—in respect of which complete agreement has not been attained. Complete agreement or unanimity

might be sought about it but it might in many cases never be attained for the simple reason that, in some respects, that standard might be wrong, or erroneous, thus it might require modification, or qualification, as experience teaches more about it or as other facets of the particular subject come to light and show their effect. Therefore, we find it very properly stressed by the learned author that the standards used by the Permanent Mandates Commission were recognized as being "in no sense binding but subject to modification by experience".

In the passages from Professor Quincy Wright's book upon which my learned friends now rely, the learned author dealt with the establishment of these self-same standards of colonial administration by the League organs. Consequently, Mr. President, it is quite clear that there could be no suggestion that these standards would be legally binding on mandatories, or that they could be enforced by the Court. Such a suggestion would have no basis in law, nor was it in the contemplation of the learned author. Indeed, the very passage from which the Applicants quote according to the verbatim record at page 256, *supra*, shows that the converse is the position. The learned author in that passage (it is at pp. 192-193 of his work), distinguishes between two methods of governmental action which, he says, may be defined as, on the one hand, legalistic, and, on the other, administrative. I quote from what he says at page 192:

> "The first [that is the legalistic method] lays down general rules and enforces them ordinarily through the legislature and the Courts. The second declares general policies and carries them out ordinarily through the executive and the administration. Clearly, the League's relation to the mandatories cannot be defined as exclusively in either of these categories. The League gives validity to general rules by confirming and interpreting the mandates and judges the acts of the mandatories according to their conformity with these rules, possibly in extreme cases sanctioning its judgment by transferring a mandate, but at the same time it gives general advice on policy and criticizes the activity of the mandatory according to its results. The first type of activity is mainly performed through the Council and the Permanent Court of International Justice; the second through the Council and the Permanent Mandates Commission, but the line of division is not strict."

It is, therefore, quite clear, Mr. President, that in so far as the legalistic method is concerned, with reference to which the author says that the first type of activity is performed mainly through the Council and the Permanent Court of International Justice, it is confined to the case where the League—

> "... gives validity to general rules by confirming and interpreting the mandates and judges the acts of the mandatories according to their conformity with these rules ...".

The function of establishing and applying standards, on the other hand, relates purely to the administrative supervisory authority; in other words, to cases where the League acts through the Council and the Permanent Mandates Commission. That is where, in the words of the author, the League "gives general advice on policy and criticizes the activity of the mandatory according to its results".

It follows, Mr. President, that the following statement in the verbatim record at page 256, *supra*, is wholly unjustified:

> "... the learned author stresses the power of the Court to judge the administration in mandated areas in the light of such standards, which includes references to matters within the scope of Article 2, paragraph 2, of the Mandate ...".

Mr. President, it will be evident not only that this statement reflects something not stated by Professor Wright, but that it is directly in conflict with what he states, as I have just demonstrated. It is not surprising, therefore, that my learned friends give no reference whatsoever in their argument on the pleadings or in the verbatim record for this version of what was allegedly stressed by the learned author.

It follows then, in our submission, that all authorities, judicial and otherwise, fail to support the Applicants' argument that standards can be regarded as legally binding *per se*, even though they have not been constituted rules or principles of law by the ordinary processes contemplated by Article 38 of the Statute. Indeed, Mr. President, the authorities confirm that the opposite is the true position, namely that standards *per se* can have no legally binding effect and that they can only become binding by operation of the ordinary contemplated processes.

Now, I indicated a few minutes ago that the content of the principles regarding denial of justice to aliens, relied upon so strongly by my learned friends, is strictly speaking not relevant to this enquiry, which is concerned only with the method or the principles by which rules attain legal effect. But an examination thereof may nevertheless be revealing, Mr. President, to show what, in fact, the content of these principles regarding denial of justice to aliens is, and show that, in that regard, too, the representation of the Applicants is without any substance. The Applicants introduced this subject in support of their contention which we find stated in the verbatim record at page 254, *supra*, and which reads— "the concept of discretionary powers limited by legal norms is well known to international judicial tribunals".

They went on to state, on the next page—

> "The discretionary powers of governments indeed are very wide with respect to aliens living within their borders, but they are limited by international norms, rather than by any asserted test of good faith or *mens rea*."

Now Mr. President, we have already dealt with the so-called "minimum international standards" referred to in this extract, in order to show that, contrary to my learned friends' contention, the authors of the mandates system were not familiar with the concept of judicial review of the internal practices and policies of States in accordance with such standards. That was dealt with particularly by my learned friend, Mr. Grosskopf, in his address to this Court some time ago. It remains to consider however, what role is to be assigned to these standards in the evaluation of the treatment of aliens by any given State; in other words, what exactly is the content and the legal effect of these standards? We are prepared to accept in that regard, for purposes of argument, the existence and the applicability of the so-called "minimum international standards". We are also prepared to accept for purposes of argument that customary international law has now evolved to a stage where States may be said to be legally obliged to comply with such standards, but what we do

dispute is that these standards are to be equated with legal norms of an exact content, capable of precise and objective application to the conduct of a State and its organs, as distinct from merely providing a means of testing whether a discretionary function in that regard has been honestly and legally exercised. If these standards were indeed intended to be precise, legal or international norms of the kind I have just referred to, then any treatment of an alien by a State in conflict with these precise requirements would obviously be illegal and such a result would follow quite independently of the good or bad faith of the State concerned.

It is evident that the Applicants have represented these particular standards in this light. In the verbatim record at page 259, *supra*, we find that the Applicants state the following—

> "The use of standards in the sense in which Applicants have viewed that concept, for purposes of measuring legal limits upon discretionary powers in objectively determinable ways rather than for the purpose of judging good or bad faith, also is found further in the denial of justice cases ..."

The Applicants make it perfectly clear that they say that we are dealing here with precise norms capable of objective application, rather than with standards which may assist in an enquiry for the purpose of judging good or bad faith.

The authorities, however, Mr. President, including those relied upon by the Applicants themselves, in our submission make it quite clear that this representation by the Applicants is entirely wrong, and that the opposite is the true position.

In one of the decisions quoted by the Applicants, that of the General Claims Commission in the *United States (Roberts Claim)* v. *Mexico*, which was decided in 1927, reference was indeed made to the test "... whether aliens are treated in accordance with ordinary standards of civilization", but the Commission did not say that such standards constituted precise legal norms of the kind suggested by the Applicants, and if regard is had to other decisions of the Commission in that year, in the previous year and subsequently, it becomes quite clear that that could never have been the intention of the Commission.

In the previous year there was the celebrated *Neer* case. There the Commission also referred to "the test of international standards", but at the same time indicated explicitly how these standards came into play. The case was also concerned with alleged denial of justice to an alien, and the Commission stated the following (I quote from reports of *International Arbitral Awards*, Vol. IV, pp. 61-62):

> "The Commission recognizes the difficulty of devising a general formula for determining the boundary between an international delinquency of this type and an unsatisfactory use of power included in national sovereignty. In 1910 John Bassett Moore observed that he did 'not consider it to be practicable to lay down in advance precise and unyielding formulas by which the question of a denial of justice may in every instance be determined', [I leave out the reference] and in 1923 De Lapradelle and Politis stated that the evasive and complex character of a denial of justice seems to defy any definition [I again omit the reference and some words which follow] ... Without attempting to announce a precise formula, it is in the opin-

ion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."

In the next year, Mr. President—in July 1927—there was the *Venable* case. That was some nine months later than the *Roberts* case to which my learned friends referred. There, the Commission again referred to—

"an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".

The reference is to the same work as before, *International Arbitral Awards*, Volume IV, page 229.

We may also in this regard refer to the attitude maintained by the British Government in a certain *Brown* case, decided in 1923 by the American and British Claims Tribunal. The British attitude is set out at page 252 of *American and British Claims Arbitration, Report of Fred K. Nielsen*, and I quote the following from that page:

"A decision does not constitute a denial of justice unless it is so obviously wrong and unjust that no court could honestly have arrived at such conclusions."

