Abbreviated reference:
I.C.J. Pleadings, South West Africa,
Vol. VI

Référence abrégée:
C.I.J. Mémoires, Sud-Ouest africain,
vol. VI

Sales number
N° de vente: 315

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SOUTH WEST AFRICA CASES

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

AFFAIRES DU SUD-OUEST AFRICAIN

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

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

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LIBERIA *v.* SOUTH AFRICA)

VOLUME VI

1966

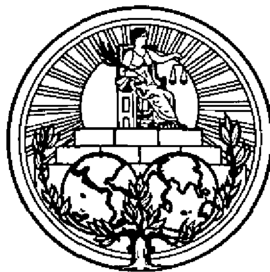
COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRES DU SUD-OUEST AFRICAIN

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

VOLUME VI



PRINTED IN THE NETHERLANDS

The present volume contains the Rejoinder (Parts III (sections F-I) to VII) relating to the *South West Africa* cases. 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 la Réplique (Parties III (sections F-I) à VII) déposée dans les affaires du *Sud-Ouest africain*. Ces affaires ont été inscrites au rôle général de la Cour sous les nos 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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7. REJOINDER FILED BY THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA (continued)

PART III

(continued)

Section F

GOVERNMENT AND CITIZENSHIP

I. Introduction

1. In the Memorials Applicants dealt with the complex of political rights under a number of headings [1], and ultimately formulated the following charge:

> "In sum, by law and by deliberate and consistent practice, the Mandatory has failed to promote to the utmost the development of the preponderant part of the population of the Territory in regard to suffrage or participation in any aspect of government. It has not *only failed to promote such development to the utmost*, it has made no notable effort to do so. To the contrary, the Mandatory has pursued a systematic and active program which prevents the possibility of progress by the 'Native' population toward self-respect, responsibility or skill in any aspect of citizenship or government, whether Territorial or local or tribal [2]."

In essence the charge involved the imputation of improper motives to Respondent, i.e., that its powers of legislation and administration were exercised with the unauthorized purpose of preventing progress of the Native population with regard to political rights, and even of reversing possibilities of progress for them [3].

2. In the Counter-Memorial Respondent, considering Applicants' allegations as a whole, submitted that they appeared to emanate from an unexpressed premise, viz., that—

> ". . . in the political sphere, as well as in other respects, there ought to be no distinction or differentiation between various inhabitants of the Territory, and that the whole population is to be treated as an integrated unit, with identical rights and facilities for all [4]".

Respondent also pointed out that Applicants in no way attempted to substantiate such a premise, and referred to the full reasons given for its submission that such a premise was wholly unfounded, in fact and in law [5].

Respondent in addition strenuously denied the imputation of improper motives on its part—which, as has been shown [6], was the essence of the charge in the Memorials—and dealt fully and in detail with the manner and extent of participation by the Native population in the field of

[1] *Vide* III, p. 104.
[2] I, p. 143.
[3] *Vide* also III, p. 105.
[4] *Ibid.*, p. 105
[5] *Ibid.*, pp. 106-107.
[6] *Vide* para. 1, *supra*.

political rights, giving reasons for the differentiation between the various population groups in relation to aspects of government and administration, and indicating the contemplated lines of advantageous future development [1]. Respondent specifically stated that it contemplated—

> "... an evolutionary growth of the traditional institutions of the various groups in a manner which would permit each to develop towards possible self-determination ...[2]",

and that it would, as soon as the Odendaal Commission's report had been considered,

> "... proceed as fast as is practicable with the development of the political institutions of the Natives, towards attainment of the ultimate aims and ideals of the sacred trust [2]".

3. The Odendaal Commission in its report expressed the opinion that—

> "... the various non-White population groups, except the Bushmen for the present, have reached a stage of development where a larger measure of self-government and judicial administration can be entrusted to them in their respective homelands, with due regard to their existing forms of government and systems of judicial administration, but supplemented according to the requirements of changed circumstances and needs and with a view to the greater participation of these groups in the further development of their homelands [3]",

and recommended a large measure of self-government for such Native groups, covering the greater part of the field of legislation as well as general and judicial administration. It may be convenient to refer here briefly to the following recommendations of the Commission in this regard:

(a) that a Legislative Council be instituted for each Native group, excepting the Bushmen and the Tswana, in its homeland, consisting of both non-elected and elected members of the said group—the non-elected members to represent the present functioning rulers, and to provide a link with the traditional type of political institutions, and the elected members, the number of whom is at first not to exceed 40 per cent. of the total Legislative Council, to introduce a modern method of suffrage [4];

(b) that the Legislative Council gradually take over all legislative authority and administrative functions, excluding Defence, Foreign Affairs, Internal Security and Border Control, Posts, Water Affairs and Power Generation, and Transport (with reasonable protection of local transport undertakings) [4];

(c) that the executive power of the Legislative Council be vested in an Executive Committee, the membership of which is to vary from group to group [4];

(d) that the franchise for elected members of the Legislative Council be granted to all male and female members of the group over the age of 18 years [4];

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[1] *Vide* II, pp. 404-488 and III, pp. 104-194.

[2] III, p. 131.

[3] *R.P.* No. 12/1964, p. 81 (para. 296).

[4] *Ibid.*, pp. 83, 85, 87, 93, 97 and 99.

(e) that, for the purposes of the administration of justice, the Legislative Council institute both inferior and superior courts, the composition and jurisdiction of such courts to be determined by the Legislative Council [1];

(f) that, in regard to general administration or civil service, the functions of Respondent's Department of Bantu Administration and Development within the Native homelands, also gradually be taken over by the aforementioned homeland authorities [2];

(g) that, in regard to non-White urban areas in the Police Zone, urban non-White councils be established to represent non-White residents of the areas in question on an elective basis, such councils to contain also representatives of the authorities in the homelands of the particular groups, and to exercise more advanced functions of local self-government than are at present entrusted to Advisory Boards [3].

4. The Respondent Government indicated in its White Paper (Memorandum) on the Commission's report that it "... accept[ed] the Report in broad principle", explaining that it thereby—

> "... accept[ed] the main features of the argument and recommendations as an indication of the general course to be adopted in the next phase of the development of South West Africa and of the promotion of the well-being and progress of its inhabitants [4]".

More explicitly it said the following regarding the Commission's recommendations in the political sphere:

> "The Government wishes to state clearly once again that its general attitude, as set out in paragraph 5 above, *inter alia*, involves agreement with the Commission's finding that the objective of self-determination for the various population groups will, in the circumstances prevailing in the Territory, not be promoted by the establishment of a single multiracial central authority in which the whole population could potentially be represented, but in which some groups would in fact dominate others. (Report, p. 55, par. 183 to 190.) The Government also endorses the view that it should be the aim, as far as practicable, to develop for each population group its own Homeland, in which it can attain self-determination and self-realization. (Report, p. 55, par. 190.) The Government moreover accepts that for this purpose considerable additional portions of the Territory, including areas now owned by White persons, should be made available to certain non-White groups. And it shares the view that there should be no unnecessary delay in taking the next steps in regard to this important aspect of the development of the population groups concerned [5]."

5. Taking into consideration the sum total of Respondent's exposition in the Counter-Memorial and the Supplement to the Counter-Memorial, read with the relevant recommendations contained in the Odendaal

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[1] *R.P.* No. 12/1964, pp. 83, 85, 87, 93, 97 and 99.

[2] *Ibid. Vide* also p. 61 (para. 222).

[3] *Ibid.*, pp. 117-119.

[4] **IV**, p. 203.

[5] *Ibid.*, p. 213. As to temporarily holding in abeyance decisions on the exact practical recommendations in these respects, *vide* also, pp. 213-216.

Commission's report, it is immediately apparent that Respondent's past and present attitude and intentions totally destroy Applicants' original charge relating to political rights [1]. It is quite clear that the Native population is, within the framework of Respondent's general policy, being, and will be, assisted to develop self-respect, responsibility and skill in all aspects of government and administration, based on full respect for their own cultures, traditions and institutions.

6. In the light of the aforegoing, it is not surprising to find that Applicants' statement of their case concerning Government and Citizenship in the Reply exhibits a major shifting of ground when compared with the Memorials. They are unable to persist with the allegation that Respondent is, with oppressive intent, preventing the Natives from acquiring any significant political rights at all. The advancement of the Bantustan programme in South Africa itself, particularly the developments in regard to the Transkei, and the Odendaal Commission's report and Respondent's reaction thereto in regard to South West Africa, made it clear that Respondent was allowing to the Natives, and assisting and encouraging them to acquire, all the things advocated by Applicants in the Memorials, i.e., progress towards self-respect, responsibility and skill in all aspects of citizenship and government. The only difference was that these facilities would be acquired by the members of each group in a homeland of their own, that there would in South West Africa be no central territorial legislature and government. Applicants therefore had to find a new basis for attacking Respondent in the altered circumstances, and this explains their altered attitude in the Reply. The change regarding Government and Citizenship may broadly be said to be in conformity with the same feature of their case generally regarding their submissions Nos. 3 and 4 [2], save that, to the extent that they may still be said to be basing their case on allegations amounting to bad faith on Respondent's part, they do so very faintly and half-heartedly, as will be shown. An analysis and evaluation of Applicants' new approach in the Reply, and of the contentions advanced in support thereof, are given in the next succeeding group of paragraphs.

II. Analysis and Evaluation of Applicants' Basic Attitude as now Set Forth in the Reply

7. The first feature to which Respondent wishes to draw attention is that the subject of Government and Citizenship is, in the order of priority, relegated to third position, after Education and the Economic Aspect. In the Applications this complaint came first [3]. In the Memorials it was shifted into second place, after the economic aspect. Now education comes into the first position, and the chapter on Government and Citizenship goes down into third place. This procedure may be a naive attempt at obscuring the fact that political domination of the whole of South West Africa by African Natives is the overriding goal of the present proceedings [4]. Or it may be due to realization on Applicants' part that, in this most crucial aspect of the whole case, they have no evidence of any weight

[1] *Vide* para. 1, *supra*.
[2] *Vide* sec. A, paras. 1-10, *supra*.
[3] *Vide* I, p. 6, para. 4.
[4] *Vide* II, pp. 446-448 (paras. 30-34).

which could substantiate the charge of deliberate oppression originally brought against Respondent [1].

For the present Respondent merely wishes to emphasize that in the task of achieving the objectives of the Mandate in the difficult circumstances existing in South West Africa, a fair and just solution in the political sphere, for everybody concerned, is obviously the matter of overriding importance. Educational and economic policies, especially in a territory with such a diversity of population groups as South West Africa, cannot be determined *in vacuo*, but must necessarily be in accord with the policy found to be desirable in regard to the political future of the various peoples —the determinative factor being whether the objective is an integrated community, within the framework of a single territorial unit, or differentiated development of the various groups towards separate self-determination for each. The same considerations as for Education and the Economic Aspect apply to policy (especially aspects in serious controversy in this case) pertaining to Security of the Person, Rights of Residence and Freedom of Movement.

Incidentally, the overriding importance of sound political development may also be illustrated with reference to events in other territories in Africa. No educational or economic policy can compensate, e.g., the unfortunate people of Rwanda for the utter chaos and misery which have resulted from the breakdown of the political system decided upon for that territory [2].

Respondent, for the above reasons, deals first and foremost with the subject of Government and Citizenship. Because of Respondent's conviction that separate development is in this crucial sphere essential for promotion to the utmost of the well-being and progress of the peoples of South West Africa, it follows naturally that it has correlated its policies in the other respects mentioned with the basic objectives and requirements of separate development—failure to have done so would indeed have constituted a dereliction of duty on its part. It follows further that policies pursued in the other spheres in question, can only be explained and understood in proper perspective after thorough consideration of the relative advantages and disadvantages of the rival policies in the political sphere. When, therefore, Applicants say that—

> "[i]n respect of Government and citizenship, Respondent's policies . . . are ruthlessly consistent with its . . . policy of *apartheid*, or separate development, and are merely specific measures of implementation thereof [3]",

Respondent wishes to correct them by stressing that future political developments, and particularly the form in which self-determination by the various groups is to become a meaningful reality, are the matters which constitute the very essence of the whole policy of separate development.

8. The next significant feature of Applicants' present exposition regarding Government and Citizenship is the fact that they now explicitly rest their case in that regard upon one so-called "decisive major premise", which accords precisely with that which Respondent in the Counter-

[1] *Vide* para. 5, *supra*, and paras. 12-13, *infra*.
[2] *Vide* sec. E, Annex VII to Chap. III, *supra*.
[3] IV, p. 440.

Memorial considered to be an unexpressed premise of Applicants' case as set out in the Memorials [1]. This premise is to the effect that there should be no differentiation between the inhabitants of the Territory on the basis of their membership of the various ethnic groups, and that they should all be integrated into "a single territorial unit", with universal adult suffrage. So Applicants submit that—

> "... the policy of *apartheid* is repugnant to Article 2, paragraph 2, of the Mandate precisely because the 'distinctions and differentiations' which it imports into the lives of the inhabitants of the Territory are based upon membership in a 'group', rather than upon their qualities and capacities as individuals [2] ".

They add:

> "The unacceptable purposes and consequences of such a policy constitute the decisive major premise upon which Applicants rest their case; all other premises, arguments and conclusions are incidental to, and derive from, this central premise [2] ";

and they rely in this regard on alleged "relevant and generally accepted norms", which—

> "... include the institution of universal adult suffrage and the promotion of participation on the part of all qualified individuals in all levels of government and administration, within the framework of a single territorial unit [3] ".

It is solely upon this "decisive major premise" that Applicants proceed to make factual allegations directed at showing that, in the sphere of Government and Citizenship, Respondent has failed in its duty as regards the Native inhabitants. This is evident not only from the above formulations themselves, but also from the form and contents of their specific allegations, as will be noted in due course. The extreme significance of this feature is further considered in the succeeding paragraphs.

9. Outside of the said "major premise", Applicants apparently no longer claim to have established any case against Respondent in the sphere of Government and Citizenship, on the basis of *mala fides* or at all. Thus, Applicants do not, e.g., allege that the Respondent Government does not bona fide intend to pursue the line of development recommended by the Odendaal Commission—any such suggestion would naturally be ridiculous. Applicants indeed firmly accept Respondent's expressed intent in this regard, even speaking of it as something "conceded" [4] by Respondent; and their attitude is that Respondent's policy—

> "... would be aggravated and rendered even more repugnant to [Article 2, paragraph 2, of the Mandate], by the policies projected in the *Report* of the Odendaal Commission [5] ".

Thereby the emphasis reverts to the "major premise" of what may be termed integration *versus* separate development. Respondent, therefore,

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[1] *Vide* para. 2, *supra*.

[2] IV, p. 440.

[3] *Ibid.*, p. 441.

[4] *Ibid.*, p. 324: "Respondent's fixed determination to extend to the Territory of South West Africa the system of 'territorial *apartheid*' is conceded by Respondent in its Pleadings herein, and confirmed by its endorsement of the arguments and findings of the Odendaal Commission." (Footnotes omitted.)

[5] *Ibid.*, p. 444.

proceeds to consider on what grounds that premise is sought to be supported.

10. In their Statement of Law [1] Applicants make it clear that they rest their aforesaid approach on the alleged existence of "... relevant and generally accepted norms by which the obligations stated in Article 2, paragraph 2, of the Mandate should be measured ..." [2].

Although not explicitly referred to by name, the alleged "legal norm of non-discrimination or non-separation" [3] is clearly intended to be included amongst these norms, as appears from the first passage cited in paragraph 8 above. Respondent has already dealt fully with Applicants' contentions regarding this alleged norm, and has in its submission demonstrated conclusively that no such norm is contained in Article 2 of the Mandate or is otherwise binding upon Respondent, but that, on the contrary, differentiation on the basis of ethnic groups is legally permissible in terms of the Mandate, and does not *per se* constitute a violation of the provisions thereof [4]. Respondent, therefore, need not repeat its argument in this respect.

In addition, however, as has been noted [5], Applicants speak also of "norms" that "have been established by the United Nations" [2]. Such "norms" are said to be descriptive of "... principles and processes generally accepted as applicable in respect of government and citizenship in dependent areas" [6], and to include, as noted above [7],

> "... the institution of universal adult suffrage and the promotion of participation on the part of all qualified individuals in all levels of government and administration, within the framework of a single territorial unit [2]".

Respondent's first comment is that when regard is had to the suggested contents of the alleged "norms", they clearly amount to no more than instances of practical application of the alleged "norm of non-discrimination or non-separation" in the sphere of Government and Citizenship in dependent territories. For this reason alone, and considering the non-application of the latter alleged norm, it would follow that the suggested norms for more particularized application cannot possibly exist, at any rate not as legally binding upon Respondent. Secondly, however, as Respondent has already demonstrated [8], there is no possibility of such alleged "norms" having been "established" as legal rules objectively defining Respondent's obligations under the Mandate, by the United Nations organs in question, i.e., the Trusteeship Council and the General Assembly.

The above considerations, therefore, dispose of any possibility of Applicants' so-called "decisive major premise" being supported by purely legal considerations, whereby ethnic differentiation in the sphere of

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[1] IV, pp. 441-442.
[2] *Ibid.*, p. 441.
[3] *Vide* sec. A, para. 7, and sec. B, para. 1, *supra*.
[4] *Vide* sec. B, *supra*, especially conclusion in para. 38 thereof.
[5] *Vide* sec. E, Chap. III, paras. 1 and 2, *supra*.
[6] *Ibid.*, p. 442.
[7] *Vide* para. 8, *supra*.
[8] *Vide* sec. E, Chap. III, para. 2, *supra*.