Then, Mr. President, there is Mr. Alwyn Freeman, an authority quoted by the Applicants, who was one of the foremost champions of the theory of "minimum international standards". In the work which my learned friends cite, *International Responsibility of States*, he gave an exhaustive review of international practice and theory regarding this concept of denial of justice to aliens, and he came to the following conclusion at page 330-331:

"It is believed that an analysis of international practice provides a sounder approach to the problem of *mal jugé* in connection with the local law. The principles governing the solution of this problem may be safely summarized as follows: Although there is unquestionably no responsibility for simple or ordinary 'reversible' errors (i.e., errors which might allow a domestic court of appeals to reverse the judgment below) clear proof of serious error plus additional factors in the nature of malice toward the alien—which may be evidenced by the court 'in consciously misapplying the law or in declaring the existence of a fact which it had previously recognized as non existent, or the non existence of a fact which obviously exists'—or, stated negatively, the absence of good faith, will involve the State where the alien's rights are materially prejudiced thereby. Where it is not possible to establish the influence of corruption, bias or malice upon the outcome of the proceedings—and here it is worth remembering that the psychological motives of the judge are absolutely immaterial if the judgment is based upon law—the State's responsibility may still be engaged *where the decision is so erroneous that no court which was composed of competent jurists could honestly have arrived at such a decision . . .*"

It is clear, Mr. President, I submit, from this review of the authorities, that the Applicants have failed in their attempt to demonstrate that the discretionary powers of a State are in this particular instance limited by objective norms. On the contrary, this topic which they have chosen to introduce provides, in our submission, a clear illustration of the use of standards in the sense for which we contend, namely with a view to providing some assistance in an enquiry whether there has been an abuse of a discretionary function through *mala fides*. That is, as I shall point out, exactly the function which, we submit, is to be assigned to international standards in the enquiry now before the Court, and these authorities in regard to denial of justice provide an example, an illustration, of a similar approach. And that brings us, Mr. President, to the question of the significance, if any, which can, in our submission, be attached to standards in the present context—standards in our sense of the word, as I explained earlier, as distinct from legally binding rules. I must first stress that we do not contend that the existence of generally accepted standards of administration not possessing legal force *per se*, is irrelevant to a consideration of the issues before the Court; that we certainly do not contend.

Nevertheless, such a submission is, in effect, attributed to us by my learned friends when they suggest, both in the Reply and in these Oral Proceedings, that we contend that Respondent's policy should be measured according to standards prevailing in 1920. The reference to the verbatim proceedings on this point I gave to the Court before in another context. It is the verbatim record at page 260, *supra*. We dealt with it in this other context in the verbatim record of 13 April, at page 589, and indicated there that this attitude on the Applicants' part flowed from a misapprehension of the principles of interpretation, and particularly of the principle of contemporaneity. All we said was that the legal norm to be applied in this case, namely Article 2 (2), was to be interpreted in accordance with the intent of its authors in 1920, and that the meaning of that norm would, therefore, today still be the same as in 1920. We did not say that in the application of the norm to facts the Court must put on blinkers and look at the facts only as they existed in 1920; it would obviously have been ridiculous to say so. Similarly, we did not suggest that, in fulfilling its discretionary function under the Mandate of promoting to the utmost, and in formulating its policies with that purpose in view, the mandatory was to have regard only to facts, conceptions and attitudes as they existed in 1920. That would have been equally ludicrous.

Mr. President, just to mention one or two examples (we take them from the facts, but they will be more fully dealt with in the later stages of the proceedings dealing with the facts): we know, as set out in the review which we give in our Counter-Memorial, and refer to again in our Rejoinder, that, on the whole, African Natives in 1920 showed little or no interest in political development of the kind which they, in fact, experienced after the Second World War, and are still experiencing at present. In 1920 little or no interest was shown in that subject by African Natives generally, including those in South West Africa. But the Mandatory could not, in the new circumstances which arose after the Second World War, when there was an awakening of interest on the part of African Natives in that regard, retain the same attitude as in 1920 when applying the law to the facts, or in formulating policies with a

view to complying with its obligations; it had to take proper cognizance of this change in attitudes and conceptions, in order to fulfil its discretionary function properly.

Similarly, as regards education, in 1920, on the facts we give, there was little or no interest at all on the part of the masses of the Native population, but, the position has changed, and today, a Mandatory, could not maintain the same attitude as was maintained in 1920 because of the fact of non-interest at that particular time. Its policy would have to be adapted to the changed circumstances, and changed attitudes on the part of the peoples concerned would be part of the changed circumstances.

Similarly, Mr. President, in so far as trends of general opinion have changed in the natural sciences and, as a consequence, or independently thereof, also in social and political sciences and in the moral concepts involved in them, the Mandatory would certainly fail in its discretionary task if it did not pay proper regard to such altered conceptions in deciding upon appropriate policies. If I may give an example, Mr. President, very bluntly but with the greatest deference, if we should assume, for the sake of argument, that it could be shown that the general conceptions in 1920 were to the effect that African Natives were inherently and permanently inferior to Europeans, that they would never be able to govern their own countries satisfactorily, and so forth, then, surely, policies can, in modern circumstances, no longer be formulated on the basis that such conceptions were established and accepted as facts in our times. Conceptions have changed. I am not suggesting that that was the attitude in 1920, I am merely putting it forward as an example. In so far as conceptions of that kind have changed, they must, of course, necessarily be considered by the mandatory in the exercise of its discretion in formulating appropriate policies with a view to fulfilling its sacred trust.

The extent to which there has been an altered conception, or altered conceptions, in the relevant scientific respects, will be dealt with by us in the course of dealing with the facts, and the significance which that may have in the present enquiry will also be dealt with at that particular stage. All I want to emphasize at the moment is the relevance of changed attitudes also in those fields, as a matter of principle and a matter of relevance.

The considerations to which I have just referred, Mr. President, in my submission, at the same time explain what role can appropriately be assigned to contemporary standards in the enquiry before the Court. In our submission, they can afford very valuable guidance to the Court in determining whether the Mandatory has or has not honestly applied its mind to the discretionary task. The issue before the Court being the Mandatory's good or bad faith, the existence of currently accepted standards can most certainly be relevant to that purpose, as we indicated in the Rejoinder, V, page 171. But, as we also stressed there, this is again, by a process of elimination, the only sense in which these standards can be relevant. They may provide relevant material from which inferences as to Respondent's intentions may be drawn, in the light of all the circumstances, in the manner we indicated in the Rejoinder, at the particular page.

If a Mandatory's policy and conduct should be totally at variance with concepts of justice, equity and morality currently operative amongst all right-thinking persons, there might well be justification for drawing

the inference that something must be wrong, in the sense that the Mandatory's attitude must be either arbitrary or *mala fide*, directed at an unauthorized or improper purpose. That is a technique or method of argument which is regularly employed by courts which have to conduct an enquiry into questions of good or bad faith on the part of an authority exercising a discretionary task, and that is the sense in which current and modern standards become relevant.

The Mandatory's position might amount to this: that it stands alone, in its concepts of justice, equity and morality, and that it seeks to defend them in relation to a particular matter when the whole of the reasonably thinking world differs from it. When the Mandatory is the only one out of step, there may be a basis for beginning to infer that something must be wrong on the Mandatory's part, that there must be either an arbitrary or a *mala fide* attitude on its part. That demonstrates, Mr. President, the test of good faith in enquiries of this nature, and, in particular, in the present enquiry. It can, indeed, constitute a very practical and valuable check upon the person or the body exercising a discretionary function, and is not something worthless, or "drained of vitality", as my learned friend suggested in the verbatim record at page 244, *supra*, specifically with reference to this contention on our part. At that page, my learned friend went on to say:

> "... Respondent's contention that the scope and content of the obligation entrusted to Respondent in terms of Article 2, paragraph 2, is to be measured by its so-called good or bad faith in the exercise of discretion under that Article, embodies its own built-in *reductio ad absurdum*.
>
> Without any purpose or intimation of comparison, or suggestion of analogy to facts in the cases at bar, the lesson of history teaches that the greatest excesses of policy, and the most reprehensible doctrines, frequently are propounded and executed with professions of good faith and lofty purpose. Indeed, human experience and all of history shows that when sincerity of purpose is carried to unreasonable lengths, or improper ends, it is often difficult to distinguish from obsession." (Pp. 244-245, *supra*.)

Now, Mr. President, I am pointing out to this Court, with respect, that once the premise is accepted that a power is limited with reference to a purpose, as a matter of law, then there can be no such *reductio ad absurdum* as my learned friend contended for.