Government and Citizenship would *per se* constitute a violation of Respondent's obligations under the Mandate. It remains to consider whether the premise is supported by factual considerations in the light of the general duty imposed by Article 2, paragraph 2, of the Mandate.

11. As Respondent has also indicated [1], it is possible that Applicants may, in speaking of the "norms" alleged to have been "established by the United Nations" [2], have intended to use the word "norms" not in the strict sense of binding legal rules [3]—or not *only* in that sense—but as meaning, or including, what may more properly be called "standards"[3], i.e., practices, theories or policies of government applied or propagated by others but not in themselves legally binding on Respondent. If so, Applicants' reference to the "norms" would constitute an attempt to justify or support their "major premise" on a factual basis, viz., that in order to comply with the obligation to promote well-being and progress to the utmost in the sphere of Government and Citizenship, the method to be employed is that of non-separation and attempted integration, and that, accordingly, the method of differentiation and separate development is to be rejected.

Respondent has already demonstrated [4] that, in so far as this may be what Applicants set out to establish, their attempt has failed lamentably, *inter alia*, for the following reasons:

(a) the alleged standards of non-separation and attempted integration were not even uniformly applied in regard to trust territories, partitions having been approved, by the self-same United Nations organs, in the cases of Ruanda-Urundi and the British Cameroons [5];

(b) in regard to cases where the approach was one of non-separation and attempted integration, Applicants have not even attempted to show that relevant circumstances in South West Africa are identical or closely analogous [6];

(c) most important of all, results of efforts to force together ethnic groups and peoples which prefer to retain their separate identities, have proved so disastrous, not only in a number of newly independent African territories generally, but also in the case of some of the very trust territories spoken of by Applicants, that Respondent can surely not be blamed for declining to apply such "standards" in South West Africa, let alone be accused of bad faith in so doing [7].

12. Apart from isolated points of criticism—to be dealt with in due course—concerning particular aspects of Respondent's policy in the sphere under consideration, the above constitutes the only material and argument offered by Applicants, in the whole of their chapter on Government and Citizenship, in attempted substantiation of their so-called "decisive major premise".

What is of particular significance is that Applicants have failed entirely to establish that Respondent, in deciding upon a policy of differentiated development of the various ethnic groups toward separate self-realiza-

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[1] Sec. E, Chap. III, para. 3, *supra*.
[2] IV, p. 441 and para. 10, *supra*.
[3] *Vide* sec. C, para. 34, *supra*.
[4] *Vide* sec. E, Chap. III, especially paras. 3 and 13-24.
[5] *Ibid.*, para. 13, *infra*.
[6] *Ibid.*, para. 3, *supra*.
[7] *Ibid.*, paras. 13-24, *infra*.

tions in preference to attempted integration, has been actuated by bad faith, in the sense of an improper motive to oppress the Natives deliberately for the benefit of the White population. In fact, Applicants can hardly be said to have made a serious attempt to furnish proof, in the sphere of Government and Citizenship, of such a proposition. This applies not only to the contents of the chapter in the Reply headed "Government and Citizenship" [1], and of Annex 7 pertaining thereto [2], but indeed also to all discussion of the political aspects of Respondent's policies as offered in regard to general policy earlier in the Reply [3], including the attack there made on the so-called "System of 'Homelands' or 'Territorial Apartheid' " [4]. It is true that, in these earlier portions, certain broad and sweeping allegations, involving bad faith in the above sense, are made [5]. But, as has been shown [6], Applicants have failed to provide any acceptable proof or substantiation of these extravagancies, or to correlate them with the indisputable facts regarding the projected development of self-governing nations in the various homelands. In dealing, shortly thereafter, with the "System of 'Homelands' " itself, Applicants base their attack, firstly, on the premise that such ethnic group differentiation is *per se* illegal [7], and, secondly, on the propositions that such homelands would be neither politically nor economically viable [8]. Although in the latter regard offering some purported criticism regarding the merits of the "system", and regarding the alleged manner of its constitution in South Africa—matters which have been fully dealt with [9]—Applicants here also signally fail to establish bad faith on Respondent's part [9]. Also the Annexes (Nos. 1 to 4) with which Applicants associate themselves in this regard, do not in any way succeed in providing the proof in respect of which Applicants themselves have failed [9].

13. From the above it is clear that Applicants have, in respect of Government and Citizenship, totally failed to establish any case in law against Respondent. Due to failure of all alleged "legal norms", properly so-called, the only possible cause of action for Applicants could be bad faith in the above sense, as has been shown [10], and this they have signally failed to establish.

Indeed, the Reply exhibits various indications that Applicants may

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[1] **IV**, pp. 439-450.
[2] *Ibid.*, pp. 451-457.
[3] *Vide*, e.g., *ibid.*, pp. 272-277.
[4] *Ibid.*, pp. 312-326.
[5] *Vide*, e.g., *ibid.*, p. 272, where "political *apartheid*" is said to be one of the "aspects of life" in respect of which "Respondent's policy and practice . . . is directed toward the primary end of assuring an adequate 'Native' labour supply. . .", etc.—being the central allegation in the Reply whereby bad faith is imputed to Respondent. At p. 273 Applicants still refer to "political *apartheid*" as involving "[d]enial of suffrage and restriction of 'non-Whites' to the most limited forms of participation in government"—exactly as if they have never heard of the Odendaal Commission's report and Respondent's reaction thereto. The latter remark applies also to their summary at p. 274 to the effect that "under *apartheid*, the accident of birth imposes a mandatory life sentence to discrimination, repression and humiliation".
[6] Sec. E, Chap. V, *supra*.
[7] **IV**, p. 318 (para. marked (A)).
[8] *Ibid.* (para. marked (B)).
[9] *Vide* sec. E, Chap. V, *supra*.
[10] *Vide* Part III, Sec. C, *supra*.

realize their failure in this respect. Reference may, *inter alia*, be made to the following:

(a) Speaking of the "System of 'Homelands' ", Applicants say that "if Respondent's good faith were, by itself, an issue in these proceedings", then certain points made by them [1] ". . . would in itself *raise a serious question* of Respondent's *mala fides*" [2]. It will be noted that they do not suggest that they have succeeded in establishing that such "serious question" is to be answered in the affirmative.

(b) In the whole of the chapter on Government and Citizenship [3], Applicants do not even make any pertinent *allegation* which, either explicitly or in its purport, directly attributes bad faith or an improper motive to Respondent in respect of its policy in the political sphere. The nearest they come to this is in a quotation of, and in a reference to, statements made elsewhere. In their introduction to the chapter [4], they quote, without comment, the charge as originally formulated in the Memorials [5]. And they further say that "[j]ust as Respondent's policies in respect of education in the Territory, as shown above, are grounded upon educational *apartheid*, so its policies in respect of government and citizenship are grounded upon political *apartheid*" [6]. Having regard to statements made earlier in the Reply regarding educational and political *apartheid* [7], this may be regarded as an indirect allegation of *mala fides*—but it does not testify to much confidence in the acceptability thereof. For the rest, when Applicants still speak, e.g., of "Respondent's refusal . . . to grant to the indigenous peoples of South West Africa rights of suffrage and participation in government" [8], such statements are qualified, either expressly or by clear implication, with reference to the "decisive major premise" of "non-separation" and attempted integration: in the instance just cited, the qualification is express, viz., "within the framework of the Territorial Government" [8]. Failing this premise, and adopting Respondent's approach, there will, of course, be no "Territorial Government" in South West Africa, and nobody will be deprived of participation therein.

(c) In keeping with what is stated in sub-paragraph *(b)*, it is noteworthy that Applicants' "Conclusions", at the end of the chapter on Government and Citizenship [9], are confined to the averment that ". . . Respondent has failed in any degree to promote the well-being and social progress of the inhabitants . . ." [9]. The further averment in the Memorials, viz.: "To the contrary, the Mandatory has pursued a systematic and active program which prevents the possibility of progress by the 'Native' population towards self-respect, responsibility or skill in any aspect of citizenship or govern-

[1] Which have all been dealt with: *vide* sec. E, Chap. V, *supra*.
[2] IV, p. 317. (Italics added, save for "mala fides".)
[3] *Ibid.*, pp. 439-450.
[4] *Ibid.*, p. 439.
[5] *Vide* para. 1, *supra*.
[6] IV, p. 440.
[7] *Vide*, e.g., *ibid.*, pp. 272 and 273.
[8] *Ibid.*, p. 444.
[9] *Ibid.*, p. 450.

ment, whether Territorial or local or tribal" [1], is now totally omitted. Although, as mentioned above [2], this passage from the Memorials is quoted in the introduction to the chapter on Government and Citizenship [3], the averment is not even formally reaffirmed in the "Conclusions".

The chapter on Government and Citizenship on the whole therefore seems to indicate an acknowledgement on Applicants' part that they have failed, in the political sphere, to establish any case on the basis of *mala fides* or improper motives, and that, failing their "major premise", i.e., the alleged "legal norms", their claim is unfounded.

14. Having regard to what has just been stated, and to the necessary correlation between policy regarding Government and Citizenship and policy in all the other spheres raised in Applicants' complaints [4], it must be *ab initio* unlikely that Applicants can succeed in establishing *mala fides* or improper motives in respect of any of the other spheres. This matter is, however, further dealt with below in the relevant sections of this Rejoinder [5].

Secondly, due to the fact that Applicants, in regard to Government and Citizenship, rely solely on their so-called "decisive major premise"; that they themselves say that "... all other premises, arguments and conclusions are incidental to, and derive from, this central premise" [6]; and that Respondent has demonstrated that the premise is unfounded, in fact and in law [7], it seems unnecessary to deal at any length with Applicants' further and more detailed statements in the chapter of the Reply under consideration. On analysis, such statements are indeed found to be entirely incidental to, and to emanate from, the said premise. Nevertheless, with a view to maintenance of a proper perspective in regard to the factual situation, Respondent deals briefly with the said allegations in the further portions of this section.

III. Suffrage and Participation in Territorial Government

15. Applicants react to Respondent's exposition relating to the above aspects in the Counter-Memorial by stating:

> "Respondent thus ignores the major point and begs the central issue: full rights of franchise and citizenship are accorded *only* to persons classified as members of the 'White population group' ... [8] ",

and they say further, with regard to Respondent's plans for future development:

> "Respondent, accordingly, projects the institution of territorial *apartheid*, in which the large majority of the inhabitants permanently will be denied the right to vote for representatives to the central governing authority or to participate therein [9]."

[1] I, p. 143.
[2] *Vide* sub-para. *(b)*, *supra*.
[3] IV, p. 439.
[4] *Vide* para. 7, *supra*.
[5] Secs. G to I, *infra*.
[6] IV, p. 440.
[7] *Vide* paras. 10 and 11, *supra*.
[8] IV, p. 442.
[9] *Ibid.*, p. 444.

Respondent submits that both the above statements "ignore the major point" in Respondent's expositions. They are both related to, and are made by Applicants in reliance on, their "decisive major premise" of "non-separation" and attempted integration, which has already been dealt with fully. On the rejection of such premise and upon implementation of Respondent's intentions, there will be no "central governing authority" in the Territory, and everybody will be able to enjoy "full rights of franchise and citizenship" in the homeland of his people.

16. Amongst Applicants' remaining isolated points of criticism [1] is the following argument adduced by them:

> "The hollow and inhumane nature of such a premise [viz., that in regard to the indigenous groups, the process of adaptation to modern conditions was foreseen as one that would necessarily have to be slow,] is obvious; every individual member of an indigenous group, however gifted, is ordained, by reason of the circumstances of his birth, to be 'slow' in 'the process of adaptation to modern conditions' [2]."

It is a *non sequitur* to infer, from a statement of the fact that the process of adaptation of the indigenous *groups* to modern conditions would be slow, that every *individual* member of such groups is ordained to be "slow" in the process of adaptation. Naturally certain individuals show a greater aptitude in this regard than others. It is conceded that at some stages of group development, more gifted or developed individuals may to a certain extent be limited by the stage of development of their group. However, such individuals, in Respondent's experience, constitute a very small minority of the total membership of the indigenous groups. Moreover, they have, as at the present stage of progress in regard to the policy of separate development, almost unlimited opportunities, apart from responsibility, to employ their talents of leadership in the separate development of their peoples and their homelands. The large measure of responsible leadership which can be exercised by the more advanced members of the indigenous groups, within the framework of a policy of separate development, is illustrated by the recommendations of the Odendaal Commission, referred to above [3]. The slight limitations that may be suffered by a small number of more developed members of the indigenous groups during transitional stages of development, have to be weighed in the context of the merits and demerits to be considered in making a choice between a policy of attempted integration on the one hand, and a policy of separate development on the other hand.

Consequently, when Applicants make the complaint that Respondent's policies so retard individual members of the Native groups that after 40 years of Mandatory administration—

> ". . . no single member of a 'non-White group' has been found with the adaptability to exercise the franchise in respect of members of the Territorial legislature. None has been found capable of taking part in the Territorial Government at the political level [4]",

they attribute to Respondent a contention which it does not advance.

[1] *Vide* para. 12, *supra*.
[2] IV, p. 440.
[3] *Vide* para. 3, *supra*.
[4] IV, pp. 440-441.

Natives, individually and collectively, are excluded from participation in the institutions of the White group, as Respondent has demonstrated [1], for the basic reason that on a proper weighing of all the circumstances, the policy of separate development is, in Respondent's view, to be preferred to a policy of attempted integration. Applicants, in making such complaints, are once more, by implication, relying on their "decisive major premise" of "non-separation", which has been demonstrated to be without substance.

17. Applicants further say:

"Nor does it suffice to afford vicarious representation through such a device as the attendance of the 'White' Secretary for South West Africa at the Executive Committee composed of four 'Whites' elected by the 'all-White' Territorial Assembly, 'whenever matters of policy or administration concerning non-Whites were considered by the Executive Committee' [2]."

It will be recollected that since 1955 the administration of Native Affairs was transferred to Respondent's Minister of Native Affairs (now the Minister of Bantu Administration and Development) [3] and that the field of activity of the Executive Committee in respect of matters concerning Natives was limited. Respondent submits that the arrangements mentioned by Applicants were at the time and in the circumstances satisfactory transitional measures of administration, which were, moreover, in conformity with arrangements in general use in other African territories at the time [4]. Respondent concedes that such arrangements have become inappropriate with the progress of development, and has fully dealt with its future plans for development, which will abrogate such transitional measures.

18. Applicants' unsuccessful attempt to deny the relevance of policies followed in other countries [5] has been dealt with elsewhere in this Rejoinder [6]. Similarly, Applicants' reference to policies pursued in trust territories [5] has been disposed of [7].

IV. Government within the Native Tribes and Native Reserves

19. In the Memorials Applicants contended that in the administration of the Native reserves all significant authority is confined to Europeans. They asserted that—

"[t]he only semblance of participation by the 'Native' population is to be found in the rudimentary functions of the 'Native' headmen and the 'Native' members of the Native Reserve Boards in regard to the Native Reserves within the Police Zone, and in the elements of traditional tribal administration under tribal laws and customs still permitted to the 'Natives' in the Native Reserves outside the

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[1] Sec. E, *supra*.
[2] IV, pp. 442-443.
[3] *Vide* III, p. 113.
[4] II, p. 433.
[5] IV, p. 444.
[6] *Vide* sec. E, Chap. III and also para. 11, *supra*.
[7] *Vide* sec. E, Chap. III, *supra*.

Police Zone . . . even this shadowy participation is kept subject to complete, comprehensive and pervasive control by 'Europeans' [1]."

20. In the Counter-Memorial Respondent demonstrated that the Native inhabitants of the reserves, far from being entrusted only with "rudimentary functions" and "shadowy participation", indeed took a significant part in the government and administration of their reserves. A full exposition was given of the functions of Native authorities in the reserves and the nature of their participation in the governmental sphere[2].

In regard to the northern territories, Respondent pointed out that the Native inhabitants to all intents and purposes governed themselves through their chiefs and headmen according to their own laws and customs [3]. It was also shown that Native courts had full jurisdiction over members of their own tribes except in respect of capital and other serious crimes [4].

As regards the reserves in the Police Zone, Respondent showed that for each reserve headmen, elected by the residents at a representative meeting, were appointed to control the reserve under the supervision of the superintendent. Furthermore, for every reserve a Reserve Board had been constituted which consisted of the Bantu Affairs Commissioner or the superintendent of the reserve, the duly appointed headmen and not more than six elected adult male Natives. This Board, apart from assisting in the administration of the trust fund of the reserve, assisted the superintendent generally in the development of the reserve [5].

21. In their Reply Applicants commence the section headed "Government within the 'Native' Tribes and 'Native' Reserves" by repeating [6] *ipsissimis verbis* the charge formulated in the Memorials [7]. From the supporting discussion contained in the sections of the Reply under consideration, it appears that Applicants, while no longer emphasizing the alleged "shadowy participation" of Native authorities in the government and administration of their reserves, raise the following objections to the system of administration which has been developed by Respondent in respect of the Native reserves:

(a) that this system does not "provide an acceptable substitute for rights of franchise" [8];

(b) that Native chiefs and headmen "are appointed by, paid by, answerable to, and removable by, Respondent" [6];

(c) that the Native inhabitants of the Territory, who are in some respects subject to the Administrator's authority, "have no voice or vote in respect of his selection or the manner of exercise of his powers" [9];

(d) that the Natives "have no effective control" over the expenditure of funds from the various trust funds [10]; and

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[1] I, p. 143.
[2] III, pp. 114-130.
[3] *Ibid.*, p. 118.
[4] *Ibid.*, pp. 116, 119 and 120.
[5] *Ibid.*, p. 128.
[6] IV, p. 448.
[7] *Vide* para. 19, *supra*.
[8] IV, p. 442.
[9] *Ibid.*, p. 449.
[10] *Ibid.*, pp. 443 and 449.