When my learned friend speaks of "the greatest excesses of policy", and "the most reprehensible doctrines of history", he no doubt has in mind cases of policies and doctrines applied by rulers of sovereign States whose powers were not considered legally limited by an objective or purpose to promote the well-being and progress of all persons or groups concerned. He appears, Mr. President, to have been concerned primarily, and particularly, with cases where the excesses, or reprehensiveness, consisted in the deliberate subordination of the well-being of some persons to that of others, even to the extent of the extermination, subjugation, expulsion and so forth of certain persons whose interests were sacrificed for the sake of a particular doctrine or to favour other persons. If such excesses were to occur under mandatory rule, they would be so obviously in conflict with the purpose for which the powers were granted as to leave no doubt whatsoever in regard to their illegality. The same

would apply to any conceivable case where "sincerity of purpose"—I am using my learned friend's words again—"is carried to unreasonable lengths", so as to be "difficult to distinguish from obsession". My learned friend himself, in this passage which I have quoted, mentioned in that regard "improper ends". Mr. President, that is exactly what I am pointing out: "sincerity of purpose" must, under the Mandate, relate to the authorized purpose only, namely the purpose of promoting the well-being and progress of all the inhabitants; and any "sincerity of purpose" of which it could be said that it "is carried to unreasonable lengths", or that it is directed to "improper ends", or that it is "difficult to distinguish it from obsession", must surely and inevitably relate to some purpose other than this authorized and legitimate purpose prescribed by the Mandate. And if that is so, Mr. President, a court of law would generally have no difficulty in discovering the real purpose of such a policy. The purpose would in such instances surely appear from express statements by leading expounders of the policy, if such "sincerity of purpose" carried to such excesses and to such unreasonable lengths on the basis of professions of good faith and lofty purpose. If we have a situation bordering on an obsession, we are bound to have express statements of purpose by leading expounders of the policy or doctrine which would make it clear to the court, in the mandate context, that what is being aimed at is an objective other than the prescribed one. And even if such leaders should endeavour to put up a smoke-screen, or a camouflage, a court would nevertheless, on proof of the relevant facts properly presented to it, have no difficulty in drawing the correct inference as to the real objective of the persons or the authority concerned; the court would be able to draw those conclusions from the very unreasonableness of the objective, from the very improper ends bordering on an obsession, and that is why, as I have said, the method of testing a Mandatory's conduct for its honesty of purpose, for its bona fides, by enquiring whether it has been directed at an authorized purpose, at a prescribed purpose, as distinct from an unauthorized and unprescribed purpose, is in practice, a very valuable one. It specifically distinguishes the mandate case from the type of case referred to by my learned friend.

But it must be borne in mind that any inference from conduct and circumstances must be a necessary inference in order to be valid, and that there must be no doubt about the utter unreasonableness, or the excess bordering on an obsession, before the inference of an ulterior motive would be justified. If it is sought to establish this through the medium of referring to currently accepted standards, as distinct from norms, if it is sought to establish it through showing disparity between Respondent's policies and such current standards, then the Applicants would have to show that Respondent is, indeed, out of step with virtually all relevant modern thought. It would not avail the Applicants to show merely that some people, or many people, disagree with the wisdom or the propriety of some of Respondent's policies, or of all Respondent's policies, or of some of the measures involved, or of all the measures involved, even if, with respect, such disagreement may be shared by this honourable Court. That appears quite clearly also from the principles of law stated by Sir Hersch Lauterpacht, which we quote in the Rejoinder, V, at page 171—I need not read the passage again to the Court. The question, in our submission, must always be: is there room

for honest difference of opinion? If the answer is in the affirmative, i.e., if the Court finds that there is room for honest difference of opinion, the Court cannot, on this line of reasoning, introducing currently accepted standards or not, come to the conclusion that Respondent has exceeded the scope of its discretionary powers.

As will appear more fully, Mr. President, from a consideration of the facts, there is, in our submission, no prospect that the Court will arrive at a conclusion that there is no scope for honest difference of opinion when regard is had to everything that can be said on this subject of currently accepted norms and standards. And it seems that my learned friends representing the Applicants indeed realize this. That is why they indicate to this Court that they do not accept the task of establishing that there is, in fact, *mala fides* in the sense under discussion on the part of the Respondent Government. There is in our submission in fact no substantial difference at all between Respondent's policies and general modern thought on the basic principles of justice and equity involved, and I stress the basic principles involved. The differences which exist relate to questions of method, and we find that condemnations of Respondent's policies, so frequently quoted by my learned friends, very often proceed from purely political motivation or from a wrong appreciation of the facts. We find, Mr. President, as we shall show more fully, that amongst properly informed and thinking persons from all over the world there is ever-growing support and appreciation of Respondent's policies, at least as regards their general trend, their objectives and the broad means by which the objectives are sought to be attained; we shall show this more fully when we come to deal with the facts. But that, in law, is, in my submission, the role that can be assigned to modern, currently accepted standards as distinct from binding rules of law.

At this stage I should like to revert to a statement made by my learned friend, Mr. Gross, in connection with the Applicants' alleged norm of non-differentiation, because it is relevant to this question of the relevancy of standards. I quote from the verbatim record at page 261, *supra*, where my learned friend said this:

> "... although Respondent refers to this basic minimum standard as a 'so-called' or as an 'alleged' norm, no serious attempt is made by Respondent to deny the existence *per se* of the standards relied upon by Applicants".

In other words, Mr. President, the suggestion seems to be this: that the existence of a standard, in our sense of the word, with a content of the alleged norm is not in dispute. Now, I have already pointed out that we denied that any such norm in such an unqualified form existed at all (we did that on the pleadings), quite apart from the fact that it was not applicable to the Respondent; that we were correct in saying that, i.e., that there was no norm in such an unqualified form as was being suggested in the Reply stage by my learned friends, has been demonstrated, amongst other things, by the fact that my learned friends have now found it necessary to introduce qualifications into the norm. By the clearest implication, Mr. President, we also denied the existence of such an unqualified standard. In regard to standards generally, I can refer the Court to what we said in the Rejoinder, V, at page 174, where we stated, amongst others, the following (about ten lines from the bottom of the page):

> "In so far as some recent formulations in resolutions of political bodies, or even in international agreements, prospective or real, may be read as seeking to lay down that methods found appropriate in some countries are to be applied universally and under all circumstances, including those pertaining to South West Africa and South Africa, Respondent has made no secret of its disagreement with such notions, or of the fact that its policies do not comply therewith. In truth, however, as will later be demonstrated, most formulations contain explicit or implicit qualifications which, in their underlying ratio, find common ground with the approach inherent in Respondent's policies."

I should like to say some more on that subject, Mr. President, with particular reference to the material relied upon by the Applicants in regard to their suggested norm of non-differentiation. The Court will recall that in the Reply the Applicants referred to a number of sources in support of this contention. We did not, in the Rejoinder, deal with them one by one, as distinct from dealing with them in general, for the reason that it was shown, conclusively in our submission, that no such norm existed or was in any way binding upon the Respondent. Now, when considering the same question in relation to its use as a possible standard, I should like to deal with it further in the light of the general statement which we made in the Rejoinder, and which we maintain.

First of all, in order to avoid misunderstanding, I want to make it clear that although we do not dispute the existence of a political standard of non-discrimination involving a prohibition of unfair or oppressive differentiation, we do dispute the existence of an absolute standard of non-differentiation; we must draw that distinction quite clearly—a distinction between non-discrimination involving a prohibition of unfair or oppressive differentiation and an absolute standard of non-differentiation *per se*. We can point out, Mr. President, with reference to the conventions and draft conventions to which my learned friends referred the Court, that the States which are seeking to achieve a convention on the subject of non-differentiation are still groping about on the question of necessary qualifications which they have to introduce in that regard, and that there is no concept having nearly the absolute nature which the Applicants seem to assign, or wish to assign, to this suggested norm or standard.

Secondly, Mr. President, I must point out that in a number of the sources cited by the Applicants, both in the Reply and in the present Oral Proceedings, reference is made to, and judgment is delivered on, Respondent's policies specifically, and my learned friends were not slow to point that out. Amongst numerous examples which we find in the pleadings and in the Oral Proceedings, I can refer to a statement by my learned friend, Mr. Gross, in the Oral Proceedings—the verbatim record, at page 265, *supra*, where he referred to the Draft Convention adopted by the Human Rights Commission at its 20th session, and he said: "The approved Draft Convention condemns *in expressis verbis* 'policies of apartheid' . . ." Now, Mr. President, our submission in that regard is this: for reasons which I have already indicated, such a condemnation cannot *per se* assist the Applicants in establishing the content of any particular norm. When we have a condemnation of a policy, there enters into that condemnation two elements which are separate and distinct. The first element is that of the applicable standard, and the second is the appraisal of the factual elements of the policy or practice. It is only

when we have the second, i.e., the appraisal of what factual elements are involved in the particular policy or practice, that we can apply the norm. So, Mr. President, if a policy is condemned on a wrong factual assumption, for instance, an assumption that it involves deliberate oppression, or that it is based on concepts of racial superiority or racial hatred, then the condemnation itself tells us nothing about standards, except about the very elementary ones which everybody accepts—that deliberate oppression is a bad thing, or that concepts of racial superiority or racial hatred are bad things; that is all such a condemnation tells us. And this is precisely what we find in the case of this last example to which I referred: the Draft Convention of the Human Rights Commission as set out in the Reply, **IV**, at page 507. We find this condemnation of apartheid *in expressis verbis* in the Third Preamble of the Draft Convention as there set out, and it reads as follows:

> "*The States Parties to this Convention,*
>
> . . . . . .
>
> "*Concerned* by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of *apartheid*, segregation or separation . . ."

That makes it perfectly clear on what basis, on what assumption, this condemnation was based. This Court is not assisted in any way by such a condemnation as far as the standards involved are concerned, because the Court must make its own determination and will, in my submission, make its own determination, on the evidence presented to it, whether that evaluation, that judgment, that the policy is based on a concept of racial superiority or racial hatred, is correct or not; and once that factual evaluation falls away, we are left in the dark, at any rate as far as the condemnation itself is concerned, in regard to the particular standard applied. When it comes to the particular standards contemplated by this particular Commission, we have to look, therefore, at the other provisions of that Draft Convention, and it is in that regard that we submit that the qualifications inherent in them are of the greatest significance also in the present enquiry.

Mr. President, I proceed then to the provisions of the Draft Convention on the Elimination of All Forms of Racial Discrimination, adopted by the Human Rights Commission at its 20th Session in 1964.

I may say that, for my present purpose, i.e., for the purpose of comparing modern standards, in so far as they are relevant, with the conceptions of the Respondent Government as expressed in its policies, I shall confine myself, out of all the sources cited by the Applicants, to this particular one. This is the very latest development on the subject in the international sphere. It does not seem to us to be necessary to go fully into the whole historical background and the precise wording of each resolution, declaration, draft convention, convention and so on, which led up to this ultimate one. This one contains all the adaptations that have been found to be necessary, from time to time, and it provides sufficient illustration of the point which we want to make in the present argument.

The preamble and the first three operative articles of the Draft Convention are cited in the Reply, **IV**, at page 507, footnote 2. The Court will there see that in the first article racial discrimination is defined as

follows: "... any distinction, exclusion, restriction or preference based on race, colour, [national] or ethnic orgin . . ."

But the Court will also notice that the word "national" appears in parenthesis. At the end of the article there appears, by way of explanation for the parenthesis, a sentence in which a special interpretation is placed on the word "national". The sentence reads as follows: "[In this paragraph the expression 'national origin' does not cover the status of any person as a citizen of a given State.]"

In other words, where there is, in general, to be a prohibition against racial discrimination, that is, against any distinction, or preference, or exclusion, or restriction based, *inter alia*, on national origin, such prohibition does not apply to a distinction because of the status of any person as a citizen of a given State.

This Draft Convention, Mr. President, is, in this respect, essentially the same as that adopted by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which fully discussed the several drafts placed before it by experts. It is very interesting to note that in these discussions much concern was expressed by members of the Sub-Commission in regard to the use of the word "national" in some of the draft definitions of racial discrimination.

They made it clear in these discussions that the Convention should be so framed that it could not be regarded as interfering with the right of each State to differentiate between its nationals and aliens.

Thus we find that at the 411th meeting of the Sub-Commission on 16 January 1964, Mr. Krishnaswami of India proposed an amendment to the draft which was then under consideration. The amendment was to the effect that the word "nationality" should be placed in quotation marks in the definition contained in Article 1 and that its meaning should be explained in a footnote, assigning to it much the same interpretation as to the last sentence of Article 1 of the draft eventually adopted and as printed in the Reply. He proceeded to state, Mr. President:

> "With that explanatory footnote, the article could not be interpreted as denying to a State its right to make special provisions regarding aliens within its territory." (U.N. Doc. E/CN.4/Sub.2/SR. 441, p. 4.)

At the 425th meeting of the Sub-Commission Mr. Cuevas Cancino of Mexico expressed the following opinion:

> "... the convention obviously could not require States to grant equal rights to nationals and aliens". (U.N. Doc. E/CN.4/Sub.2/SR.425, p. 8.)

At the same meeting Mr. Mudawi of the Sudan, referring to a draft Article 8 in which it was sought to place a restrictive interpretation on the word "national" in Article 1, remarked that—

> "... an alien might be denied rights other than political rights which were granted to nationals". (U.N. Doc. E/CN.4/Sub.2/SR. 411, p. 10.)

The next speaker, Mr. Saario of Finland, commented that:

> "... There were some areas other than political rights, e.g., the right to social security and the right to work, in which a distinction was made between nationals and aliens; accordingly, it might be unwise to single out political rights in the interpretative clause." (U.N. Doc. E/CN.4/Sub.2/SR.411, p. 10.)

These, Mr. President, as I have said, are extracts from the deliberations of the Sub-Commission.

At the meetings of the Commission of Human Rights in 1964 similar sentiments were expressed by delegates and it was generally understood, as appears from the record, that the Draft Convention should not be read so as to prohibit differentiation between nationals and aliens, hence the retention of the interpretative sentence in Article 1 of the draft which is in the Reply.

With respect, the Court could refer in that regard, for example, to United Nations Documents E/CN.4/SR.783-785.

Now, Mr. President, once it is accepted that differentiation between nationals and aliens is permissible, then surely as a matter of logic and of justice and of equity, there can be no objection to differentiation between different groups inhabiting a given territorial area, which is, for the time being, administered as a unit but which is destined to be split up into separate political areas, each with its own nationality and each capable of achieving autonomy.

Surely there can be no distinction, as I have said, of logic, or of justice, or of equity, between these two cases.

If it is accepted that it is in the interests of all the different groups in such a territory, that a separate country, or homeland, should be set aside for each group, and if it is further accepted that, on the road towards achieving this objective, it is necessary to distinguish between the various groups, even before their respective areas have developed to countries, in the true sense of the word, what difference could there then be in logic, or fairness, or justice, between differentiation in such a case and that involving nationals of States already existing as separate States.

Surely, Mr. President, it would, in our submission, be hypocritical to suggest that the various States might freely differentiate between nationals and aliens once they have become autonomous, or semi-autonomous, but that until that stage were reached, the administering power, which is striving to that ultimate end, would be precluded from any differentiation between the groups at all. Surely that would be a completely artificial and a completely unjustified distinction and it would, as we submit, be hypocritical.

It would be tantamount to saying, Mr. President, that such a solution is not to be allowed to the administering power at all, because once it is accepted that the best purpose to be striven after is the creation of different political units with different nationalities, the application of a policy of differentiation with a view to achieving that end could not be distinguished in justice or fairness from the case where the final result has already been achieved.

As I have said, Mr. President, it would be tantamount to saying that such a solution is in itself debarred to the administering authority, and as far as I know there is no modern standard, or rule, or norm, which has that content. There certainly could not be any moral or equitable justification for such a norm or standard because it involves not a question of principle, of justice, of equity, or of morality, but purely a question of method of achieving ideals of justice and fairness towards everybody concerned—and the soundness of the method applied would have to depend upon the facts and the circumstances of each particular case.

It therefore, Mr. President, becomes clear from this qualification about differentiating on a nationality basis alone that there is no material

distinction between the underlying concepts of justice, equity and morality (as distinct from particular questions of method) of the particular Draft Convention and those involved in the Respondent's policy. But, Mr. President, the same feature appears from a further factor, namely the following: the authors of the Draft Convention did not consider that differentiation between groups in a country destined to be administered as a territorial unit would be impermissible in all circumstances, even on a permanent basis. In other words, even in cases where it is not the objective to have a separation into different political units, but where the country is being administered as a single territorial unit and the intention is that it is to continue to be so administered, even there the conference did not consider that differentiation was to be barred in all circumstances.

So we find that the same speaker from Mexico, Mr. Cuevas Cancino, said the following at the 411th meeting of the Sub-Commission:

> "... [it] was important to bear in mind that protection of certain groups did not constitute discrimination. Nor should such measures be abruptly discontinued. In some cases, they became part of national institutions, and a permanent means of securing rights which were in the interests of the country as a whole. As an example, he cited the case of Mexico, where the ownership of the land by the Indians had been originally recognized by the Spanish Crown, and subsequently, withdrawn on legal grounds, after the revolution of 1870, so that the Indian villages had been left entirely without land. It had required the revolution of 1910, with its ensuing land reform, to restore the original more equitable situation." (U.N. Doc. E/CN.4/Sub. 2/SR.411, p. 9.)

This was, therefore, a further case, Mr. President, where particular circumstances rendered such a solution more equitable than a rigid precept of non-differentiation, even in a country governed as a territorial unit and destined to continue to be so governed.

At the 425th meeting of the Sub-Commission the same speaker commented adversely on a draft Article 8 that had been proposed. The relevant portion of paragraph 2 of the draft Article 8 read as follows:

> "Nothing in this Convention shall be interpreted as implying ... a grant of political rights to a distinct racial ethnic or national group as such." (U.N. Doc. E/CN.4/Sub.2/L.340.)