(e) that "policy making with regard to reserve development is entirely in the hands of 'Europeans' "[1].

Before dealing with some particular aspects of Applicants' objections, Respondent makes the following general observations.

22. It will be seen that Applicants' objections are directed at the admitted facts, firstly, *that the inhabitants of the reserves do not participate* in a central government for the whole Territory, and secondly, that Respondent through its representatives, at present still exercises control over the indigenous governmental institutions in the reserves.

As regards the first aspect, Respondent has already shown[2] that Applicants' so-called "decisive major premise" to the effect that there should be no differentiation between the various population groups and *that they should all be integrated into "a single territorial unit"*, with universal adult suffrage, is unfounded. It is consequently unnecessary to add anything to what Respondent has already stated in that regard.

As regards the second aspect, it is obvious that Applicants cannot possibly contend that no such control should be exercised, since that would be tantamount to an abdication on Respondent's part of its duties and prerogatives as Trustee and Guardian. The gravamen of Applicants' objections must *therefore be that the said control is too tight*, and that the inhabitants of the reserves are consequently not afforded sufficient participation in the government and administration of their own affairs. Sufficiency is, of course, a matter of degree, and it is difficult to see how Applicants can contend that the subject-matter of this complaint does not fall essentially within the Respondent's discretionary sphere, where "differences of opinion could arise"[3], or how they can advance it as a *matter in respect of which "the violation of the duty to promote . . . is* beyond argument"[3].

The extent to which a dependent people should be allowed to manage its own affairs in the governmental sphere must necessarily depend on a number of factors, and especially on the standard of general development reached by such a people. In Respondent's view the degree of development reached by the inhabitants of the reserves in the Territory was in the *past not such that any substantial increase in powers of self-government* was warranted. This view was based on facts which were set out in the Counter-Memorial. So, for example, Respondent pointed to the grave difficulties which were experienced by officials in getting headmen in the northern territories to exercise authority and to take the lead and show initiative in their respective areas[4]; to the efforts required to persuade chiefs to adopt more just and democratic forms of government, including *the use of elders and headmen as counsellors*[5]; to the problems involved in exercising control over, and preventing clashes between, the various tribes living in a large and wild area such as the Kaokoveld[6]; and to the fact that in the reserves in the Police Zone tribal life and institutions, which had broken down completely during the German regime, had to be built

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[1] IV, p. 449.
[2] *Vide* paras. 10-12, *supra*.
[3] I, p. 104.
[4] III, p. 115.
[5] *Ibid.*, pp. 115, 119 and 120.
[6] *Ibid.*, pp. 121-124.

up anew [1]. If regard is further had to the fact that at the inception of the Mandate the indigenous inhabitants of the Territory were almost without exception illiterate, it is obvious that decades had to pass before the inhabitants of the reserves would be ripe for the greater responsibilities of, e.g., the more advanced type of self-government recently instituted in the Transkei [2].

Applicants do not attempt to controvert, or even to discuss, the exposition in the Counter-Memorial; yet they suggest that Respondent should have provided for a greater measure of self-government in respect of the reserves, without indicating why, or to what extent, Respondent should have done so.

23. In the Counter-Memorial Respondent stated that it contemplated an evolutionary growth of the traditional institutions of the various groups in a manner which would permit each group to develop towards self-determination, without, in the process, preventing self-determination by others. It was also pointed out that the success of Bantu authorities in South Africa had suggested that a similar system might fruitfully be applied in the Territory, and that this matter formed part of the topics then under consideration by the Odendaal Commission [3].

The recommendations of this Commission regarding political institutions in the proposed homelands have been dealt with above [4]. As has been shown, these include the institution for each of the Native groups, other than the Bushmen and the Tswana, of a Legislative Council consisting of non-elected traditional leaders as well as members elected by the group concerned. The executive power of the Legislative Council is to be vested in an Executive Committee, the membership of which will differ from group to group. It is clear that the implementation of these recommendations, which have been accepted in broad principle by Respondent, will involve the transfer of wide legislative and executive powers to the aforesaid Councils and Committees, subject, of course, to temporary further control by Respondent.

In view of the essence of Applicants' complaints, referred to above [5], one would have thought that they would have welcomed the recommendations of the Odendaal Commission. Instead, Applicants say that Respondent's present policies "would be aggravated and rendered even more repugnant to [Art. 2, para. 2, of the Mandate] by the policies projected in the Report of the Odendaal Commission" [6].

It is indeed not easy to understand what steps Applicants would have Respondent take in order to grant to the inhabitants of reserves a greater degree of participation in the government and administration of their own areas, and thereby remove the grounds of Applicants' objections—save in so far as the said objections are intended to depend entirely on the contention that the Territory is to be treated as a single territorial unit, in the government of which all inhabitants are to participate on

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[1] **III**, p. 125.
[2] *Vide* **II**, p. 480.
[3] **III**, p. 131.
[4] *Vide* para. 3, *supra*.
[5] *Vide* para. 22, *supra*.
[6] **IV**, p. 444.

a basis of universal adult suffrage, a contention which has already been disposed of [1].

24. As regards Applicants' first objection referred to above [2], Respondent is in full agreement with Applicants that its system of indirect rule with regard to the inhabitants of the reserves does not "provide an acceptable substitute for rights of franchise", if it is taken for granted that these inhabitants can profitably exercise such rights. It is precisely because Respondent believes that the indigenous groups in the reserves have now reached a sufficient degree of development, that it has accepted in principle the above-mentioned recommendations which envisage, *inter alia*, the election of a number of members of the proposed Legislative Councils by the groups concerned. Applicants' reaction is to recoil in horror from the very notion advocated by them, for the sole reason, apparently, that the proposed form of giving effect thereto will not bring about Native domination of the whole Territory. Needless to say, they do not thereby establish any dereliction of duty on Respondent's part.

25. It should be observed that Applicants, by referring to the "details of arrangements concerning the 'indigenous population groups' in South West Africa" set forth in the Counter-Memorial, and by stating that "such arrangements are envisaged as 'channels of communication' for the purposes of providing a 'link' with such groups and maintaining 'close contact' with them" [3], create a misleading impression of the functions of the indigenous political institutions in the Territory. Although it is true that Respondent stated that it had built up certain channels of communication—notably the office of Chief Bantu Affairs Commissioner and its staff—to enable Respondent to be fully acquainted at all times with the desires of each group, it was at the same time made clear that Respondent's representatives for the most part acted purely in an advisory capacity [4]. Although the Native authorities in the reserves have not enjoyed direct legislative powers in the past, Respondent has been able to give effect in most cases to the wishes of these duly constituted authorities, exactly by reason of the links which have been established between itself and the indigenous groups.

26. In connection with their assertion that the Native chiefs and headmen in the reserves "are appointed by, paid by, answerable to, and removable by, Respondent" [2], Applicants state that—

> "[i]t is not surprising . . . that Respondent describes eighty-one chiefs, headmen and tribal councillors as 'officials' whom 'Respondent employs' [5] ".

In the Counter-Memorial Respondent used the word "official" in its ordinary dictionary meaning, viz., "holding office, employed in public capacity" [6]. In the same sense the Administrator of the Territory, who also exercises wide powers in respect of the White inhabitants, is an

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[1] *Vide* paras. 10-12, *supra*.
[2] *Vide* para. 21, *supra*.
[3] IV, p. 442.
[4] III, p. 113.
[5] IV, p. 443.
[6] Fowler, A. W. and Fowler, F. G. (Eds.), *The Concise Oxford Dictionary of Current English*, Fourth Edition (1956), p. 822, s.v. "official".

"official" who is "appointed by, paid by, answerable to, and removable by Respondent".

27. It should be observed that the chiefs and headmen in Ovamboland, the Okavango Territory and the Kaokoveld are *not* paid by Respondent. And, as regards the appointment of chiefs and headmen in the northern territories, Respondent pointed out in the Counter-Memorial [1] that when a vacancy occurs, the tribe concerned decides for itself who is to be its nominee. After arriving at a decision it informs the authorities of its choice and requests approval thereof. Such approval is a mere formality and, as far as is known, no such tribal request has ever been refused.

28. Applicants' third objection [1], viz., that the Native inhabitants of the Territory, who are subject to the Administrator's authority, "have no voice or vote in respect of his selection or the manner of exercise of his powers" [2], is rather difficult to fathom. The Administrator, who is Respondent's representative in the Territory, exercises wide powers in respect of *all* the inhabitants of the Territory, and neither the Europeans nor the non-Whites have any say in respect of his appointment or the exercise of his powers. To allow the inhabitants of the Territory to dictate to Respondent who should be its representative in the Territory and exercise powers in its name, would again be tantamount to an abdication on Respondent's part of its duties and prerogatives as trustee and guardian.

29. With reference to the expenditure of money from the various trust funds which have been established for the Native groups, Applicants allege that "the indigenous inhabitants have no effective control over such expenditures since the funds must be 'expended as directed by the Administrator (now the Minister of Bantu Administration and Development)' " [3].

In the Counter-Memorial Respondent pointed out that the tribal leaders were regularly consulted as regards the manner in which the money in the trust funds should be spent, and that their suggestions were normally given effect to [4]. The purpose of the trust funds is primarily to provide a procedure which will ensure that the moneys credited to the funds will be properly administered and expended upon objects which are in the interest of the tribe and calculated to promote its welfare. It is for this reason that annual estimates are prepared by the tribe in consultation with the Bantu Affairs Commissioner and his technical officers; that the tribe is assisted in the planning of the services it wishes to undertake, and is guided in the application of methods necessary for the proper control of expenditure from its funds. The tribe has complete freedom of action in respect of the administration of its funds, and the Minister's direction is in effect and in practice but a formal approval of a document in which the services and the amounts to be expended, accepted as they have been by the tribe, are set out. The functions of the Minister and of the officials of his department are, therefore, in their practical application purely advisory and designed to assist the tribes in carrying out their functions and in controlling

[1] III, p. 116.
[2] IV, p. 449.
[3] *Ibid.*, and *vide* para. 21, *supra*.
[4] III, pp. 117, 119, 124 and 127.

and expending their funds in a business-like manner and in accordance with sound accounting principles.

30. Applicants' last objection, viz., that "policy making with regard to reserve development is entirely in the hands of 'Europeans'"[1], pertains to the reserves in the Police Zone[2]. Respondent does not deny that it has in the past exercised direct control over policy making in regard to these reserves, but it should be observed that the members of the Reserve Boards have been given every opportunity to assist in this aspect of government. The portion of paragraph 127 of Book V of the Counter-Memorial quoted by Applicants in the Reply[3] bears out this, rather than the contrary, which is suggested by Applicants. It should be made clear that the Europeans who exercise the said control are not the White inhabitants of the Territory, but Respondent's representatives.

V. General Administration (Civil Service)

31. In the Memorials Applicants sought to create the impression that Respondent had by design prevented Natives from participating in the Civil Service of the Territory beyond "the lowest and least skilled categories"[4]. Thus Applicants alluded to the "practice of 'job-reservation'" in the Service[4], and furthermore alleged that—

> "[a]t the administrative levels of the Government of the Territory, in the Public Service, the participation of 'Natives' is minimal. With few exceptions, 'Natives' are confined to the lowest levels of employment, involving neither skill nor responsibility[5]."

In their summary of the situation in the Territory with respect to participation in, *inter alia*, the Civil Service, Applicants charged Respondent with having—

> "... pursued a *systematic* and active program which *prevent[ed]* the possibility of progress by the 'Native' population toward self-respect, responsibility or skill in any aspect of citizenship or government ...[6]".

The only evidence adduced by Applicants in support of their allegations was information, extracted from the 1946-1954 budgets, in respect of positions held at the time by Natives in six departments of the Service[7].

32. In the Counter-Memorial Respondent pointed out that Applicants, by the selection of only the said six departments, did not present a true picture of the Civil Service as a whole[8]. A full exposition was accordingly given by Respondent of the extent to which Natives participated in other branches such as the police force, the nursing profession, the teaching profession, the prisons service, the Department of Information and the administration of Native Affairs[9]. Respondent further stated

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[1] *Vide* para. 21, *supra*.
[2] IV, p. 449.
[3] *Ibid.*, p. 450.
[4] I, p. 136.
[5] *Ibid.*, p. 142.
[6] *Ibid.*, p. 143. (Italics added.)
[7] *Ibid.*, pp. 136-137.
[8] III, pp. 164-165.
[9] *Ibid.*, pp. 147-155.

that the limitation by Applicants of the period of the extracts to the years 1946 to 1954 detracted from the true position in the 1960s, since Respondent's long-term policy of education and training of the Native peoples resulted in more and more Natives qualifying for and obtaining responsible posts each year even in those departments of the Service selected by Applicants [1].

33. In explaining its general policy with regard to the Civil Service, Respondent pointed out that, in view of the differences between the various population groups and their past history, it had not been practicable to treat the inhabitants of the Territory as one integrated nation for administrative purposes. Respondent consequently considered it to be in the best interests of the various groups to treat each as a separate entity for the said purposes, as far as this was practicable [2]. Not only did this policy have the effect of giving preference to members of a particular group when it came to appointments to posts designed to serve that group, but it also served to minimize racial or group prejudice and friction [3].

Whilst conceding that there were as yet few Natives in the higher posts in the Service, Respondent made it clear that this was due to the serious lack of adequately qualified Native candidates for employment in these posts, and not to a deliberate policy of repression [4].

34. Respondent's exposition of its policies and practices regarding the Civil Service further covered, *inter alia*, early attempts, reported to the League of Nations, to introduce Natives into the Service [5], positive steps taken by Respondent, such as in-training and the lowering of entrance qualifications, to ensure greater participation of Natives in the administrative sphere [6]; the problems experienced in other countries in Africa in connection with the "Africanization" of the Public Service [7], and Respondent's declared policy of making senior posts, designed to serve any particular Native group, available to Natives of that group as and when they achieved the necessary qualifications [4]. Save for the few respects indicated hereunder, this exposition is ignored by Applicants.

35. In the Reply Applicants apparently no longer contend that Respondent pursues a policy aimed at the absolute exclusion of Natives from any but "the lowest levels of employment" [8] in the Civil Service. On analysis, their contentions appear to be, firstly, that "Respondent's policies of educational *apartheid*" [9] are the direct cause of the lack of Natives with suitable qualifications for the higher positions in the Service, and, secondly, that Respondent's policy of progressively introducing Native officials to senior positions in those areas and departments designed to serve the ethnic group of which the official concerned is a member, is "a mere corollary of the basic policy of *apartheid*" [10], and therefore,

[1] III, p. 165.
[2] *Ibid.*, p. 141.
[3] *Ibid.*, p. 142.
[4] *Ibid.*, p. 164.
[5] *Ibid.*, pp. 146-147.
[6] *Ibid.*, pp. 142 and 157.
[7] *Ibid.*, pp. 155-163.
[8] I, p. 142.
[9] IV, p. 445.
[10] *Ibid.*, p. 446.

presumably, in conflict with Applicants' newly formulated "major premise" of non-differentiation and attempted integration [1].

Thus, in regard to Respondent's explanation of the fact that there are as yet relatively few Natives in the higher posts in the Service, Applicants allege that this contention if true, is—

"... merely a self-indictment of a course of administration which, during a period of more than forty years, has failed to produce numbers of persons qualified to undertake administrative, professional and technical employment in government. Analysis of Respondent's policies of educational *apartheid* explains the result [2]."

In another section of this Part of the Rejoinder, Respondent will deal fully with similar assertions regarding its educational programme, and will show that its policies in the field of education were designed, *inter alia*, to ensure increased participation of members of all the groups, including the Native group, in all aspects of administration as well as in the economic life of the Territory [3]. It is consequently unnecessary to deal with the above allegation in the present context.

36. Applicants further allege that Respondent's policies—

"... stand in sharp contrast to the view of the Trusteeship Council of the United Nations that education of indigenous inhabitants 'to fill responsible posts in th[e] administration' should be carried out so as to enable such inhabitants to have a 'progressively important share in the conduct of their own affairs *and those of the Territory as a whole*' [2]".

The phrases quoted by Applicants in the above passage are contained in a report of the Trusteeship Council pertaining to a particular Territory, viz., Ruanda-Urundi. In essence, the Council recommended that the Administering Authority should "provide increased facilities for training indigenous inhabitants to fill responsible posts in the administration" [4].

37. In so far as the observations of the Council may have been intended to relate to a major premise of territorial integrity, this has been disposed of by Respondent above [5]. Apart from this aspect, Respondent has in fact sought to provide just such "increased facilities" for the training of Natives for responsible positions in the Civil Service of the Territory. Apart from the fact that Respondent has increased the facilities for education and vocational training of the indigenous peoples of South West Africa, the forms of in-service training on which Respondent relies have had the effect of attracting more and more Native candidates to the various branches of the Service, and have thereby given to the Native people an ever-increasing share in the administration of the Territory [6].

38. It should be observed that Applicants create a misleading impression of the aims and effect of Respondent's policy to treat, as far as is practicable, each group as a separate entity for administrative purposes.