Mr. Cuevas Cancino said in this regard:

> "The second part raised a question as regards the kind of groups to which it referred. He could suggest some cases where political rights would have to be granted to distinct groups as such—the Turkish minority in Cyprus was a case in point. In fact, in some cases the denial of special political rights on such grounds might in itself constitute discrimination." (U.N. Doc. E/CN.4/Sub. 2/SR.425, p. 8.)

At the same meeting Mr. Ivanov of Russia also objected to the cited portion of the draft Article 8, paragraph 2. He is reported to have said the following in the same document at page 6:

> "... the draft convention should not deny political rights to any group, but should ensure them to all. In some countries racial and ethnic groups had political autonomy, and special provision was made for that situation in the Constitution. If a limitation along the

lines proposed was included in the draft convention, it might have the effect of depriving entire groups of their legitimate rights. At a time when peoples in many parts of the globe were striving for autonomy, such rights ought to be defended."

Mr. President, one of the proposers of this draft Article 8, Mr. Calvocoressi of the United Kingdom, reacted to these speeches which I have cited by assuring Mr. Ivanov as follows:

"... that paragraph 2 of Mr. Capotori's and his own draft for Article VIII ... was not intended to limit the rights to political autonomy held by racial, ethnic or national groups ...".

And he also assured Mr. Cuevas Cancino as follows:

"... that it was not intended to affect the rights of such groups as the Turkish minority in Cyprus. The paragraph simply stated that nothing in the draft convention should be interpreted as granting such rights." (U.N. Doc. E/CN.4/Sub.2/SR.425, p. 9.)

So Mr. President, it becomes clear again that there was general agreement that there could, in fit cases, be distinctions of this nature, such as the granting of political and other rights to particular ethnic groups as such, even within a country destined to be governed as a unit. And it would seem, in consequence, that there is no basic difference—no difference of real principle—between the attitudes of the authors of the Draft Convention and that of the Respondent Government regarding differentiation in a country or area inhabitated by various national or racial groups.

The common attitude seems to be that differentiation of the nature of unfair discrimination is impermissible but that measures of differentiation which are genuinely designed to promote the interests of all the groups concerned, is permissible. Any difference which may exist between Respondent's attitude and that of the authors of the Draft Covention, relates to formulation, particularly of detailed aspects of method, and not to the underlying ideas themselves.

Well, there are, indeed, such differences in regard to formulation of particular aspects of method. I may in that regard refer the Court to paragraph 2 of Article 1 of the Draft Convention, as an example. The paragraph is quoted in the Reply, **IV,** at page 507. It contains wording which, in my submission, will quite evidently require further consideration, and probably modification, in the course of gaining full wisdom on the subject and before a final conclusion is reached, because we find that it reads as follows:

"Special measures taken for the sole purpose of securing adequate development or protection of certain under-developed racial groups or individuals belonging to them in order to ensure to such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

Mr. President, the part of this paragraph before the proviso accords entirely with the basic underlying attitude of the Respondent in regard

to its policies. The only difference arises from this rather rigidly worded proviso reading "provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved". Mr. President, the injunction in this proviso that protective measures are not to "lead to the maintenance of separate rights for different racial groups" appears to be in conflict with certain of the sentiments expressed by speakers in the very debate I have referred the Court to, which led up to the adoption, by that conference at least, of the Draft.

It is certainly in conflict with the fears expressed on behalf of various States in regard to paragraph 2 of the draft Article 8 to which I have referred.

Surely the separate rights granted to the Turkish minority in Cyprus were not intended to be of a temporary nature and they were not discussed in the debate as if they were intended to be of a temporary nature only. And the rights of the racial and ethnic groups, referred to by the Russian delegate, in the passage which I quoted to the Court, were not spoken of as being intended to be temporary. The wording of this proviso, therefore, seems to be going beyond the contemplation of at least some of the delegates. That is one of the reasons why I have said, with the greatest respect, that it would seem to be evident that this is an example of a standard which would require modification with experience as it goes along. In addition, Mr. President, if underdeveloped groups may be specially protected by measures involving compulsion from the point of view of the developed groups, there can, in our submission, hardly be any logical or equitable justification for denying similar protection to developed groups, which may be minority groups in particular countries, involving compulsion from the point of view of the underdeveloped groups. I have dealt with that point before but on a basis of equity or justice or ethics or morality, Mr. President, there cannot be any distinction in that regard. If there is a moral right, on the part of a more developed group, to inhabit a certain country, if that group plays a constructive part in that country, if it is to the advantage of all that that group is to remain, then what objection could there be in fairness or justice to such special measures of protection as might be required for that group? Yet this proviso, to which I referred, or rather the whole of that paragraph 2 of Article 1, does not make provision for a case of that kind. It makes provision for protection of underdeveloped groups but not for the most developed groups in the territory even though that group may be a minority.

It is in regard, Mr. President, to the introduction of such elements of rigidity into what must essentially in our submission be questions of method that Respondent differs from the terms of the Draft Convention but clearly not from the underlying principles of justice and equity.

So, Mr. President, having considered the suggested norms and the suggested standards and the interpretation which, in our submission, is to be placed on Article 2, paragraph 2, of the Mandate, we come to the question of the application of the legal principles to the facts—the legal principles contended for by us and by my learned friends. The full consideration of that part of the enquiry, of course, is to be left over until the facts have been properly debated and canvassed and investigated but there are certain aspects of that part of the enquiry to which I

should like to draw attention now because they seem to be relevant in regard to the legal questions which we have been debating.

On the first day of these Oral Proceedings, my learned friend, Mr. Gross, made the submission—

> "... that the legal issue joined between the Parties in respect of the irreconcilability of the policy and practice of apartheid with the obligations of Article 2, paragraph 2 of the Mandate, hinges on no undisputed fact".

That is from the verbatim record at page 115, *supra*.

He also said at the same page—

> "That there is no 'issue of fact to be determined between the parties' on any decisively relevant aspect of these cases, has been made clear in the Reply and is here reaffirmed."

Still proceeding at the same page, he said—

> "The Applicants, of course, take sharp issue with the premises upon which Respondent's policy is based, as well as with the inferences and legal conclusions which Respondent seeks to draw from its admitted, factual, policies."

Now we have pointed out several times before, Mr. President, that the suggested norm of non-differentiation was formulated in the Reply in such absolute terms as to outlaw any differentiation of any kind between ethnic groups, no matter for what reason and no matter what the results of the differentiation might be. Measured against that norm, Respondent's policies and practices were obviously impermissible and if, such a norm were to exist in that absolute form, it would be true to say that there would be no factual disputes between the Parties which prevented adjudication and indeed condemnation of Respondent's policies and practices. That result would follow automatically because it is common cause that there is differentiation on a group basis. And in that respect of course, there is no factual dispute and on application of the absolute norm the consequence of illegality would follow.

As soon, Mr. President, as we depart from such an absolute norm, i.e., if we have to find some other basis for illegality, then that question, as to there being no fact in dispute, becomes certainly not nearly as clear as on the said premise. In fact, we submit that in the light of the correct basis for adjudication of the issues regarding Article 2, paragraph 2, this attitude stated by my learned friend in regard to there being no dispute on material questions of fact, is an untenable one. It is untenable for two reasons: the first one is the very fact that, as we have pointed out, it has been necessary for the Applicants to introduce qualifications into their suggested norm of non-differentiation. They have qualified it by the concept of "protection, not compulsion", and *if* the Court were indeed to have to apply a formula of that kind, then numerous factual disputes might be involved in regard to each one of the various measures and policies and practices concerned. I have pointed that out earlier to the Court and I need not elaborate upon it.

What I do want to stress at this stage, is this further factor, that my learned friend himself says that he takes sharp issue on the premises upon which Respondent's policy is based, as well as on the inferences and legal conclusions to be drawn therefrom.

It is, in our submission, completely illogical, Mr. President, for the

Applicants to say that there is no material factual dispute between them and us and to say at the same time that they take this sharp issue on the premises upon which our policy is based. What do they mean by "premises"? That becomes perfectly clear, when we have regard to what they said about this very same word "premises" in the pleadings which are before the Court. When we have regard to that, Mr. President, we find that those premises indeed involve questions of pure fact—pure fact as distinguished from evaluations of fact or inferences to be drawn from fact. Surely, Mr. President, the question whether various population groups in South West Africa desire to retain their separate identities or desire to have separate schools or separate territories and separate residential areas or separate political institutions, and so forth, is a pure question of fact. And can my learned friend say to this Court that there is, for relevant purposes as far as any of these theses or bases are concerned, no issue of fact between the Parties? Is it not, Mr. President, a question of fact whether school children might progress better when taught in their home language than in a foreign language? Is it not a question of fact as to the psychological way in which children and indeed adults in South West Africa react to separate institutions, separate schools and separate other institutions, as compared with the situation in a country, for instance, like the United States of America where the psychological aspect of the matter was dealt with in the *Brown* case? Is that not a question of fact? Is it not a question of fact in what manner members of groups, of ethnic groups, react when they feel that the identity or the continued existence of the group is being threatened? Is that not a question of fact? And is it not a question of fact, or at least of evaluation of techniques involved in government, to decide what is the best reaction of a government to group reactions of that nature, if established as facts? Must a government try to smash them altogether, try to over-rule them, ignore them, or must the government take cognizance of their existence and try to evolve a policy which takes cognizance of them and which is capable of using the human material involved, the human sentiments involved, the human reactions involved, to a positive purpose and to a positive result?