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[1] *Vide* para. 8, *supra*.
[2] **IV**, p. 445.
[3] *Vide* sec. G, *infra*.
[4] **IV**, p. 455, where the full passage is quoted by Applicants.
[5] *Vide* paras. 10 and 11, *supra*.
[6] **III**, p. 157.

Thus Applicants state that—

> "... it is Respondent's policy affirmatively to exclude 'non-Whites' from senior ranks of the Civil Service, irrespective of qualification. This is a reflection, and is in implementation, of Respondent's policy of regarding higher levels of government and administration as 'political institutions devised and intended solely for the White population group' [1]."

In the Counter-Memorial Respondent stated, with reference to Applicants' allegations that only White persons are allowed to vote at an election of members of the Legislative Assembly, and that Natives are excluded by law from serving as such members, that "these allegations concern[ed] only political institutions devised and intended solely for the White population group" [2]. This statement was not, as Applicants suggest by referring thereto in the present context [1], intended to signify that the Civil Service of the Territory as a whole or "higher levels" of employment therein, were devised solely for Europeans, and could not be read as being so intended. Indeed, Respondent made it perfectly clear that its policy envisaged the advancement of Natives to senior positions in the Service in those areas and departments designed to serve the Native groups [3].

39. If Applicants assume that there are no senior positions in the Civil Service in the above-mentioned areas and departments, the assumption is clearly wrong. In the Counter-Memorial [4] Respondent pointed out that senior White officials had in the past been employed in Native areas in order to guide and assist the Native groups towards modification and adaptation of their traditional systems of government to meet the exigencies of a modern world. At the same time, however, Respondent made it clear that the role of such officials was purely of a transitional character, and that it was hoped that it would be possible to dispense progressively with these officials in the administration of Native areas, until they were replaced altogether by members of the groups concerned.

40. Inherent in the recommendations of the Odendaal Commission is the notion that each homeland is to have its own public service comprising members of the group concerned, who will eventually be able to occupy positions comparable to the highest categories in the present Civil Service of the Territory [5]. On the practical side the Commission has recommended the institution of an administrative centre for each group with such administrative offices and accommodation as may be necessary [6], and the arrangement of courses in management and administration for Natives employed in the Service [7].

In view of what has been stated above, Respondent submits that there

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[1] **IV**, p. 445.
[2] **III**, p. 132.
[3] *Ibid.*, p. 164.
[4] *Ibid.*, p. 141.
[5] *Vide R.P.* 12/1964, p. 61 (para. 211), where the Commission "considers it to be of the utmost importance that the non-Whites should constantly, *and to the highest possible degree*, be guided towards self-help ... and full responsibility in the process of developing their own homelands *in every field*". (Italics added.) *Vide* also para. 3 *(f)*, *supra*.
[6] *Ibid.*, p. 61.
[7] *Ibid.*, p. 259.

is no substance in Applicants' conclusion that "... Respondent has failed in any degree to promote the well-being and social progress of the inhabitants of the Territory ...", with regard to the General Administration of South West Africa [1].

VI. Local Government

41. In the Memorials Applicants charged Respondent with having "almost entirely" excluded the Native population from "participation or even any semblance of participation" in the government of the established local units within the Territory [2].

Applicants alleged in this regard that "the limited advisory role of the Native Advisory Boards" constituted the "sole faint approximation of any kind of participation" of Natives in local government, which participation was subject to "the firm control of the 'white' local authorities and the Administrator" [2] (now the Minister of Bantu Administration and Development).

42. The charge formulated in the Memorials is repeated *ipsissimis verbis* in the section of the Reply under consideration [3]. From an analysis of the supporting material offered by Applicants, it would appear, however, that they now rest their case on two separate contentions, viz.:

(a) that Natives should be allowed to participate in the existing local government institutions on the same footing as Europeans, i.e., to coin a phrase, "within the framework of a single [urban] unit" [4], and

(b) that, even on the assumption that Native urban communities are to be treated separately from the White inhabitants of the towns, Respondent has discriminated unfairly against such communities by refusing to allow them some form of local government, and by entrusting to White local urban authorities powers "which have a major impact upon the welfare" of the Natives living within urban areas [5].

These contentions will be dealt with separately in the succeeding paragraphs.

43. As regards the first contention, Applicants allege that—

> "[t]he refusal to permit the indigenous inhabitants ... to *participate* in local government, constitutes a failure 'to promote to the utmost the development of the preponderant part of the population of the Territory' in regard to political advancement. It is submitted that Respondent has substantially conceded the validity of the premises underlying the foregoing contention [3]." (Italics added and footnote omitted.)

In support of this allegation Applicants proceed to enumerate a number of facts which, according to them, Respondent does not dispute [3].

44. Although it is in broad substance true that the said facts are not in issue, Respondent finds it difficult to understand how this can be regarded as a concession on its part of the validity of Applicants' premises. The very first fact enumerated by Applicants, namely that "the popula-

[1] IV, p. 450.
[2] I, p. 142.
[3] IV, p. 446.
[4] Cf. "within the framework of a single territorial unit": IV, p. 441.
[5] *Ibid.*, p. 447.

tion of [urban areas] includes a significant number of non-White inhabitants" [1], seems to form the basis of their argument, inasmuch as they regard every urban area as an indivisible unit comprising White and non-White inhabitants, who should consequently partake in common in the local government of such area. The true position, however, is that every urban area in the Territory comprises separate geographical portions inhabited by different population groups.

45. In the Counter-Memorial [2] Respondent pointed out that at the inception of the Mandate Natives were living in a largely unorganized and haphazard manner on the outskirts of White towns. It was consequently a primary concern of Respondent to see to it that the White municipal authorities played their part in providing these peri-urban communities with proper housing and attendant facilities such as roads, water, lighting, sanitation, etc.—facilities which the Natives concerned could hardly have established if left to fend for themselves.

Respondent also pointed out that the various Native groups preferred to live apart from the Europeans and from each other, and to have their own separate schools, clubs, churches, etc. In the light of these preferences, and of the state of affairs prevailing when the Mandate was assumed, it was only natural for Respondent to act in accordance with this tendency in the provision of proper housing and municipal facilities for the various Native groups [3]. In Respondent's view it appeared to be in the general interest of the population that this tendency should be respected and given effect to, as was done by means of Proclamation No. 34 of 1924 (S.W.A.), which was later superseded by Proclamation No. 56 of 1951 (S.W.A.) [4]. These measures provided for the setting aside of separate urban residential areas for Natives, which not only served to facilitate the administration of urban communities, but also afforded a familiar community life to those Natives who came into the general unfamiliar White urban areas. So, too, homogeneous communities, with their own artisans, tradesmen, government servants, etc., could be encouraged to develop in such residential areas [3].

46. The position then is that the urban areas of the Territory have never formed integrated units, but, on the contrary, have always been divided into White and non-White sections. It was consequently only realistic to provide for separate forms of local government for respectively the White and non-White inhabitants of urban areas. As far as the European inhabitants were concerned, Respondent could shortly after the inception of the Mandate allow them participation in modern forms of local government, viz., municipal councils and village management boards. In the case of the native groups, however, it was only after the gaining of a basic degree of knowledge of the organization of urban and peri-urban societies that they could be introduced to some constructive role in the local government of their own residential areas. As was pointed out in the Counter-Memorial, the intermediate stage was sought to be bridged by a system of Advisory Boards, which were intended, *inter alia*, as a training ground for wider responsibilities [5].

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[1] IV, p. 446.
[2] III, p. 170.
[3] *Ibid.*, p. 180.
[4] *Ibid.*, p. 175.
[5] III, pp. 171 and 181-182.

47. In the Counter-Memorial Respondent also explained that at the inception of the Mandate most of the towns and villages existing today had already been established, and a form of local government had already been instituted. Respondent further pointed out that these towns and villages had been founded by the early European pioneers as areas for their own communal habitation, and were never intended for the communal settlement of any of the indigenous inhabitants of the Territory [1].

48. With regard to this explanation, Applicants state that—

> "[t]he indefensible nature of the policy implicit in the exclusion of 'non-Whites' from agencies of local government is compounded, rather than justified, by Respondent's assertion that towns and villages of the Territory 'were never intended for the communal settlement of any of the indigenous inhabitants . . . and indeed such towns were something foreign and unknown to the Native population' [2] ".

Respondent fails to understand how its observation regarding circumstances which existed as facts at the inception of the Mandate, can be said to compound the "indefensible nature" of its policy of providing separate forms of local government for the White and non-White inhabitants of urban areas [2]. As already explained, the state of affairs prevailing in and around urban areas when the Mandate was assumed, was one of the reasons that influenced Respondent in providing for the establishment of separate Native residential areas [3]. Apart from their bare statement, quoted above, Applicants do not even attempt to show that these reasons are unsound or why Respondent should have adopted a policy of administering the White and non-White sections of the towns and cities of the Territory as integrated units. Instead Applicants merely allege that—

> ". . . Respondent has not justified, and cannot justify, exclusion from local government of persons solely on the basis of their membership in a 'group', without regard to individual qualification [4] ",

and that—

> "Respondent misdescribes this policy as a 'system of indirect rule'... The notion of 'indirect rule', however defined, has nothing in common with the systematic allotment of status, rights, privileges and burdens on the basis of group or race. *Apartheid* is *sui generis* [4]."

49. It is clear, therefore, that Applicants' condemnation of Respondent's policy with regard to local government is based on their "major premise" that in all spheres of government differentiation is impermissible, and that the Territory as such, as well as the urban areas in the Territory, should be governed and administered as integrated units. Respondent has already dealt fully with this premise, and since no independent argument or factual information is adduced in support thereof in the section of the Reply at present under consideration, it is unnecessary to add anything to what has already been stated by Respondent in this regard [5].

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[1] III, p. 168.
[2] IV, p. 446.
[3] *Vide* III, p. 180 and para. 45, *supra*.
[4] IV, p. 447.
[5] *Vide* paras. 10-12, *supra*.

50. With regard to their second contention [1], Applicants merely enumerate a number of powers of local urban authorities "which have a major impact on the welfare of all the inhabitants subject to their jurisdiction", with a view to showing that the statement in the Counter-Memorial that Respondent has looked upon the administration and control of Native Affairs in the Territory as its own responsibility [2], does not "justify *exclusion* of 'non-Whites' from local government" [3] (italics added).

It is obvious that Applicants fail or refuse to appreciate the aims of Respondent's policies with regard to local government. While it is true that Natives are not allowed to participate in the local government units which have been designed for the White group, Respondent made it perfectly clear in the Counter-Memorial that it has sought systematically to guide developments so that the indigenous inhabitants may be fitly *included* in the local government of their own urban residential areas [4]. Respondent explained that it envisaged the replacement of the system of Native Advisory Boards, which had served as a training ground for wider responsibilities during the intermediate stage of the development of the urban Native communities, by a system similar to that of Urban Bantu Councils in South Africa [5]. And the Odendaal Commission has indeed made a recommendation to this effect [6], which, when implemented, will ensure to the Native inhabitants of urban areas wide legislative and executive powers in respect of their own areas.

51. In their Reply Applicants completely ignore Respondent's exposition in the Counter-Memorial regarding such a system for South West Africa and also the Odendaal Commission's recommendation in that regard. Yet Applicants bluntly allege that it is Respondent's policy to *exclude* Natives from local government.

52. As regards the powers which White urban authorities may exercise in regard to Native urban areas, Respondent pointed out in the Counter-Memorial [7] that considerations of practical expediency had led Respondent to delegate some of its powers of management and administration of Native affairs in urban areas to the urban local authorities, thereby in a sense constituting such authorities Respondent's agents in this regard. At the same time, however, Respondent made it clear that it had reserved to itself certain powers whereby strict control can be exercised over the activities of these authorities [7].

Applicants do not deny that Respondent exercises control over the manner in which urban local authorities exercise the powers enumerated in the Reply. Indeed, they admit that these powers are "subject to varying degrees of control on the part of higher authority" [8]. Applicants' objection, therefore, seems to be directed at the very fact that such powers have been delegated, albeit with reservations, to urban local authorities.

Until such time as the degree of development of the Native inhabitants

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[1] *Vide* para. 42, *supra*.
[2] III, p. 173.
[3] IV, p. 447.
[4] III, p. 168.
[5] *Ibid.*, p. 188.
[6] *Vide* para. 3 *(g)*, *supra*.
[7] III, p. 185.
[8] IV, p. 448.

of urban areas would justify some other arrangement, the powers of management and administration of Native affairs obviously had to be exercised by some or other White agency. In Respondent's view these powers could best be entrusted to the urban local authorities concerned, which had intimate knowledge of local conditions. Respondent consequently fails to see how any objection can be raised to the delegation, with reservation of control, of the said powers to the municipal councils and village management boards of the Territory.

53. Finally, since Applicants' incomplete rendering of the powers provided for by section 17 (1) of Proclamation No. 56 of 1951 (S.W.A.) [1] creates a misleading impression [2], Respondent deems it desirable to point out that any fine recovered in a case in which an urban local authority acts as prosecutor, must be paid into the Native revenue account, and be utilized for the benefit of the Native residents of the urban area concerned [3].

54. In the result there is no substance in Applicants' allegation that "Respondent has failed in any degree to promote the well-being and social progress of the inhabitants of the "Territory" in respect of local government [4].

VII. Conclusion

55. Respondent submits that in the crucially important sphere of Government and Citizenship, Applicants have entirely failed to substantiate their charges, either as originally formulated in the Memorials or as now advanced in the Reply. In particular Applicants have failed to establish that Respondent's policy of separate development violates Article 2, paragraph 2, of the Mandate, whether by reason of any norm alleged to be contained in the said paragraph, or by reason of an alleged motive of deliberate oppression of the Native inhabitants of the Territory, or for any other reason.

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[1] *Proc.* No. 56 of 1951, sec. 17 (1) in *The Laws of South West Africa 1951*, Vol. XXX, p. 118.

[2] IV, p. 448 (para. *e*).

[3] *Proc.* No. 56 of 1951, sec. 17 (2) in *The Laws of South West Africa 1951*, Vol. XXX, p. 118.

[4] IV, p. 450.

Section G

Education

CHAPTER I

INTRODUCTION

1. Part I of Chapter IV B.3.*c.* of the Reply deals with education, and is described by Applicants as an "analysis" of the "measures of implementation" of Respondent's educational policies [1]. The subject-matter of the said part is dealt with by Applicants under the following three heads:

(A) General Policy [2];
(B) Nature of Education in the Territory [3];
(C) Extent of Education in the Territory [4].

Thereafter follows an Annex, headed "Racial Separation In Education In Dependent Territories, As Viewed By The United Nations" [5].

2. The following chapters contain Respondent's reply to the aforesaid sections (A), (B) and (C), as well as to the said Annex.

3. In common with Applicants' case generally [6] regarding alleged violation of Article 2, paragraph 2, of the Mandate, their case concerning education exhibits in the Reply a major shifting of ground as compared with the Memorials.

In this instance also the original complaint was founded on alleged improper motives on Respondent's part regarding the Natives. In sum it was said that Respondent was, "by deliberate policy and practice . . . restrict[ing] and shap[ing] the education of the young so as to perpetuate the denial of possibilities for self-improvement and the relegation to a status of imposed inferiority to which the 'Native' population [was] now subject" [7]. In the Counter-Memorial [8] Respondent on this basis dealt fully with all aspects of the charge, and has here also been met in the Reply with reliance upon the newly formulated so-called legal norm of "non-discrimination or non-separation", which Applicants now seek to introduce as a new cause of action [9].

Respondent has already demonstrated that no such norm is contained in Article 2 of the Mandate or is otherwise binding on Respondent [10]. Indeed, if there were such a norm, Respondent would be guilty of a violation of its obligations under Article 2 of the Mandate inasmuch as it admittedly differentiates between persons on the basis of member-

[1] *Vide* heading at **IV**, p. 362.
[2] **IV**, pp. 362-370.
[3] *Ibid.*, pp. 370-386.
[4] *Ibid.*, pp. 386-397.
[5] *Ibid.*, pp. 398-403.
[6] *Vide* sec. A, paras. 1-15, *supra*.
[7] **I**, pp. 159-160.
[8] **III**, *vide* especially pp. 341-342 (paras. 1-4).
[9] *Vide* sec. A, paras. 7-10, *supra*.
[10] *Vide* sec. B, *supra*.

ship in a group, and Applicants' lengthy demonstration of the alleged effects of Respondent's policy would have been entirely unnecessary, save to substantiate their charge of *mala fides* on the part of Respondent in regard to the Native population—which charge is referred to hereinafter.

4. First, however, Respondent may point out that Applicants have also in a further respect, apparently as a corollary of attempted introduction of the alleged "norm", changed their ground in the Reply. This charge concerns their attitude regarding population groups other than the Natives, especially the Coloured and Baster groups and it is also in keeping with the shift of ground regarding their case generally [1].

Although Applicants in the Memorials drew attention to the fact that the educational system in South West Africa is organized in three separate divisions, in the sense that separate facilities are "maintained for 'Europeans', 'Natives' and 'Coloured Persons'" [2], and although, in dealing with the factual situation, they made various allegations to the effect that there was a disparity between the educational opportunities and facilities provided, on the one hand, for Europeans, and, on the other hand, for non-Europeans (i.e., Native and Coloured persons) [3], their complaint in regard to Respondent's educational policies and practices was concerned solely with the alleged oppression of the *Native* inhabitants of the Territory: the Coloured or Baster groups were not mentioned at all [4]. Neither were they mentioned in Applicants' Legal Conclusions regarding education [5].