Surely, Mr. President, those are questions of fact and of scientific appraisal of the problems involved. In the Reply, **IV**, page 302, we find the clearest indication that the Applicants include these matters, to which I have referred, in what they call the premises upon which the Respondent's policies are based. They say there, under the heading of a portion of their Reply, namely *The Weight of Contemporary Scientific Authority*:

> "Respondent's underlying premises are, in effect, that historical circumstances have created a situation in which members of different 'groups' *prefer* to 'associate with members of their own group'."

Mr. President, let us pause here, for a moment. Surely, that in itself is a statement of a question of fact, whether members of groups indeed, prefer to associate with members of their own group. The Applicants go further and state various other examples, some absolutely correctly, some correct with some qualifications, some incorrectly, but, nevertheless, in purported illustration of what the Applicants conceived to be the premises which we, on our part, stated to be those underlying the policy of separate development. These premises referred, *inter alia*, to

group reactions, which we said existed as social phenomena, as facts independent of government action. The whole subject is discussed in the Reply, **IV**, pages 303-305, where the Applicants set out what they conceive to be our stated basic premises. Then, Mr. President, at the conclusion of this setting out of our premises, or the way in which we expressed the premises, the Applicants say:

> "In reply, Applicants show that, to the contrary, the foregoing assumptions and generalizations, asserted by Respondent to underly and shape its policy of *apartheid*, or separate development, are contrary to, and are rejected by, the overwhelming weight of authority in the political and social sciences." (**IV**, p. 305.)

I ask the Court again, with due respect, is that not a statement of an issue of fact, especially when the Applicants proceed to isolate three of these so-called premises, or assumptions, or generalizations, asserted by Respondent to underly and shape its policy, and to deal with them in order to show that they are contrary to and rejected by the overwhelming weight of authority in the political and social sciences. The first one is paraphrased at page 305 of the Reply as being Respondent's contention regarding " 'Difference' without 'Inferiority' ". The second one at page 306 is paraphrased as being Respondent's contention of "Inevitable 'Frustration' if all Inhabitants of the Territory Are Accorded Equal Opportunity". The third one is paraphrased as "Respondent's Contention that, As a 'Realistic Government', it Must Support Existing 'Group Reactions' ". The Applicants then proceed under this heading with a discussion, running from page 305 to page 312, in which they offer, what they call, the overwhelming weight of authority in the political and social sciences, which they say refutes these underlying assumptions, generalizations—in other words, premises—of Respondent's policies.

Mr. President, we dealt with that subject-matter in our Rejoinder, **V**, pages 400-461—a treatment spread out over, if I recall correctly, four different chapters of our Rejoinder—in order to show that the Applicants' statement that the overwhelming weight of authority in the political and social sciences, is against these various premises on the Respondent's part, properly stated and properly understood—that that contention on the Applicants' part is wholly unfounded. Mr. President, surely that constitutes an issue of fact between the Parties on what the Applicants call the premises, on which they take sharp issue. How then can the Applicants tell us that there are no material issues of fact between the Parties which are relevant to a determination of this case in regard to Article 2 (2)?

These are only some examples. There are others which make it equally clear that, in contending as they do that the policy of apartheid, as practised in South West Africa, is repugnant to the Mandate (that we find in the verbatim record at p. 113, *supra*) the Applicants have in mind a certain factual conception of the policy of apartheid. They indeed make that very clear, Mr. President. They go on to say, at page 114 of that same verbatim record:

> "... it is impossible to deal with the legal issues underlying the mandatory rights towards the inhabitants of the Territory without considering, if only briefly, the Applicants' theories, or contentions at least, with respect to the nature of the practices and policies with which those legal issues are vitally concerned".

At page 113 the Applicants make it perfectly clear what is their factual conception of the policy of apartheid, as practised in South West Africa, and I quote:

> "The Applicants do not use the terms 'apartheid' or 'separate development' as words, but as defined acts with a legal consequence.
>
> The Applicants present to this honourable Court the policy and practice of apartheid as it is, and as it has been, in the daily lives of the individual persons who comprise the collectivity of the inhabitants of the Territory.
>
> The Applicants define apartheid, for the purposes of these proceedings, as a policy and practice under which:
>
> > 'the status, rights, duties, opportunities and burdens of the population are determined and allotted arbitrarily on the basis of race, color and tribe, in a pattern which ignores the needs and capacities of the groups and individuals affected, and subordinates the interests and rights of the great majority of the people to the preferences of a minority'. [I, p. 108.]"

Mr. President, in that passage I can point to three basic questions on which the sharpest issue was taken by the Respondent in the pleadings before the Court. The suggestion that the allotment is arbitrary, the suggestion, or allegation, that the pattern ignores the needs and capacities of the groups and individuals affected, and the allegation that the pattern subordinates the rights and interests of the great majority of the people to the preferences of a minority, are the cardinal factual issues between the Parties in this case. My learned friend retains this definition when he says that the policy of apartheid, as practised in South West Africa, is repugnant to the Mandate. Indeed, he stresses that this definition must be read into that concept because he does not use the term "apartheid", or "separate development" as words, but as defined acts, and this is the definition. So, Mr. President, how can he tell this Court that there are no material factual issues between the Parties?

His further recognition of the importance of the factual aspects, to which I have referred, appears from the fact that, when he came to the end of his arguments in the verbatim record at page 269, *supra*, my learned friend stated certain submissions to the Court apparently as if he had put his full case in regard to those already, but he made an exception in regard to his Submissions 3 and 4 when he said:

> ". . . I terminate, on behalf of the Applicants, the first phase of these oral proceedings, and reserve to the subsequent phase a fuller discussion of issues involved in Article 2, paragraph 2, of the Mandate, including the legal issues there involved and the submissions relevant thereto, which I have not now presented to the Court . . .".

Mr. President, that is the lack of logic which we still, with the greatest respect, find in this presentation of the Applicants' case, and I mention it, not in order to be facetious about it, but because it creates a real practical difficulty as to what case it is that we have to meet, and as to what case it is that this Court is asked to decide. It may well be, and I say it with the greatest respect, that questions ought to be asked of the Applicants (I cannot ask them), questions that may be necessary to clarify these basic aspects of what their case really is. Perhaps my learned friend will deal with the matter in any case in reply to what I

am saying now, so that we may in fact know where we stand in regard to this matter.

The practical conclusion to which we come, Mr. President, on the argument which I have presented to the Court in regard to the law involved in Article 2 (2) of the Mandate, amounts to this: Let us assume for the moment that the Court decides in our favour, on the proposition that the Applicants have not succeeded in establishing any of their suggested legal norms, or standards having legal effect *per se*. Let us assume further that the Court finds in our favour that the basis upon which the alleged violation of Article 2 (2) of the Mandate is to be determined, is one of good faith—in other words, that in order to establish a breach or violation of our obligation under that Article, it is encumbent upon the Applicants to establish bad faith on our part, in the sense under discussion.

Let us assume further that the Court finds in our favour that an enquiry into that question of bad faith is not to proceed on the limited and artificial basis suggested by the Applicants in their reference to a so-called presumption that a man is presumed to intend the natural and probable consequences of his actions, but that the Court agrees with us that all the relevant facts—all the relevant evidence—is to be considered before the Court comes to a conclusion on the issue of intent of good or bad faith involved in that respect.

Mr. President, on the assumption that those findings are made by the Court purely on an assessment of the legal argument which is now being adduced to the Court, and if the Court then, in addition, takes into account the Applicants' specific disclaimer about making a case on the basis of bad faith—I refer the Court again to that in the verbatim record at page 116, *supra*, where the Applicants say—

> "... the fact undisputedly is that the Applicants do not make an issue, have not sought to make an issue, and do not intend to make an issue of good or bad faith in the premises".

Mr. President, on that basis, the question may well be put to the Applicants that if the Court makes these findings I have postulated, do the Applicants wish to proceed at all with their case in regard to the facts and, if so, on what basis? On what basis can the facts be said to be legally relevant and for what purpose?