5. In the Counter-Memorial Respondent drew attention to this feature of the Memorials [6]. Applicants have responded in the Reply by now alleging that their complaint concerns all the population groups of the Territory. Thus they say with respect to education that—

> "[i]n view of the fact that Applicants' submissions have not distinguished between the 'European', 'Coloured', and 'Native' groups in the Territory, and since Applicants view Respondent's policies of 'Coloured' and 'European' education as sharing the essential evils of 'educational *apartheid*', as dramatized in its most severe and unwholesome form in Respondent's 'Native' education policy, it will not be necessary to deal with the 'Coloured' policies *per se* except insofar as they are interwoven with the policy in respect of 'Natives' [7]".

Respondent has already demonstrated—in its submission conclusively—that Applicants, in formulating their submissions in the Memorials regarding alleged violations of Article 2 of the Mandate, did in fact distinguish between the different population groups and that the complaint then made by them involved only Respondent's treatment of the

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[1] *Vide* sec. A, paras. 11-15, *supra*.

[2] **I**, pp. 152-153.

[3] *Vide*, e.g., **I**, p. 153 (para. 160) concerning compulsory education; p. 153 (para. 162) concerning courses of instruction; p. 134 (para. 166) concerning school opportunities; p. 155 (paras. 169-170) concerning training of nurses and p. 157 (paras. 178-179) concerning higher education.

[4] *Vide* **I**, pp. 159-161.

[5] *Ibid.*, pp. 165-166.

[6] **III**, p. 342 (para. 6 *(b)*).

[7] **IV**, pp. 363-364.

Native group [1]. This general exposition of Applicants' case as originally presented in the Memorials and as sought to be extended in the Reply, applies to their complaints regarding all aspects of government, including education.

In so far as Applicants' above contention [2] is intended to rest purely on the alleged norm of "non-discrimination or non-separation", it falls together with Respondent's demonstration of non-application of any such norm [3]. In so far as it may be intended to be included in the factual aspects of Applicants' complaint, it is further referred to below [4].

6. Applicants do not rest their case solely on their new cause of action, based on the so-called legal norm of "non-discrimination or non-separation", but, as has been shown [5], they continue to rely on their original charge of a deliberate process of unfair discrimination against the Native inhabitants of the Territory. Thus, in regard to education, the allegation of unfair discrimination against the Natives is repeated with reference to specific policies and practices. The following serve as examples of allegations made in this connection:

(a) that "Respondent in effect concedes [the] *evil* of its *plan*" relative to Native education [6]; (Italics added.)

(b) that Respondent's policy "*thwart*[s] the social progress of '*Natives*' by isolating them from each other, and from the modern world..." [7]; (Italics added.)

(c) that "such policies have as their *purpose* and *inevitable consequence*, restriction of the *'Native' inhabitants* of the Territory to their isolated, pre-industrial, tribal groups . . ." [8]; (Italics added.)

(d) that "[t]he *'Natives'* have thus been *delegated the duty of promotion of their own social progress* which, in the Mandate, was entrusted to Respondent . . ." [9]; (Italics added.)

(e) that the alleged discrepancy between the expenditure on Native education and European education "is a *per se* indication that Respondent has, from the inception of the Mandate, *neglected the 'Native' population, to the advantage of the 'European' population*" [10]; (Italics added.)

(f) that "circularities exist in every aspect of the education of '*Natives*' in the Territory. Such patterns rest upon the same assumptions, and move towards a *common objective* . . . all of these aspects relate to, and are informed by, the *essential design and assumptions of apartheid*" [11]. (Italics added.)

7. As was the case in the Memorials, allegations in the Reply of the kind aforementioned, viz., of oppressive and unfair conduct on the part of Respondent, are limited to the Native inhabitants of the Territory,

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[1] *Vide* sec. A, paras. 11-15, *supra*.
[2] *Vide* para. 4, *supra*.
[3] *Vide* para. 3, *supra*.
[4] *Vide* para. 7, *infra*.
[5] *Vide* sec. A, paras. 9-10, *supra*.
[6] IV, p. 377.
[7] *Ibid.*, p. 378.
[8] *Ibid.*, p. 380.
[9] *Ibid.*, p. 390.
[10] *Ibid.*, p. 393.
[11] *Ibid.*, p. 397.

and no independent charge of such a nature is made in regard to the Coloured population group. In fact, Applicants disavow an intention of making such a charge when, in contrast to the statement made earlier in the Reply to the effect that Respondent's policy and practice is "directed toward the primary end of assuring an adequate 'Native' labour supply in the Territory" [1], they aver that in the case of the " 'Coloured' persons . . . no syllabus is required for their instruction as manual labourers, as in the case of the 'Natives' " [2]. They even say that "[t]he education of 'Coloured' children 'has been promoted in *principle* to equality with European education' " [3].

They do, however, state:

> "Respondent's policy of educational *apartheid* with respect to the children of 'Native' persons within the Territory inevitably distorts the social perspective and political and moral outlook of the children of 'Coloured' or 'European' inhabitants. As such, the 'Native' education policy is, in itself, a violation of Respondent's obligation to promote to the utmost the material and moral well-being and the social progress of all of the inhabitants of the Territory [4]."

Applicants do not say whether their contention is that the alleged adverse effects of Respondent's policy are due to the mere fact of differentiation between the population groups in the Territory, or to the further element which is alleged to pervade Respondent's policy with regard to the Natives, viz., unfair discrimination and oppression. Furthermore, Applicants tender no evidence to substantiate the statement that "the social perspective and political and moral outlook" of the children of the Coloured or European inhabitants is in fact distorted, whether by *apartheid* or at all. There is also nothing to show that if any such distortion should in fact exist, it would be the result of any of Respondent's policies, and not of an outlook arising from factual conditions affecting the various population groups, such as different stages of development, different moral and social standards, different habits of thought, etc., which exist quite independently of any governmental policy.

Applicants' contention in this regard is also basically unsound inasmuch as it rests on a false premise, namely that Respondent's policy of separate development is designed for the "benefit and privilege" [5] of certain sections of the community only. Respondent has always contended, and has demonstrated [6], that its policy is designed to benefit the population of the Territory as a whole. This is so in all aspects of government, including the education of the various population groups [7]. The whole idea that there are certain groups—European and Coloured—"whose benefit and privilege are purported to be served" by the policy of *apartheid* [5], is foreign to the basic principles of the said policy. And the application of this idea in formulating an argument that Respondent's policy of educational *apartheid* with respect to Native children has a

[1] **IV**, p. 272.
[2] *Ibid.*, p. 363.
[3] *Ibid.*, p. 362.
[4] *Ibid.*, p. 364.
[5] *Ibid.*, p. 258.
[6] **II**, pp. 457-488 and sec. E, *supra.*
[7] **III**, pp. 353-406.

detrimental effect on European and Coloured children, suffers from the same basic defect.

Respondent has not denied that in its practical effect the policy of separate development has certain disadvantages, nor that in its implementation at its present stage of evolution the various population groups may, in certain respects, experience inequalities—in particular respects, some groups more so than others. This is so, however, by reason of the different circumstances of the various population groups, and not because of any intent or design to create or maintain benefits and privileges for, or to discriminate unfairly against, certain groups, or, as Applicants allege, to oppress deliberately a particular group, viz., the Native group. Furthermore, Respondent is not aware of the existence of any exceptional measure of distortion of "social perspective and political and moral outlook" on the part of members of any population group. To the extent that any such distortion might exist at all, the matter should be considered in the light of the ultimate aim of Respondent's policy of separate development, which is the creation of separate, independent and self-respecting communities which will be less inclined to such prejudices, apprehensions and outlooks as might manifest themselves in inter-group relations at the present transitional stage of development, and which will, in Respondent's submission, be free from the more serious prejudices, frictions and struggles which are bound to arise under any policy of attempted integration of the different population groups.

8. The real issue at present, however, is not whether Respondent's policy has certain disadvantages. It concerns the question whether, seen as a whole and in their practical effect, the advantages of the system for all the inhabitants outweigh, or are likely to outweigh, the disadvantages that are or may be suffered in the implementation of the system by the various population groups. This question is, of course, not presented to the Court with a view to possible substitution of its opinion for that of the Mandatory, but as part of the inquiry into the issue of good or bad faith [1]. For this purpose objective evaluation, through weighing of advantages and disadvantages, is relevant only in so far as the result might indicate whether or not a governmental authority, having an honest approach to the problems of the Territory, could consider such policies and measures suitable for promoting to the utmost the well-being and progress of all the inhabitants of the Territory [2].

9. As will appear from the various chapters below, in which Respondent deals with Applicants' allegations regarding particular educational policies and practices, Applicants have not succeeded in establishing any charge of improper motives on the part of Respondent towards the Native inhabitants of the Territory and their education.

In regard to the Coloured group Applicants say that, inasmuch as they view "Respondent's policies of 'Coloured' and 'European' education as sharing the essential evils of 'educational *apartheid*', as dramatized in its most severe and unwholesome form in Respondent's 'Native' education policy, it will not be necessary to deal with the 'Coloured' policies *per se* except in so far as they are interwoven with the policy in respect of 'Natives' " [3].

[1] *Vide* sec. C, paras. 20-39, *supra*.

[2] *Ibid*., para. 39, *supra*.

[3] IV, p. 364.

In the circumstances it will be unnecessary for Respondent to give a full and systematic account of education of the Coloured group, and, as in the Counter-Memorial [1], Respondent will in this Rejoinder deal with the education of Coloured persons only for the purpose of answering specific points or allegations made by Applicants with regard thereto, or for purposes of explanation or clarity, or the like.

10. Before dealing with Applicants' allegations regarding specific educational policies and practices, Respondent draws attention to a further matter raised by Applicants in the introductory portion of the Reply dealing with education, viz.:

> "... Respondent's frequent references to practices in other African States, including those of Applicants, are wholly irrelevant to the present proceedings, inasmuch as there is no other African State subject to Mandate, nor any other State, anywhere in the world, which practices the policy of *apartheid* [2]".

Earlier in this Rejoinder [3] Respondent dealt generally with the above contention and illustrated why references to other countries, including the Applicant States, are relevant for certain purposes [4]. In addition to what has been stated there, Respondent points to the following considerations which apply specifically to the educational sphere.

Respondent's contention is that particular conditions and circumstances in South West Africa create, as they do elsewhere in Africa, peculiar problems and difficulties which hamper or retard educational advancement, and, in an evaluation of Respondent's achievements in the educational field, conditions and practices in other States with comparable conditions and problems are highly relevant. For example, if vast distances and low density of population hamper the development of education in other countries in Africa, it is logical to expect similar conditions in South West Africa to retard development [5]. If school attendance in other African countries is adversely affected by attitudes which seem to be common amongst people who have no tradition of modern education, it is only logical to expect that similar attitudes in South West Africa will have a like influence [6]. If an attendance figure is reached in South West Africa which compares favourably with that reached in territories more or less similarly circumstanced, such result can fairly be taken to reflect favourably on Respondent's efforts to extend education [7]. If it is sound educational policy in an African State to use textbooks which "illuminate the familiar environment of pupils and reflect their cultural history" [8], and which are "more relevant to African life and culture" [9] than those used in European schools, such policy cannot become unsound merely because it is applied to Native (or African) education in a mandated territory, or in a country where *apartheid* is applied. If Africans in an African State consider it a matter of pride, and a matter of

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[1] **III**, p. 342.
[2] **IV**, p. 364.
[3] Sec. A, paras. 21-24.
[4] *Vide* in this regard **II**, p. 3 and **III**, pp. 342-343.
[5] **III**, p. 411.
[6] *Ibid.*, pp. 397-399 and 407-410.
[7] *Ibid.*, pp. 444-446.
[8] *Ibid.*, p. 379.
[9] *Ibid.*, p. 378.

cultural importance, to study African languages and to establish an African language study institute for the purpose [1], the establishment of a Bureau for Native Languages in South West Africa [2] for similar purposes cannot be wrong because of the status of the Territory. And it is surely relevant to point out that it has elsewhere [3] been recognized that "language barrier(s)" and "very large differences in the children's ages, curricula, and cultural backgrounds" make the teaching of such children "in the same schools and classes . . . impracticable".

In the circumstances Respondent repeats its submission that the references made in the Counter-Memorial to conditions and practices in other territories are valid for the purposes intended to be served thereby.

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[1] **III**, p. 362.
[2] *Ibid.*, p. 361.
[3] *Ibid.*, p. 382.

CHAPTER II

GENERAL POLICY

A. Introductory

1. This chapter is devoted to a treatment of the subject-matter of section (A), of Chapter IV B.3.*c*.I of the Reply [1], in which Applicants discuss what they term "General Policy" under three heads, viz.,

"Introduction" [2],
"General Policy" [3]; and
"Categorization" [4].

In Chapter I above Respondent, in analysing legal aspects of Applicants' case regarding education, also dealt with certain broad allegations made by Applicants concerning educational policy generally as it affects the different population groups of the Territory.

In the following paragraphs Respondent deals with specific allegations made by Applicants under the above-mentioned three heads concerning particular practices and measures applied in implementation of its educational policies. For convenience the subject-matter will be divided into two parts, headed respectively "General Policy" and "Categorization".

B. Applicants' Allegations regarding General Policy

2. In their "Introduction" to this part of the Reply Applicants make certain allegations of which the effect is that apartheid, as it affects the different population groups in its application in the educational sphere, is "severe" in varying degrees, and that it is, furthermore, intended to have that effect. Thus they speak of the Native education policy as manifesting "educational *apartheid*" [5] in its "most severe and unwholesome form" [5], and they seek to demonstrate this by referring to the application of principles of "Bantu education" [6] to Native education in the Territory, and, more particularly, to the use of special syllabuses in Native schools, and to the practice of mother-tongue instruction in such schools. In the case of education of the Coloured people, on the other hand, Applicants, while noting that there is also "institutional apartheid" [6] in so far as they are concerned, allege that "[t]he education of 'Coloured' children, 'has been promoted *in principle* to equality with European education' " [7]. In this regard they allege, by reference to a statement made by the South West Africa Committee, that courses, syllabuses and examinations for

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[1] IV, pp. 362-370.
[2] *Ibid.*, pp. 362-364.
[3] *Ibid.*, pp. 364-367.
[4] *Ibid.*, pp. 367-370.
[5] *Ibid.*, p. 364.
[6] *Ibid.*, p. 363.
[7] *Ibid.*, p. 362.

Coloured school children are the same as those for European children, and that steps are taken to ensure the maintenance of similar standards in the schools of these two groups [1]. At the same time, however, Applicants point to differences between European and Coloured education with reference to differing measures concerning compulsory education and ages of first admission to school, and they draw the conclusion, as expressed in the words of the Committee on South West Africa, that—

> "... Coloured education is devoted to the fundamental aims of keeping the Coloureds as a group apart, superior to the Natives but inferior to the Europeans [1]".

3. Respondent denies that it is part of its policy in education, or in any other aspect of government, to treat the various population groups on the basis of any alleged inferiority or superiority on the part of any of the groups. In this regard Respondent refers to what has already been stated in this regard, viz., that its policy of separate development is not based on a concept of inferiority or superiority, but merely on the fact of differences between the various population groups [2]. Nor is there any question of a forcible keeping apart of the different population groups, for, quite apart from the various considerations which make separate educational facilities advisable from an educational point of view [3], there is the fact, as already mentioned by Respondent [4], that the different population groups prefer that their children be taught in schools of their own.

It is true that in the educational sphere, as in other spheres, the Coloured population occupy a position between that of the European and of the indigenous groups, but this is not so by reason of policy directed to achieve this end. It is the natural result of the fact that the Coloured group has reached a stage of development above that of the indigenous groups, but still below that attained by the European group. This consideration, as well as others which distinguish the Coloured from the various indigenous groups, e.g., differences in language and culture, lies at the root of the differentiation between the Coloured and indigenous groups in education. Since practically all the Coloured people of the Territory have Afrikaans as their home language, it is only natural that they should be instructed through the medium of that language. Coloured children therefore receive instruction in their mother tongue, as Native children do, and there is consequently no substance in the point which Applicants seek to make when they say that "'Coloured' persons have no tribal tongue for 'mother-tongue instruction'" [5].

Likewise, differences in levels of development, in culture, social systems etc., account for the fact that syllabuses used in Coloured schools differ from those used in Native schools.

Respondent will deal later with specific allegations made by Applicants regarding such matters as syllabuses, mother-tongue education and compulsory education. At this stage Respondent is merely concerned with demonstrating—as it has, in its submission, demonstrated—that there is no substance in Applicants' allegation that Coloured education is de-

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[1] IV, p. 362.
[2] II, p. 471.
[3] III, pp. 353-406.
[4] *Ibid.*, pp. 367 and 376.
[5] IV, p. 363

voted to the aim of "keeping the Coloureds as a group apart, superior to the Natives but inferior to the Europeans" [1].

4. After referring to what they call the "asserted objectives of Respondent's policy of *apartheid*" [2], Applicants make certain allegations concerning Respondent's "General Policy" [3] in regard to Native education. Most of these allegations deal with the alleged "intention of Respondent's 'Native' education policy" [4].

Applicants refer solely to the system of Bantu education as introduced in South Africa pursuant to the Bantu Education Act (Act No. 47 of 1953). This appears clearly from their general treatment of the matter, and from their references to statements which deal specifically with the said Act and the system of education introduced by it. These statements are, for the most part, contained in two speeches made by Dr. H. F. Verwoerd. The first speech was made in the South African House of Assembly on 17 September 1953 when the Bantu Education Bill was read for the second time [5], and the second in the Senate on 7 June 1954, when the Minister made a statement in regard to Bantu education policy [6].

Respondent proposes to deal first with the basic considerations and aims of the system of education introduced by the Bantu Education Act, and will do so by referring mainly to the two aforementioned speeches by Dr. Verwoerd. Thereafter the allegations made by Applicants will be dealt with.

5. In his policy speech in the Senate in June 1954 [7], Dr. Verwoerd dealt with the *general aims* of the Bantu Education Act after he had discussed certain shortcomings of the then existing system. He said:

> "The general aims of the Bantu Education Act are to remove the abovementioned defects by transforming education for Natives into Bantu education; by transforming a service which only benefits a section of the Bantu population and consequently results in alienation and division in the community, into a general service which will help in the building up of the Bantu community [8]."

On another occasion, also in the Senate, Dr. Verwoerd again stressed the fact that the Government's Bantu education policy involved a new approach and aimed at a new ideal, viz., that of building up a Bantu

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[1] **IV**, p. 362.

[2] Applicants' reference to **III**, p. 527 is brief and incomplete. As regards the development and aims of Respondent's policy of separate development, *vide* **II**, pp. 457-483.

[3] *Vide* the title to the section.

[4] **IV**, p. 365.

[5] *U. of S.A., Parl. Deb., House Assembly*, Vol. 83 (1953), Cols. 3575-3590.

[6] *Ibid., Senate*, Vol. II (1954), Cols. 2595-2622.

Other statements referred to by Applicants which deal with the Act and Bantu education policy are by the International Commission of Jurists (**IV**, pp. 364-365) and Lord Hailey (*ibid.*, p. 366). There is also a reference to the Eiselen Commission (*vide* **III**, p. 364) whose report and recommendations preceded the passing of the Act.

[7] *Vide* para. 4, *supra*.

[8] *U. of S.A., Parl. Deb., Senate*, Vol. II (1954), Col. 2599. The transformation referred to in this quotation, and how it would be effected, is referred to in para. 9, *infra*.

community [1]. He indicated that Bantu education was part of a general plan for the development and upliftment of the Bantu, and stated that Bantu leaders and Bantu schools had an important role to fill in the progress of the community. The approach to the task of community development, he said,

> "... is governed by the idea that the development of a community can actually be encouraged from outside but can only take place from within, that it is a process of growth which in the main always rests upon inherent growing power. That means that there can be no mention of progress unless the bearers of the progress are found within the community itself [2]."

The role of the school was referred to by him in the following terms:

> "The influence of the school can and should be two-fold. There is firstly the moulding of the individual child according to aptitude and talent, and secondly there is the moulding of the under-developed community by means of the school. On the one hand by the ploughing back of the good products to fertilize the community, a long term benefit, therefore, and on the other hand, a benefit which is immediately obtained, or can be obtained by making the parents and the Bantu authorities school-conscious and school-responsible and vice versa by also making the teacher school-conscious and responsible to the community [3]."

Dr. Verwoerd also stated that the idea that there could be Bantu community development, and civilization, without disowning everything that was Bantu, was to most of the Bantu a novel one. He said in this regard:

> "They (the Bantu) thought that there were only two alternatives, namely, to shake off everything that was Bantu and to assimilate as much as possible of the western civilization and of the English language as they were able, or to remain Bantu and uncivilized. That you may remain a Bantu, that your Bantu language can become a medium to civilization, and that you and your whole community together with you in this manner can achieve far quicker a higher spiritual, social and economic level of living, is for them a brand new and almost unbelievable thought [4]."

6. The Eiselen Commission, it may be pointed out in this connection, advocated a system of education which would, apart from its importance to the individual, play a vital role in the general development of the Bantu. The Commission stated in its report:

> "It is evident, therefore, that Bantu development and Bantu education must be largely synonymous terms. Education is more than a matter of schooling; indeed, in the education of a society to make a tremendous cultural leap such as the South African Bantu are called upon to make, the schooling of children, though of the utmost importance, must be regarded as only a part of a larger process. School education, if it is to be co-ordinated and in harmony with social development, must be seen as one of the many

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[1] *U. of S.A., Parl. Deb., Senate,* Vol. III (1955), Col. 4531.
[2] *Ibid.,* Col. 4528.
[3] *Ibid.,* Col. 4529.
[4] *Ibid.,* Col. 4530.

educational agencies and processes which will lead the Bantu to better and fuller living [1]."

The Commission proposed the following definition of the aims of Bantu education:

"*(a)* From the viewpoint of the whole society the aim of Bantu education is the development of a modern progressive culture, with social institutions which will be in harmony with one another and with the evolving conditions of life to be met in South Africa, and with the schools which must serve as effective agents in this process of development.

(b) From the viewpoint of the individual the aims of Bantu education are the development of character and intellect, and the equipping of the child for his future work and surroundings [2]."

Upon this definition follow these words:

"To harmonize the individual and social viewpoints as stated above it is essential to consider the language of the pupils, their home conditions, their social and mental environment, their cultural traits and their future position and work in South Africa [2]."

7. At the outset of his aforementioned speech in the Senate, Dr. Verwoerd stated that a comparison between the then existing educational system and the "new approach" [3] of the Bantu Education Act made it possible to "appreciate more clearly that the most important aim of the latter is to provide a more effective constructive service" [3]. He thereafter proceeded to deal, as has been noted [4], with what he termed the "shortcomings" of the then existing system. These shortcomings, as dealt with by him, may be summarized as follows:

(a) As a result of the fact that schools were controlled by numerous churches and missions "... there was no co-ordination of school interests with community interests ..." [5], and "... there was no co-ordination between school education and the broad national policy" [3].

(b) Control of education by the Provincial Administrations, and a general lack of co-ordination, had the result that—

"[e]ducation in the four respective provinces ... did not take into account either the communal interests of the Bantu or the general policy of the country or the policies of the other three provinces [6]".

(c) It would be unsound not to require the Bantu to make a direct financial contribution to their education, as had been the position from 1925 to 1945, because—

"... it is a sound educational policy to engender a feeling of responsibility among the (Bantu) community by allowing it to carry so much financial responsibility that it accepts the de-

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[1] *U.G.* 53—1951, p. 130 (para. 764).
[2] *Ibid.* (para. 765).
[3] *U. of S.A., Parl. Deb., Senate,* Vol. II (1954), Col. 2596.
[4] *Vide* para. 5, *supra.*
[5] *U. of S.A., Parl. Deb., Senate,* Vol. II (1954), Col. 2596. *Vide* also Col. 2598.
[6] *Ibid.*, Col. 2597 and *vide* Col. 2598.

velopment as something of its own and in this way guarantees the continuity thereof [1]".

(d) Because the schools did not form part of the community service,

"... education was not built up on community requirements and in the first place was not directed towards the promotion of community interests. The attempts of the provincial Departments of Education to direct it in that direction were only partly successful [2]."

In elaborating the point made in *(d)* above, Dr. Verwoerd said that Native education under the then existing system showed poor results, firstly, because curricula were unsatisfactory, being too European in character, and, secondly, because the schools had little holding power. He stated:

"In the main, education is provided which aims at getting pupils through examinations which up to Standard V and up to Junior Certificate and at the Senior Certificate standard is practically identical with European schools. The result is the weak grip of the school and the unsatisfactory achievements of the great majority of pupils. Nearly half the pupils are in the sub-standards, ten per cent reach Standard II, 3½ per cent reach Standard VI, only a half per cent reach Junior Certificate and a very few Matriculation. In evaluating these figures, it must further be borne in mind that the majority who pass just pass these examinations [2]."

Poor results, according to Dr. Verwoerd, were obtained also because of wrong teaching methods. He said that many teachers who had been taught in English had an "irresistible desire" [3], perhaps because of their inability "to differentiate ideas from the related terminology" [3], to convey knowledge to pupils in the same words in which such knowledge had been imparted to them. The result was that—

"... the Bantu pupil could not ... receive a thorough grasp of reading matter in the natural way through his mother tongue ... As was to be expected, the progress of the pupils was seriously hampered and those who reached the goal, mostly did so on the basis of superficial knowledge supplemented by an enviable ability to remember terms and definitions. They could couple richness

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[1] *U. of S.A.*, *Parl. Deb.*, *op. cit.*, Cols. 2597-2598. The word in brackets is wrongly printed as *Basuto* in Hansard. In regard to some of the points made in paragraphs *(a)*-*(c)* above, reference may be made to p. 129 (para. 752) of *U.G.* 53—1951 which reads as follows:

"Your Commission considers that the four most important criticisms of the present systems are:

(a) Bantu education is not an integral part of a plan of socio-economic development;

(b) Bantu education in itself has no organic unity; it is split into a bewildering number of different agencies and is not planned;

(c) Bantu education is conducted without the active participation of the Bantu as a people, either locally or on a wider basis;

(d) Bantu education is financed in such a way that it achieves a minimum of educational effect on the Bantu community and planning is made virtually impossible."

[2] *Ibid.*, Col. 2598.

[3] *Ibid.*, Col. 2610.

of vocabulary with a lack of knowledge and education in the true sense [1]."

8. Education provided in the aforementioned form, Dr. Verwoerd stated, "must stand isolated from the life of the Bantu society" [2] and did not uplift the community. It served, at most, to create a small class of educated or semi-educated persons who considered themselves elevated above their own people and who sought to enter the ranks of the Europeans, only to become dissatisfied and frustrated when they found that the Europeans were not prepared to admit them to their society. In this regard he elaborated as follows:

> "It prepares them not for life within the community which would gradually be uplifted by it, but for a life outside the community and for situations which in fact do not exist. In other words the community has not benefited from this to such an extent that because of the general progress of its sons and daughters who have won pretty examination certificates it could absorb them in a suitable manner. A considerable number of those who were trained in this way were taken up again in the education machine which created a cycle of its own and of the evils in isolation of the Bantu community. In this way Native education served to create a class of educated and semi-educated persons without corresponding national development. This is the class which 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 [3]."

The same point was also made in other parts of Dr. Verwoerd's speech. After stating that "segregation" had been "accepted as the country's policy from the beginning" [4], he said:

> "The curriculum (to a certain extent) and the teaching methods, by ignoring the segregation [or] apartheid policy, could not offer preparation for service within the Bantu community. 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 which has been mentioned. This is what is meant by the unhealthy creation of white-collar ideals and the creation of wide-spread frustration among the so-called educated Natives [5]."

And also:

> "The Bantu must be guided to serve his own community in all respects. There is no place for him in the European community above the level of certain forms of labour. Within his own community

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[1] *U. of S.A., Parl. Deb., op. cit.*, Col. 2610. In *R.P.* No. 22/1963, it is stated *i.a.* that "every examiner and Inspector of Bantu Education" could confirm the view that—

> "[w]here the Bantu child is ... confronted with strange facts in a strange language it is hardly surprising that downright memorisation remained the only way out". (Sec. E, p. 18 (para. 7 *(d)*.)

[2] *U. of S.A., Parl. Deb., Senate*, Vol. II (1954), Col. 2610.

[3] *Ibid.*, Cols. 2610-2611.

[4] *Ibid.*, Col. 2597.

[5] *Ibid.*, Cols. 2598-2599. The word in brackets is wrongly printed as "of" in the official text.

however all doors are open. For that reason it is of no avail for him to receive a training which has as its aim absorption in the European community while he cannot and will not be absorbed there. Up till now he has been subjected to a school system which drew him away from his own community and practically misled him by showing him the green pastures of the European but still did not allow him to graze there [1]."

Dr. Verwoerd had made the same point in his aforementioned 1953 speech in Parliament. He stated that in the past education had not only failed to strengthen Bantu communal life, but had, on the contrary, actually undermined community life and development; that it had divorced individuals from their communities, and made them feel that they were elevated above their own people [2].

Very much the same view was expressed by the Eiselen Commission in the following terms:

"The content of education and the methods employed have had harmful effects on the community in certain respects. The parents are frequently estranged from the school. In many respects the schools, especially secondary and high schools, have joined in creating a modern and extremely undesirable phenomenon, viz. that group of people who break away too rapidly from the views and habits of their own people and sometimes act against their own people. Such a stray minority is readily formed where two cultures are in close contact. The individual lives in the midst of his own community, but is not of the community; he is an outcast among his own people and can find no anchorage with the people of the other culture. He does not contribute to building up his own people and is of no significance in the other culture [3]."

9. After he had dealt with the general aims of the Bantu Education Act as outlined above, Dr. Verwoerd referred to methods to be employed in order to give effect to the reforms contemplated. He mentioned four measures, viz.,

(a) "... the control of the education system is taken out of the hands of the provinces and placed in the hands of the Department of Native Affairs so that a uniform education policy in accordance with the broad policy of the country can be introduced so that education can be co-ordinated with other services and so that the co-operation of the Bantu can be organized [4]";

(b) "... the local control of the schools under the supervision of the State is entrusted to Bantu bodies which must now learn to perform a service for the community as a whole ... The mission school is replaced by the community school [4]";

(c) "... the control of schools which do not serve local communities but whole areas, that is, institutions for advanced education and especially for the training of teachers, must be controlled by the Department itself [4]";

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[1] *U. of S.A., Parl. Deb., Senate,* Vol. II (1954), Cols. 2618-2619.
[2] *U. of S.A., Parl. Deb., House of Assembly,* Vol. 83 (1953), Col. 3577.
[3] *U.G.* 53—1951, p. 128 (para. 743).
[4] *U. of S.A., Parl. Deb., Senate,* Vol. II (1954), Col. 2599.

(d) "... it will be arranged that the Bantu themselves will carry an increasing amount of the cost of expanding their education services. The principle of a Native Development Account is re-established in practice by the creation of a Bantu Education Account [1]".

10. Describing existing Native schools generally as "schools within the Bantu society, but not of the society" [2], Dr. Verwoerd stated in his aforementioned speech of 1954 that it was the intention "to transform them into real Bantu community schools" [2]. To effect such a transformation, he said, Bantu education would have to comply with the following requirements:

"*Firstly, (a)* every Bantu taxpayer must have an equal right for his children to the fundamental education facilities which can be provided from the available funds. This is education in Sub *(a)* and *(b)* and probably up to Standard II, therefore in reading writing and arithmetic through mother tongue education, as well as knowledge of English and Afrikaans and the cardinal principles of the Christian religion. *(b)* The money which is contributed by the European and the Bantu taxpayer must be used to the greatest possible advantage for the greatest possible number.

Secondly, (a) the Bantu pupil must get knowledge, training and an attitude in school which will be useful and advantageous to him and at the same time benefit his community. *(b)* The subject matter must be put to him in such a way that he can understand it easily and make it his own so that he can benefit and serve his community in a natural way. *(c)* The school education must also equip him to meet the demands which the economic life in South Africa will make on him.

Thirdly, the Bantu teacher must be utilized as an active factor in this process of development of the Bantu community to serve his community and build it up and learn not to feel above his community so that he wants to become integrated into the life of the European community and becomes frustrated and rebellious when this does not happen and he tries to make his community dissatisfied because of such misdirected and alien ambitions [3]."

11. In dealing with the practical steps which would be taken to carry out the aforesaid requirements, Dr. Verwoerd made the following points:

(a) The primary school curriculum would consist of two complete courses, viz., the lower or fundamental course, and the higher course [4].

Dr. Verwoerd said in this regard:

"Education in the lowest classes is seriously affected by what is described as the Standard VI mentality of the teachers. This means that the education is conducted as if every pupil will finish the whole primary course. In practice, as a result, just the opposite has happened. As the figures show, approximately 3½ per cent. of the pupils finish the primary course. In

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[1] *U. of S.A., Parl. Deb., op. cit.,* Cols. 2599-2600.
[2] *Ibid.,* Col. 2606.
[3] *Ibid.,* Cols. 2606-2607. (Italics added.)
[4] *Ibid.,* Col. 2608. *Vide* also *U.G.* 53—1951, pp. 121-122 (paras. 686 and 688).

other words, the hold of the schools on the pupils leaves much to be desired [1]."

(b) Curricula in the fundamental stage would not go further than to teach pupils—

"... to read, write and do arithmetic through the mother tongue medium, and begin to learn Afrikaans and English with religious education and singing [2]".

Dr. Verwoerd pointed out in this regard that the requirement of mother-tongue instruction up till at least Standard II was not a new one, but that it had largely been ignored in the past [3], and, also, that the syllabuses, for the lowest classes would not differ fundamentally from those then prescribed in the various provinces, but not always used in practice [4].

(c) After stating that the curriculum of the schools envisaged a system of education which, starting with the circumstances of the community, aimed at meeting the requirements of the community and which would be "carried by the mother tongue of the pupils" [4], Dr. Verwoerd said [4]:

"The economic structure of [South Africa] of course results in the Natives in large numbers having to earn their living in the service of Europeans. For that reason it is essential that Bantu students should receive instruction in both official languages from the beginning so that they can already in the lower primary school develop an ability to speak and understand them [4]."

Dr. Verwoerd explained that his remarks, as summarized in this paragraph, were concerned largely with "the basic lower primary school course" which would soon be "introduced everywhere" [5]. He stated that urgent attention would also be given to certain changes in the "higher grades" of education [6], and indicated that there would be an expansion of school facilities for Bantu children. He pointed out in this regard that expenditure on Bantu education, including school feeding, during the then current year amounted to £8,500,000, and that expenditure *per capita* of the population was higher than in the case of "any other Native community in Africa" [7].