If this attitude, which I have just read to the Court, is maintained and assuming the Court makes these findings as to the law involved in the matter, that may well mean the end of the Applicants' case.

The Respondent is ready and willing and anxious to put its full case in regard to the facts before the Court, to proceed with the evidence I have referred to—oral evidence—and to proceed with the inspection, if the Court decides to have an inspection. The Respondent is anxious that the Court should have regard to all the relevant facts but the question may well arise, as a matter of practical convenience whether, if the Court makes these findings on the basis of the law, there is any presentation of an issue of fact at all, from the Applicants' point of view, which requires consideration by this Court.

In that event, one would have to draw one's own conclusions and the world would have to draw its own conclusions from the fact that the Applicants have not seen fit to meet squarely on its merits the case which we have already presented in full on the pleadings, in regard to

the facts involved, in regard to Respondent's policy and objectives, motives and so forth, but that instead they prefer to rely on legal technicalities in that regard and that those legal technicalities have turned out to be unsound and without substance.

Mr. President, I submit, that that is a very real practical result which would flow from acceptance of our contentions on the legal questions involved regarding Article 2, paragraph 2.

I should like to add only one further comment. If the Court should come to the conclusion that our contention is correct in regard to the discretion which was intended to be exercised by the Mandatory in this regard, and that the sole test, apart from Articles 3 to 5 of the Mandate, is whether the Mandatory is honestly setting about its sacred mission in that regard, then I want to emphasize that that conclusion will not be a negative one, Mr. President. It will be a positive one—positive in this sense, that the task involved in that sacred trust, or sacred mission, is one which must necessarily, from its very nature, adapt itself to circumstances as they change and as they evolve. That is why it is so necessary to have a discretion on the part of the administering authority—a discretion which makes it possible for that administering authority to apply policies which are pliable, which are elastic and which are adaptable to altered circumstances. Without that legal discretion that would not be possible, especially not if the authority were, from time to time, to be fettered with a type of norm or standard having the effect in law, suggested by the Applicants.

Mr. President, I may refer the Court in that regard to a brief passage in the very brilliant judgment of Lord Birkenhead in *McCawley* v. *The King*, reported in the *Law Reports of Appeal Cases* in 1920 and I am reading a brief passage from page 703. Lord Birkenhead was there comparing various constitutional systems and I merely want to read his remarks regarding the constitutional systems of the British Empire.

> "Some communities, and notably Great Britain, have not in the framing of constitutions felt it necessary, or thought it useful, to shackle the complete independence of their successors. They have shrunk from the assumption that a degree of wisdom and foresight has been conceded to their generation which will be, or may be, wanting to their successors, in spite of the fact that those successors will possess more experience of the circumstances and necessities amid which their lives are lived. Those constitution framers who adopted the other view must be supposed to have believed that certainty and stability were in such a matter the supreme *desiderata*." (Italics added.)

The judgment goes on to analyse the various aspects of the distinction.

I merely want to emphasize these words as being *par excellence* applicable to the mandate instrument before the Court.

Apart from the particular instances in which a Mandatory's discretion was shackled, the authors of the Mandate quite obviously shrank from the assumption that they had a degree of wisdom and foresight that would be denied to successive generations of Mandatories, despite the fact that those successors, as Lord Birkenhead said, would possess more experience of the circumstances and necessities amid which their lives would be lived.

It is true, Mr. President, that the authors of the mandates system

considered that Mandatories, in this discretionary task, would have the assistance, by way of co-operation and collaboration, in the manner which I have indicated before, of the Permanent Mandates Commission, an expert commission, and of the supervisory powers of the League Council itself.

Respondent itself would have preferred to be assisted in its discretion by that type of supervision. But then it must be that type, Mr. President. It must be the type of supervision which realizes the ever-changing facts and circumstances involved, which realizes that if one evolves standards those are not binding rules but are there only for guidance, and are subject to modification, according to the teachings of experience.

Under those circumstances, supervisory functions and powers on the part of bodies of that kind are indeed of assistance to a mandatory authority which has to exercise a discretion of that kind.

Any assistance of that kind which is still offered by way of criticism, Mr. President, is always welcome. The only stand which the Mandatory Government, the Respondent Government, takes in that regard, and strongly takes, is that when criticism is offered from outside, which is either politically motivated, or uninformed, which is directed at forcing its hand in accepting a policy which the South African Government itself knows will have disastrous results, then that type of assistance from outside is not welcome and does not help. That is where the South African Government stands in law, and in conscience, in regard to this sacred trust.

That, Mr. President, concludes my argument in regard to Article 2, paragraph 2.

It remains for me to refer, very briefly, to the legal questions involved in the only other matter which requires discussion now, namely in regard to the suggested modification, unilateral modification, by Respondent of the international status of the Territory, as referred to in the Applicants' Submission number 5 and, as was argued in conjunction therewith, by my learned friends, also the suggested modification of the terms of the Mandate itself, as stated in the Applicants' Submission number 9.

Mr. President, I have scanned the record of the verbatim records in this regard very carefully, and I find that very brief reference was made to this matter, by my learned friends.

I could give the Court first a summary of the passages where any reference was made at all to these matters and then indicate, in sum, what they amount to. The first reference is to the verbatim record at pages 134-135, *supra*. The second is to page 139. The third is to the verbatim record of 23 March. There are three passages in it—one at pages 219-220, the second at page 221 and the third at page 231. Then we find a reference to the matter again at pages 268-269.

Now, Mr. President, on analysis what do we find here? We find, first, that in the first passage to which I referred the Court (the verbatim record, pp. 134-135) my learned friend indicated very clearly that he would not deal with the subject-matter of Submision 5 at this particular stage. He would reserve this treatment of the subject to what he called the facts stage of the enquiry.

He said the same in regard to issues arising in regard to militarization—the alleged violation of the military clause—as dealt with in the Applicants' Submission number 6.

Nevertheless when it comes to the end (in the verbatim record at pp. 268-269, *supra*) we find that my learned friend, in fact, stated his

submissions as if he were then asking for orders in terms of those submissions—in regard to both Submission number 5 and Submission number 9—Submission 5 relating to alleged violation of the separate international status of the Territory and number 9 to modification of the Mandate.

This, Mr. President, he did despite the fact that Submission No. 9 was expressly qualified as depending on the facts discussed in Chapters V, VI, VII and VIII of the Memorials. The Court will recall that Chapters V and VI of the Memorials dealt with the Applicants' version of the Respondent's policy of apartheid, and with all the facts relating to that; in other words, to the issue in regard to Submissions 3 and 4 falling for consideration under Article 2, paragraph 2, of the Mandate. And in that respect my learned friend, as I have pointed out, at the end of his address stated that he was not putting his submissions in regard to that matter to the Court at all, but that he was reserving that for further consideration at the facts stage. But nevertheless, we find that Submission 9 which is dependent in part on the canvassing of the facts in regard to Submissions 3 and 4, is already stated to the Court, as a submission.

We find, Mr. President, that Submission 9 also refers specifically and expressly to Chapter VII of the Memorials. Chapter VII, as the Court will recall, dealt with militarization. This is again a matter which is reserved to be dealt with at the facts stage. Not only is there the statement to which I referred in the verbatim record (pp. 134-135, *supra*) in that regard, but, in fact, my learned friend put no submission in regard to militarization to the Court at that stage.

And Submission 9 refers also to Chapter VIII of the Memorials, which deals with the subject of alleged violation of international status, and which I call, for short, alleged piecemeal incorporation of the Territory.

Now, Mr. President, in that regard we find that there are a number of facts which are indeed also in issue between the Parties, and which fall to be considered, amongst others, in conjunction with the issues relating to Article 2, paragraph 2, of the Mandate. We find that in regard to the charges of piecemeal incorporation the Applicants refer, amongst others, to subjects such as the fact that Native administration in South West Africa is conducted as from 1954 by the Department of Bantu Administration and Development, as distinct from the position that had obtained before, namely that it fell under the South West Africa Administration. They refer to the fact that Native land in South West Africa is, as from that same time, vested in the South African Native Trust. They complain about the fact that the Eastern Caprivi is administered separately from the rest of South West Africa.

Now, Mr. President, in that regard they themselves made a submission to the Court which is very significant and relevant in this regard. They pointed out that power was given to the Mandatory to administer South West Africa as an integral portion of the Union, but they submitted in that regard that although acts may appear to be innocent, as falling under the exercise of this power, the real motive of the Mandatory in that regard may be an important indicator. They said in their Memorials, I, at page 186:

> "Piece-meal incorporation amounting to *de facto* annexation is both insidious and elusive. Motive is an important indicator since it sheds light upon the significance of individual actions, which might otherwise seem ambiguous."