12. Having in the preceding paragraphs given an outline of the general aims of Respondent's Bantu education policy in South Africa, Respondent now proceeds to deal in this and the succeeding paragraphs with specific allegations made by Applicants.

In discussing Respondent's general education policy Applicants make the following allegation: "Education in South Africa and in South West Africa is geared to the objectives of Respondent's general policy of *apartheid* [8]."

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[1] *U. of S.A., Parl. Deb., Senate,* Vol. II (1954), Cols. 2608-2609.
[2] *Ibid.*, Col. 2609, *vide* also Col. 2611, where handicraft is also mentioned.
[3] *Ibid.*, Cols. 2609-2610.
[4] *Ibid.*, Col. 2611.
[5] *Ibid.*, Cols. 2611–2612.
[6] *Ibid.*, Col. 2612.
[7] *Ibid.*, Col. 2607.
[8] **IV**, p. 364.

This statement is true as far as it goes. Respondent has already stated that its educational policy conforms to its general policy of separate development in that separate educational facilities are, as far as is practicable, provided for the various population groups. In this sense Respondent's educational policy relative to the Native population, like its policy relative to all the groups, forms an integral part of state policy. It has already been explained that Respondent's policy of separate development is based on the fact that there are material differences between the various population groups, and that the policy is directed at the development of the said groups into independent, self-respecting communities. It is therefore misleading to refer only to Respondent's " *'Native' education policy*" [1] as having "come to form an integral part of state policy".

13. In other respects, too, Applicants make allegations, or refer to statements made by others, which misrepresent Respondent's policy and intentions. Thus, they state:

> "The asserted objectives of Respondent's policy of *apartheid* are that the various 'non-European' groups be separated in every possible way from the 'European' group and from each other, that such 'non-European' groups 'develop' in their own manner and at their own rate to form their own institutions and communities, and that such groups eventually 'have self-government . . . '[1] "

Respondent points out that in the above passage Applicants have used two expressions extracted from the Counter-Memorial, viz., "develop" and "self-government", which they have mingled with assertions of their own in order to render a distorted version of the objectives of Respondent's policy. In this manner they create the impression that Respondent *enforces* separation on the non-European groups in "every possible way". This is, of course, not the case. As Respondent has explained, it *recognizes* the differences between the various population groups and their desires to be treated as separate communities, to which desires Respondent gives effect as far as is practicable. There is accordingly no question of the groups being kept apart in order that they may "form their own . . . communities". Their existence as separate communities has at all times been a fact. Applicants' statement in question, by the use of the words " 'develop' in their own manner and at their own rate", also creates the impression that there is neglect on the part of Respondent in that it allegedly leaves the non-European groups to develop on their own without encouragement, advice or assistance from Respondent. There is no truth in such a suggestion. Throughout the Counter-Memorial proof is given of the efforts made by Respondent to promote the well-being, progress and development of all the inhabitants of the Territory. Indeed, in the very section of the Counter-Memorial from which Applicants have extracted the words "have self-government" Respondent explained, with reference to developments in South Africa, that—

> "[i]n the process of advancement towards this goal, measures have been and are constantly being taken to develop the Bantu areas, and it is Respondent's belief that the Bantu themselves should play an active part in this development. In this process of development Respondent, through its Departments of Bantu Administration and

[1] IV, p. 364. (Italics added.)

> Bantu Education, employs and trains Bantu who can contribute to the development of their areas and to the advancement of their own people [1]."

The same approach is followed by Respondent in promoting the progress of the Native groups in South West Africa in all spheres of administration, including education. In testimony thereof Respondent need only refer to the findings of the Odendaal Commission with regard to present conditions in the Territory, and to Respondent's acceptance of the recommendations of the Commission, which recommendations are aimed at further and accelerated progress of the non-European groups in the Territory, especially the Natives.

14. Applicants rely on a statement of the International Commission of Jurists to the effect that the Bantu Education Act and subsequent Acts pertaining to education—

> "... are necessary to complement the African reserve, group areas and pass law legislation which aim at separate and restricted development of the non-white only to the labour level required by the Europeans [2]".

It is hardly necessary for Respondent to say that this contention of the Commission is without substance. None of the legislative measures referred to by the Commission is aimed at "restricted development of the non-white", or has that effect. The facilities provided, and opportunities created, for the educational advancement of the non-White groups, and the level of advancement already attained by many of them, refute the suggestion of the Commission. Indeed, as has been demonstrated above [3], the very object of the Bantu Education Act is to build up sound, self-respecting Bantu communities in which there will be no limit to the level to which members of such communities would be able to aspire in both the educational and economic spheres.

15. Applicants say:

> "The basic assumption of *apartheid*, which therefore constitutes *a fortiori* a basic premise of 'Native' education policy, is that there is an unbridgeable gulf between the population 'groups' [2]."

In making this statement, Applicants refer to three sub-paragraphs in Respondent's Counter-Memorial [4] which dealt with certain aspects of policy relevant to a particular issue raised in Applicants' Memorials [5]. Elsewhere in the Counter-Memorial [6] Respondent dealt in detail with the circumstances and considerations governing its system of separate education for the different population groups of South West Africa. These expositions, when read as a whole and in their context, do not in the least support the "unbridgeable gulf" contention.

Applicants proceed to say that the Commission on Native Education (the Eiselen Commission) whose recommendations resulted in the Bantu Education Act, found in its report that:

> "The Bantu child comes to school with a basic physical and

[1] **III**, p. 527.
[2] **IV**, p. 365.
[3] *Vide* paras. 5-6, *supra*.
[4] *Ibid.*, footnote 2, being a reference to **III**, p. 527 (paras. *(b)-(d)*).
[5] **I**, pp. 157-158.
[6] *Vide* **III**, pp. 353-372 and 376-382.

psychological endowment which differs, so far as your Commissioners have been able to determine from evidence set before them, so slightly, if at all, from that of the European child that no special provision has to be made in educational theory or basic aims [1]."

Applicants' suggestion seems to be that, in the light of this view of the Commission, there is no ground for differentiation in the case of education for children of the Native and European groups. Applicants, however, neglect to say that, whilst the Commission thought that no special provision had to be made in "educational theory or basic aims", it nevertheless thought that there were various factors which affected the *content* and *methods* of the Bantu child's early instruction. The Commission stated—to cite the rest of the paragraph in the report from which Applicants quote:

> "The now universally accepted principle of leading the child in his education from the known and familiar to the unknown and the unfamiliar has to be applied equally in the case of the Bantu child as with children of any other social group. But educational practice must recognize that it has to deal with a Bantu child, i.e., a child trained and conditioned in Bantu culture, endowed with a knowledge of a Bantu language and imbued with values, interests and behaviour patterns learned at the knee of a Bantu mother. These facts must dictate to a very large extent the content and methods of his early education [2]."

Dr. Verwoerd dealt with the same matter in his 1953 speech in Parliament [3] when he said, *inter alia*:

> ". . . your teaching should begin where all education should begin, namely with the known facts or common knowledge. The common knowledge of the white child is different from that of the Bantu child. Everybody who has had anything to do with intelligence tests knows that when you try to apply an intelligence test based on the common knowledge of children of a certain community, the test can be a complete failure and give entirely wrong results in respect of children not falling within the same group of common knowledge. If the contents of that intelligence test is based on the knowledge of an urban child, you cannot apply that same test to the rural child. He possesses a different fund of common knowledge. The same applies to education. It is therefore also correct to say that Bantu education must of necessity be different, because it has as its starting point other sources and other kinds of knowledge. One should therefore not confuse fundamental principles of education which may be similar for all people, with the practical form which positively differs for different people [4]."

16. In illustration of what Applicants describe as the "intention of Respondent's 'Native' education policy" or "basic policy", Applicants cite short extracts from the speeches by Dr. Verwoerd in the South African Parliament which have been referred to above [5].

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[1] IV, p. 365, footnote 5.
[2] *U.G.* 53—1951, p. 131 (para. 773).
[3] *Vide* para. 4, *supra*.
[4] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 83 (1953), Col. 3585.
[5] *Vide* paras. 4, 5 and 7-11, *supra*.

Applicants use these extracts and comment thereon out of context in an attempt to establish a charge that Respondent's Native education policy is inspired by improper motives towards the Bantu of South Africa and, by necessary implication, also towards the Native inhabitants of South West Africa.

Respondent submits that if due regard is had to the full text of the speeches from which Applicants have extracted the passages quoted by them, the said speeches do not establish what Applicants seek to prove. Indeed, a proper reading of these speeches will show that Respondent's policy of separate development, and its educational policy as implemented in the Bantu Education Act, do not aim at unfair discrimination against any population group, Native, Coloured or European, but are directed to the very opposite end, namely to bring about a situation in which, by a system of separate development, unlimited opportunities in the educational and in all other spheres will be possible for all sections of the community. In this way Respondent aims at seeking a solution to the problem that besets countries like South Africa and South West Africa which are populated by heterogeneous communities standing at different levels of development, possessing different languages, cultures and customs, and desiring to preserve their separate identities. In these circumstances Respondent regards it as in the best interests of the Native groups that education should be provided for them in separate institutions where due consideration can be given to their specific culture, outlook and aspirations.

It will be observed that although Applicants speak of the "intention" of Respondent's educational policy, they make no reference to its primary aims of strengthening and building up healthy, self-respecting and self-governing Bantu communities. For Applicants the "intention" lies in the fact that the policy does not contemplate an attempt at the creation of one single and integrated society in which all individuals have identical rights. This they regard as basically wrong, and it is for this very reason that they seek to establish improper motives on Respondent's part. As will be shown in the next succeeding paragraphs, their attempts in this regard are singularly without success.

17. Referring to the aforementioned speech made by Dr. Verwoerd on 7 June 1954, in which he stated, *inter alia*, that "[t]here is no place for the [Native] in the European community above the level of certain forms of labour. Within his own community however all doors are open to him", Applicants say: "Any concept of 'equality' of the 'Native' and the 'European' is, therefore, antithetical to this basic premise [1]."

Since Respondent's policy does not aim at creating inequalities as between the European and Native population groups, but at providing separate facilities which, inasmuch as they are intended to serve the different interests of the various groups, are not identical in all respects, but are nevertheless in principle of the same nature, Applicants' complaint can arise solely from the fact that there is a separation between the groups. Applicants are, however, not content to rest their charge on this basis only, but proceed with an attempt to establish *mala fides* on Respondent's part. Thus they say, with reference to another statement made by Dr. Verwoerd, that—

> "Respondent apparently hopes to avoid this 'frustration' [of the Natives], in part, by creating a utilitarian scheme of education for

[1] IV, p. 365.

the 'Natives' in the Territory which will train them to continue serving the 'White' group without 'frustration', on the one hand, and to tend to their own problems in their own 'areas' by themselves, on the other [1]."

In support of this statement they cite another passage from a speech of Dr. Verwoerd in which he said, *inter alia*:

"Uptil now [the Native] has been subjected to a school system which drew him away from his own community, and practically misled him by showing him *the green pastures of the European but still did not allow him to graze there* [1]."

From a proper reading of Dr. Verwoerd's speech it will be seen that it was precisely because of the limitations which prevented the Natives from being absorbed in and progressing within the European community, that Respondent's policy aimed at providing, and educating them for, opportunities of advancement within their own communities.

Applicants advance nothing which can serve to support their contention that Respondent's policy is directed at training the Natives to "continue serving the 'White' group". It is purely a figment of their imagination. Indeed, a total lack of evidence to support their allegation leads them to omit from another passage quoted by them from a speech of Dr. Verwoerd, a vital part which contradicts the very charge made by them. There they quote Dr. Verwoerd as having said that Native education is planned so that—

"[it] will be suitable for those who will become the industrial workers in the country and also that education can be suitable for those who have to stand on their own feet in the reserves and who will have to conserve their soil and develop their agricultural activities . . . [2]".

In this speech Dr. Verwoerd stated that the control of Native education would be transferred from the four provinces to a single department of State so as to ensure, *inter alia*, a uniform education policy, but that the principle of uniformity would not preclude efficient decentralization or diversified education to meet various circumstances. Even in a uniform policy, he said, education could be made suitable for various classes of men of the future: not only industrial and agricultural workers, but also farmers in the reserves, and professional men. What Applicants conveniently omitted from the passage quoted by them are the following words, which concluded the passage:

". . . that education can also take into account the requirements of those who will become the rural and agricultural workers, *and it can also keep in mind those who would develop to the higher professions by means of which they will be able to serve their own community* [2]". (Italics added.)

Respondent submits that the conclusion which Applicants seek to draw from their incomplete quotation of part of Dr. Verwoerd's speech does not merit further consideration.

18. Another part of a speech of Dr. Verwoerd quoted by Applicants, which, if read out of context, creates a wrong impression, is the following:

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[1] IV, p. 366.

[2] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 83 (1953), Col. 3580.

"I just want to remind hon. members that if the Native in South Africa to-day in any kind of school in existence is being taught *to expect that he will live his adult life under a policy of equal rights, he is making a big mistake* [1]."

This passage is described by Applicants as the "most concise illumination of Respondent's basic policy" [1].

This single passage, read out of context, does not illuminate, but rather creates a wrong impression of Respondent's policy. The remark made by Dr. Verwoerd related to the aspect of the policy of separate development which envisages the most appropriate and beneficial advancement potential of the Native as lying not in attempts at creating an integrated society, but in the development and progress of a heterogeneous society in which, while there is denied to the Native equal rights in European areas, there is reserved to him rights of priority in his own areas. Dr. Verwoerd's remark applies *mutatis mutandis* to the position of the European in the Native areas. In its proper perspective, therefore, this statement also does not in any way serve to establish improper motives on the part of Respondent.

19. Applicants also profess to find support for their abovementioned charge regarding the intention of Native education in a paragraph in the report of the Eiselen Commission. Applicants say:

"The Eiselen Commission, in discussing the plan with regard to language instruction, expressed the view that instruction should proceed so that 'the Bantu child will be able to find his way in European communities; *to follow oral or written instructions; and to carry on a simple conversation with Europeans about his work and other subjects of common interest*' [1]."

Applicants seem to suggest that the Eiselen Commission held the view—and, also, that Respondent shares that view—that Native children need be taught no more English or Afrikaans at school than would be sufficient to make them capable of understanding instructions given them as employees of European masters.

The Eiselen Commission, however, did not, to the knowledge of Respondent, either say, or intend, anything of the kind. The Commission, well aware of the fact that many Native pupils leave school during the first four—or even two—years of schooling [2], and, also, aware, of the contradictory views held by educationists as to the wisdom of teaching a foreign [3] language to children in primary schools [4] felt that in South Africa economic considerations made it necessary in the interests of the Native children to teach them English and/or Afrikaans at an early stage. The Commission stated in this regard:

"Your Commission wishes to emphasize, however, that economic considerations make it absolutely necessary that the Bantu child should obtain a knowledge of one or both of the official languages while he is still at school. The Bantu population is indeed so alive to this that they consider it the main object of the child's schooling [5]."

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[1] IV, p. 367. (Italics added by Applicants.)

[2] *U.G.* 53—1951, p. 134 (para. 796).

[3] I.e., a language other than the child's mother tongue.

[4] *U.G.* 53—1951, p. 146 (para. 922).

[5] *Ibid.* (para. 923).

From the paragraph of the Commission's report referred to by Applicants, it appears clearly that the Commission dealt only with the minimum of English or Afrikaans which should be taught to those pupils who do not proceed beyond the lower primary standards. It does not refer to language instruction above the level of the lower primary course. The said paragraph reads as follows:

> "We also wish to point out that witnesses, particularly the Bantu, laid great stress on the need to teach both official languages. We are therefore of the opinion that provision should be made for instruction in both these languages even in the lower primary school, and this should be done in such a way that the Bantu child will be able to find his way in European communities; to follow oral or written instructions; and to carry on a simple conversation with Europeans about his work and other subjects of common interest [1]."

Dr. Verwoerd, in one of the speeches from which Applicants have extracted certain passages, also referred to the fact that a low percentage of Native pupils completed the lower primary standards [2], and that the economic structure of South Africa was such that many Natives earn their living in the service of Europeans. "For that reason", he said,

> "... it is essential that Bantu students should receive instruction in both official languages from the beginning so that they can already in the lower primary school develop an ability to speak and understand them [3]".

20. Applicants also cite excerpts from the work of Lord Hailey, *An African Survey*, in which he states that the—

> "... advocates of the principle of separatism clearly hold that the gulf between the European and the Bantu is so deep that it would be unprofitable, even if it were not politically inadvisable, to attempt to bridge it [4]".

Another passage cited by Applicants from this work is to the effect that the passage of the Bantu Education Act—

> "... amounted to a decision that education on European lines would be no good to an African in the sphere which he was now destined to fill, and it might even be dangerous, as encouraging him to trespass into that occupied by the European [5]".

Save in one respect Respondent is not in disagreement with the light in which Lord Hailey views the objects of the Act. The respect in which there is disagreement is the view which he expresses as to the "sphere which [the Native] was now destined to fill". As will be clear from the statements of policy referred to above [6], the object of the Act was not to divert the Native from a sphere which he was formerly either allowed or "destined" to fill into a new sphere. The legislature recognized the limitations which in fact existed for the Native within the areas of the European community and for that very reason sought to create opportunities for him within his own community—hence the aim of adapting

[1] *U.G.* 53—1951, p. 146 (para. 924).
[2] *U. of S.A., Parl. Deb., Senate,* Vol. II (1954), Cols. 2598 and 2609.
[3] *Ibid.*, Col. 2611.
[4] IV, p. 365.
[5] *Ibid.*, p. 366.
[6] *Vide* paras. 5 *et seq.*, *supra*.

the educational system to conform with the broader objects of the policy of separate development, in which the Native groups are intended to develop as separate and self-respecting communities to ultimate self-realization.