They suggested, therefore, that if they could establish an intent to incorporate then these acts, which might otherwise have been innocent under the formulation of administration as an integral part of the Union, that that might become in truth a violation of the Mandate.

Now, Mr. President, we took them up on that basis, and we submitted that in fact the motive or the intent in that regard was not only an important indicator, it was the decisive factor. If the intent was bona fide to administer South West Africa as an integral part of the Union, with a view to better administration under the Mandate—in the interests of all concerned—then such acts would be perfectly in order. If the motive was, as alleged by the Applicants, a motive unilaterally to incorporate South West Africa into the Union, or now into the Republic, then such acts would, on the assumption that the Mandate is in force, be a contravention of the Mandate.

On that issue between the Parties then, Mr. President, it becomes very clear that, when one views subjects such as the administration of Native Affairs by the South African Department of Bantu Administration and Development, the question of vesting land in the South African Native Trust, the separate administration of the Caprivi strip, that one has to examine all the facts involved, in order to see whether the purpose was better administration or whether the purpose was piecemeal incorporation, and that, therefore, one cannot come to any conclusion that in that respect there has been an attempted violation of the international status of the Territory, unilaterally, or an attempted unilateral amendment of modification of the terms of the Mandate, before going into all these facts. And yet my learned friend indicated that he is now asking for an order in that regard. Perhaps I misunderstood him; perhaps that is not his intention, because he certainly did not deal with any of the facts in support of that submission, and he did indicate initially that he would reserve dealing with those facts at what he called the fact stage.

I shall, therefore, in the circumstances, also, Mr. President, not at this stage of my argument deal with the details and the ramifications—if I may call them that—of these two particular contentions or submissions, Nos. 5 and 9, on the part of the Applicants. There are, in some of the detailed aspects, certain questions of law to be considered, but they seem to be essentially tied up with specific points complained of, specific aspects of fact, specific transactions, specific laws, specific policies and so forth. We shall, therefore, deal with those matters after the Applicants have made it clear to the Court what exactly their case now is in that regard, because it would seem to me that they could hardly have intended to present their full oral case to the Court in regard to those submissions already.

If that is indeed their intention, they can say so at the Reply stage and then I shall, at a convenient stage, deal with the rest of the matter, or somebody on our side will. But, since at this stage we have not heard the Applicants' case in that regard I do not intend to reply thereto.

I wish to reply to only one general aspect, and that is one to which I have already referred to a certain extent. That is the attitude which the Applicants adopt in regard to this very question of intent to incorporate, or, alternatively, intent to modify the terms of the Mandate. I pointed out before, Mr. President, that in this regard, too, in the Memorials the Applicants commenced with an allegation—a very positive and a specific allegation—that intent is an important aspect of what one might call

their cause of action. I read some passages to the Court earlier relating to their Submission 9, namely the question of incorporation. There is another one to which I wish to refer. It occurs in the Memorials, **I**, at page 195, where the Applicants stated their legal conclusions and summary in this regard, and where they said:

> "By the foregoing actions, read in the light of the Union's avowed intent, the Union has violated, and is violating, its international obligations stated in Article 22 of the Covenant of the League of Nations and in Article 2 of the Mandate."

And, Mr. President, in their Submission No. 5 itself, at page 198 of the Memorials **(I)**, they said that "the Union, by word and by action" was violating its obligations regarding the separate international status of the Territory. "By word" there refers to the references they had already given to a series of speeches, by officials and political leaders, from which they sought to draw the inference of an intent to incorporate the Territory. But after we dealt with the matter fully and when it came to the Reply stage, the Applicants then came with an alternative contention, which we find in the Reply, **IV**, at page 573, to this effect:

> "Respondent's policies and acts ... constitute *per se*, and without regard to Respondent's purpose or motive, a violation of Respondent's obligation to respect the separate international legal status of the Territory."

But at the same time they maintained that "Respondent's purpose or motive to incorporate the Territory clearly emerges from the record herein", and they even maintained, at the next page, that "in decisive respects, indeed, such a purpose is conceded in Respondent's own avowals".

Now we may come to the present Oral Proceedings. The Applicants completely minimize the requirement of intent regarding this part of their case also. They now say, in the verbatim record at page 220, *supra*:

> "As formulated in the Memorials **(I)**, at pages 184-195, and reaffirmed in the Reply **(IV)**, at pages 572-586, Respondent has taken action reflecting a purpose, objectively determined, to incorporate and annex the Territory into the Republic of South Africa. Respondent has pursued this objective by means of policies and acts which impair, and are incompatible with, the separate international status of the Territory."

They make it clear, Mr. President, that this objectively determined intent is one which rests entirely on this suggested presumption. One finds that in passages which I need not read to the Court, in the verbatim record at pages 220-221, *supra*. I might read the last few lines:

> "The 'intent' referred to in Submission No. 9, as I have said, is the objectively determinable intent, legally to be inferred from Respondent's conduct by virtue of the universally accepted principle that a person or entity is presumed to 'intend' the necessary and reasonably foreseeable consequences of his, or its, actions."

And immediately before they made it clear that what they say in regard to Submission 9 applies also to their Submission 5.

So, Mr. President, the position, on analysis, now is that whereas in the Memorials they attempted to show by direct evidence that Respondent has the intent or purpose, and in the Reply, while formulating an alternative basis for their charge in regard to Submission 5, they still

maintained that the intent or purpose appeared clearly from statements made by Respondent's Prime Minister, they now contend that Respondent's intent is to be inferred solely from its deeds in accordance with this artificial presumption.

The same position is made clear, Mr. President, in regard to their contentions under their Submission No. 9. The charge made in the Memorials (I read from **(I)**, p. 196 again), was that certain acts of the Respondent read in the light of the Respondent's intent "constitute a unilateral attempt . . . to modify the terms of the Mandate" without the consent of the United Nations.

We pointed out in the Counter-Memorial that the Applicants appeared to concede that in order to establish a contravention of Article 7 they would require to prove an intent on Respondent's part to modify the terms of the Mandate.

Now we get the Applicants' reaction in their Reply, **IV**, at page 587, where they say that the alleged violations of Article 7 of the Mandate—

> "do not turn upon the question of 'good or bad faith', or subjective motivation. Respondent is presumed to intend the reasonably predictable consequences of its acts. In this sense, intention is implicit in Respondent's conduct . . ."

Now, Mr. President, in the Rejoinder, **VI**, at pages, 424-425, we pointed out the fallacy underlying this approach—I need not read that passage to the Court. What I want to emphasize is that in regard to both these submissions, i.e., Submission 5 and Submission 9, the Applicants now seem to be driven to take up this untenable attitude that an enquiry into intent is to be embarked upon, merely on the basis of this so-called presumption, only with reference to some of the relevant facts and to the exclusion of the others. And that is the same type of attitude previously taken, Mr. President, in respect of Article 2, paragraph 2; I have dealt with that fully; I have indicated to the Court, with submission, why that is in principle an untenable attitude.

In regard to their Submission 9 it is, in conclusion, significant to note that the Applicants have retained a reference to intent in the submission itself, and they gave this explanation for it in the verbatim record at page 221, *supra*:

> "Submission No. 9 is the only one of the Applicants' Submissions . . . in which explicit reference to 'intent' is made. Such reference is regarded by the Applicants as relevant because of the fact that Article 7, paragraph 1, is the only provision in the Mandate which contemplates a consensual arrangement between the Mandatory and the supervisory organ, a subsequent agreement to accomplish a certain result.
>
> Accordingly, conduct from which may be objectively inferred an intent to evade the requirements of Article 7, paragraph 1, by means of unilateral action, takes on significance in the absence of a showing by Respondent of any plan or purpose to seek consent of the supervisory organ."

Mr. President, I submit that this explanation makes no sense whatsoever. Surely if at the time of preparing the Memorials the Applicants thought that Respondent's intent was indeed to be determined only by application of this particular objective-criterion in the same way as in regard to their Submissions 3 and 4 and 5, then one would not have found this specific

reference to intent in this formulation of their Submission No. 9. In our submission, Mr. President, whether intent relates to modification of an agreement, whether it relates to a suggested international delinquency, whether it relates to a suggested violation of duty where it is necessary to establish intent in order to establish a violation, the principles remain the same: the enquiry has to be a full one in respect of all the relevant facts, and only then the Court can come to its conclusion.

The fact is, in our submission, that the Applicants are here also running away from the task of embarking upon that full enquiry, of establishing by ordinary, evidential means an intent which they have to prove, and which they admit that they have to prove, in order to establish their case in law. I have never heard of a proposition that an unintentional violation of an obligation can be seen as an attempt at a unilateral modification thereof.

I must express my appreciation to the Court for the very patient manner in which it has listened to a rather lengthy argument. Thank you.