21. Finally Applicants refer to a statement allegedly made by Respondent's Minister of Bantu Education in the course of a speech made on 22 August 1959 [1], and they contrast this statement with a passage in Book VII of Respondent's Counter-Memorial [2]. The allegation made by Applicants is that the Minister, in contrast with the "benevolent form of expression" [1] used in the Counter-Memorial, made a "more forthright admission" [1] in the words ascribed to him. Precisely what the Minister is alleged to have admitted [3], is not stated by Applicants. The suggestion seems to be, judging by the words which Applicants italicize [4] and by what they allege in the Reply [1], that the Minister made it plain that it has been, and is, Respondent's intention "to ensure the paramountcy of the white man in South Africa", and not to allow the Bantu to fill any but the lowliest occupations.

The fact is that the Minister did not say, or intend to convey, any such thing.

Respondent wishes to point out the following in regard to the statement attributed to the Minister of Bantu Education and the speech made by him on the aforementioned date:

(a) The statement quoted by Applicants is, on the face of it, a summary of what is supposed to have been said.

(b) The speech in question was not, as is alleged by Applicants, broadcast by the South African Broadcasting Corporation, either at the time alleged or at all; nor did the Corporation furnish the text of the statement to Dr. Xuma, who is alleged to have quoted it in a paper read by him [5].

(c) The statement quoted by Applicants is an incomplete and distorted summary of what the Minister actually said. The Minister did not say that every law concerning the Natives which had been passed by the Government had been passed with the object of protecting the White man. Such a statement would have been ridiculous, and untrue. Nor did the Minister say that every such law was intended—or that

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[1] **IV**, p. 367.

[2] **III**, p. 529 (para. 20 *(h)*). Respondent in this paragraph made the point that its policy of separate development involves advantages for the educated and more advanced members of the Bantu groups, and that because this policy is in a stage of transition from an earlier position of "White guardianship and leadership in every sphere of a partially integrated economy to equality of opportunity for members of the non-White groups in the form of leadership in largely separated, though mutually interdependent economies of their own groups", Respondent has "found it best, as a matter of practical policy, to respect the unwillingness of members of the White group to serve in positions of subservience to members of the Bantu groups, but at the same time to create compensatory opportunities for higher employment of members of the last-mentioned groups through acceleration, as far as practicable, of the development of their own homelands and economies".

[3] As will be indicated below, Respondent denies that the Minister used the words ascribed to him.

[4] Viz., "to ensure the paramountcy of the white man in South Africa".

[5] **IV**, p. 367, footnote 3.

the Government intended—to ensure the paramountcy of the White man in South Africa. Such a statement, if made without qualification limiting it to the parts of South Africa intended to be "white", would have been in conflict with what Respondent's Prime Minister had stated only three months previously, viz.:

> "I say that if it is within the power of the Bantu and if the territories in which he now lives can develop to full independence, it will develop in that way [1]."
>
> "Therefore to talk about partition and subdivision as being a distasteful pattern is utterly nonsensical, because in terms of both policies there will be Black areas, and in terms of the policy of apartheid the White man will at least control his own area, whatever the difficulties might be and however hard it might be. He at least has the opportunity to save himself which under the other circumstances of a multi-racially controlled state he will not have [2]."

(d) The Minister of Bantu Education made the point that peaceful and friendly relations could best be ensured by having separate areas for Whites and Bantu, and that the development of the Bantu in a unitary state, or under a policy of partnership with the Whites, held greater dangers for the latter than the development of the Bantu in their own areas. Political power, the Minister said, would have to be given to the Bantu, but it would be given to them in their own areas, and not in South Africa's existing Parliament.

(e) The Minister also said that education would in future play an important part in relations between the Whites and the Bantu. For that reason, and to prevent wrong developments, the Government had decided to assume control of Native education. The Minister then dealt with these aspects of Bantu education on substantially the same lines (although much more briefly) as Dr. Verwoerd had done in his speech in the Senate in 1954 [3]. He said, *inter alia*, that the Bantu should be equipped to serve their own people; that educated Bantu should strive to develop their own communities; and that education in the past had often wrongly led the Bantu to believe that they could fill jobs in the White economy when, in fact, such jobs were not available to them.

In the premises it is clear that this speech of the Minister of Bantu Education does not support Applicants' contention.

C. Categorization

22. Applicants' allegations in this section of the Reply may be summarized as follows:

(a) that Respondent's policy is one which has regard to "groups", and considers individuals only as members of groups;

(b) that the "policy of differentiation ... is rigidified by its ready suitability for the development of the policy outlined" thereafter [4], by which is apparently meant a policy of alleged oppression of the

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[1] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 101 (1959), Col. 6221.

[2] *Ibid.*, Col. 6223.

[3] *Vide* paras. 5 *et seq., supra.*

[4] IV, p. 370.

Natives; and that it "enables Respondent to adopt differentiated policies of expenditure" [1].

Respondent will deal with Applicants' specific allegations in the order aforestated.

23. Applicants say that "[t]hroughout its Counter-Memorial, Respondent expresses its policy in terms of 'groups' " [2], and that a "rigid tendency to categorize by group designation is the recurrent theme of the metaphysics of *apartheid*" [3].

As has been shown in the Counter-Memorial, Respondent's policy in South West Africa is one of separate development of the various population groups which constitute the total population of the Territory. The reasons for this policy have been dealt with before [4], and it is not intended to do so again. It will be sufficient to repeat that the population of the Territory has never been a homogeneous one, but, on the contrary, is composed of several distinct racial and cultural groups; that in regard to education—

> ". . . it is Respondent's firm belief that it would be failing in its duty under the Mandate if it were to abolish its present system of separate schools for the respective groups and to substitute for it schools which will be open to all the groups. Not only would such a system lead to dissatisfaction and group friction, but it would also result in the neglect of the needs of all the groups and in irreparable harm to the Territory as a whole [5]",

and that it is Respondent's conviction that its policy of separate development is best able to avoid or reduce to a minimum all undesirable aspects and manifestations of group reactions, such as unfair discrimination, domination of one group by another, and the like [6].

Respondent believes, in other words, that it will be inadvisable to attempt to establish an integrated, or single, society in which group considerations will be absent, or count for nothing: a society, in other words, which will know only "individuals", and not "groups", or "members of groups".

The aforegoing does not mean, as Applicants allege, that Respondent has regard to individuals only as members of groups [3], or that Respondent "does not attempt to provide for the 'particular needs' of *individuals comprising* the groups" [1]. On the contrary, the separate development of the groups will, it is Respondent's conviction, provide for the individual members thereof the best possible opportunities for self-realization, whatever the level such individuals may be capable of achieving. As has been seen, this is one of the most important objectives of the policy. Applicants base their allegations on Respondent's use of words like "group", "groups", "members of groups", etc., in cases where, as will appear from an analysis of the statements referred to by them, Respondent dealt with the differences between the various population groups, or with the reasons underlying its policy for differentiating between the groups. It was, of

[1] IV, p. 370.

[2] *Ibid.*, pp. 367-368. Applicants' references to the Counter-Memorial are, however, in the present content, limited to Book VII thereof.

[3] *Ibid.*, p. 368.

[4] *Vide* II, pp. 404-488.

[5] III, p. 382.

[6] *Ibid.*, p. 528.

course, only natural that Respondent, in dealing with its policy in the Counter-Memorial, should frequently have used words like "groups", "members" of groups, "children" of groups, etc. On occasion it also used the word "group", or "groups", to signify the individual members composing a particular group or groups [1]. When regard is had to the context in which these words are used in the Counter-Memorial, they cannot, by themselves, justify allegations of the kind referred to above. Nor can it be said that Respondent, in using such expressions in the context stated, formulated its "concept of the role of the individual in human society" [2].

In the following paragraphs Respondent deals with the specific allegations made by Applicants in this regard.

24. Applicants say that nowhere in the Counter-Memorial is there "a sign of an individual being considered other than as a member of a group" [3], and they refer "especially" [4] to certain pages of Book VII of the Counter-Memorial where Respondent dealt briefly with social and economic conditions, past and present, in South Africa, and with certain basic considerations which contribute towards the motivation of Respondent's policy of the separate development of the European and Bantu population groups of the country [5]. Respondent pointed out, *inter alia*, that there "has, throughout South Africa's history, been social separation between the White and Bantu groups; that the members of each group prefer to associate with members of their own group; and that certain kinds of close contact between members of the two groups, particularly in the more intimate spheres, tend to create friction" [6], and stated its conviction that a policy of separate development of the groups was, both in South Africa and South West Africa, best able to avoid or reduce to a minimum all undesirable aspects and manifestations of group reactions [7]. Respondent, in other words, stressed that there had, as a fact, always been separate societies in South Africa, and expressed the view that attempts to create an integrated, or single, society would create competition and conflict, to the detriment of all concerned. This, in Respondent's submission, is no justification for saying that Respondent has regard to individuals only as members of groups.

In this same regard Applicants refer, in a footnote, to a brief passage in the report of the Odendaal Commission reading as follows:

> "The moral and economic principles of a modern economic system are different from those of traditional groups where the *group* and not the *individual* is the focal point [8]."

It is not clear what point Applicants seek to make in this regard, particularly since the passage quoted seems to be contrasted [9] with the pages of the Counter-Memorial mentioned in the same footnote. The intention may be to convey that the Commission's ascription of certain "moral

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[1] *Vide* passage quoted at IV, p. 370 ending with the italicized words "highest level they can attain".

[2] IV, p. 369.

[3] *Ibid.*, p. 368.

[4] *Ibid.*, in footnote 3.

[5] III, pp. 527-530.

[6] *Ibid.*, p. 527.

[7] *Ibid.*, p. 529.

[8] IV, p. 368, footnote 3, referring to *R.P.* No. 12/1964, p. 427 (para. 1431).

[9] *Vide* the "Cf." in footnote 3 at IV, p. 368.

and economic principles" to traditional groups is an unwarranted "categorization", or that there is no justification for saying that in the case of traditional groups "the group and not the individual is the focal point"—or, perhaps, something else; Respondent does not know. Be this as it may, it is Respondent's submission that there is adequate authority for the view expressed by the Commission.

The relevant paragraph in the Commission's report reads as follows:

> "The moral and economic principles of a modern economic system are different from those of traditional groups where the *group* and not the *individual* is the focal point. The modern economic system and the traditional system are therefore not comparable or readily reconcilable. Their problems are different, their human values and motivations are different. Consequently there has to be a differentiated policy, since—
>
> > 'to assume, as is sometimes done, that one may proceed from a strictly economic analysis of the development problem to a prescription of a program for development without careful attention to the social-cultural environment within which this program will have to be undertaken is to proceed in ignorance towards almost certain disillusionment and possibly outright disaster' [1]." (Footnote omitted.)

This is followed by a paragraph which begins as follows:

> "While in the case of the Whites the primary problem is one of further technological development, in the case of the traditional non-White it is one of socio-cultural transformation providing increasingly for the adoption and spontaneous application of modern production methods and aims. Socio-cultural changes are inevitably painful and take place slowly . . .[2]"

The aforementioned views of the Commission are supported by other authorities.

Thus, in a recent United Nations publication the concept of community in traditional African society is referred to as follows:

> "Traditional Africa is characterized by a social organization in which the individual lives, acts and works as a member of the group to which he belongs, whether this group be the family or the village. All social, moral and economic life in the traditional society is permeated by this Community structure, which governs man's reaction. In his civil status, the methods of production, his rights as a landowner, the sharing of consumer goods, the individual is dependent upon the other members of the community. In exchange for this subordination, however, he gains a solidarity which affords him relative security. The efforts of the productive unit, confined to the family or the village, are limited to providing its domestic needs; the unit is enclosed within an economy of subsistence [3]."

And Westermann wrote as follow of the prevalence of the idea of community in African societies:

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[1] *R.P.* No. 12/1964, p. 427 (para. 1431). The quotation is from Buchanan, N. S. and Ellis, H. S., *Approaches to Economic Development* (1958), p. 86.

[2] *Ibid.*, p. 427 (para. 1432).

[3] *U.N. Doc.* E/CN. 14/171, *Economic Bulletin for Africa*, Vol. II, No. 2 (June 1962), pp. 92-93.

> "African society is characterized by the prevalence of the idea of community. The individual recedes before the group. The whole of existence from birth to death is organically embodied in a series of associations, and life appears to have its full value only in these close ties. Though there is in them a well-ordered gradation between persons who command and who obey, yet the prevailing feeling is that of equality ... The group imposes duties on the individual, but it also grants privileges; it takes from its members much of their personal responsibility and offers them its protection ... Membership in a communal bond which involves fellowship with the co-members and connexion with the ancestors gives the individual peace of mind and a feeling of security. The introduction into a conscious participation in the communal life of the group, and a knowledge of the rules of behaviour resulting from it, form an essential part of education [1]."

A modern economist, Prof. A. O. Hirschman, has pointed to what he describes as a "group-focused image of change" in the case of the traditional, communal type of society. He writes that even—

> "[w]hen the idea of the possibility of economic progress is forcibly impressed upon the consciousness of such a society, it will be interpreted to apply only to society as a whole. In other words, individuals will think of economic change as something that must affect equally all members of the group with which they identify themselves [2]",

and that this "group-focused image of change" is "... incompatible with any large-scale development aiming at a fundamental transformation and modernization of an economy" [3].

25. Applicants purport to find the "most extreme" example of Respondent's alleged "tendency to categorize by group designation" [4] in the speech made by South Africa's Minister of Bantu Education on the occasion of the introduction in the South African Parliament of the Extension of University Education Bill in 1959 [5]. They quote a part of the said speech, and say that the Minister therein characterized "South African tribes as 'national units' and 'national groups' " [4].

Applicants' allegations are not correct. The Minister did not characterize South African "*tribes*" as "national units" or "national groups", and in the passage quoted by Applicants he did not, as they suggest, deal with such Bantu units or groups. The Minister, who spoke in Afrikaans, used the word "volkseenheid" [6] to describe the European group, the Coloured group, and various Bantu groups, or peoples. The word is quite inappropriate to describe a tribe, and was not intended to refer to tribes. There are, to cite an example, various Xhosa tribes in South Africa, and all these tribes together constitute the Xhosa people, or such a "national unit" or "national group" as the Minister had in mind. There are several such Bantu groups or peoples in South Africa. They are, and

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[1] Westermann, D., *The African:* To-day and Tomorrow (1949), p. 65.

[2] Hirschman, A. O., *The Strategy of Economic Development* (1960), p. 12.

[3] *Ibid.*, p. 13.

[4] **IV**, p. 368.

[5] *Vide* **III**, pp. 482-486, in regard to separate universities in South Africa.

[6] The word "volk" means a "people", while "eenheid" means "unit". *Vide* **III**, p. 484.

have for a long time been, separate groups which are conscious of, and desirous of maintaining, their separate identities, and in Respondent's submission the recognition of such groups as peoples or embryo nations is not only realistic, but proper.

In the passage quoted by Applicants the Minister, as stated above, did not deal only with *Bantu* "national units", but had in mind *all* such units in South Africa, i.e., also the White, Coloured and Indian groups. This is clear from the extracts from the speech quoted by Respondent [1], and also from words used by the Minister but not quoted in the Counter-Memorial. The following, e.g., occurs in the Minister's speech shortly after the first extract quoted by Applicants in the Reply [2]:

> "... it has been our experience that when Bantu students register at universities *which are really intended for other national groups*, the needs of their own national communities are not taken into account ... [3]".

Applicants say that as a result of the outlook reflected in the final paragraph quoted by them "the social interchange and natural competition necessary for the realization of wider horizons is made impossible" [4] and that "Respondent's policy serves to harden the lines of demarcation and to render static the elements of society" [5].

Respondent has already shown that all relevant factors were duly considered and weighed when it was decided to establish separate universities in South Africa, and that Respondent believes that such universities serve the best interests of all [6]. Respondent has also shown that its policy of separate development is based, *inter alia*, on the fact that society in South West Africa, as in South Africa, is not homogeneous, and that the separate development of the various groups, or societies, constituting the population, offers the best prospect of ensuring the peaceful development and co-existence of all concerned [7]. In the circumstances Respondent does not propose to deal specifically with Applicants' above-quoted allegations, save to say that it does not understand the allegation that its policy "serves to ... render static the elements of society". If the contention is that its policy in providing for the separate development of the population groups does not foster integration of such groups, then their statement may be accepted as correct. If, however, the contention is that the policy of separate development inhibits progress, then the allegation is emphatically denied. As Respondent has explained, the aims of its policy are precisely to promote the progress of all the population groups, and particularly the Native groups, and proof has been given of the achievements actually attained in this regard.

26. Applicants also say that—

> "[a] striking indication of Respondent's attitude is revealed by the fact that, throughout its Counter-Memorial, Respondent attributes

[1] III, pp. 483-484. *Vide* particularly the last paragraph in the sub-section at p. 485.

[2] IV, p. 368, footnote 4. The words occur where the first dots appear.

[3] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 100 (1959), Col. 3264. (Italics added.)

[4] IV, p. 368.

[5] *Ibid.*, pp. 368-369.

[6] *Vide* III, pp. 477-489.

[7] II, pp. 457 ff.

to individuals *qualities and characteristics* which may only properly be assigned to groups [1]".

Respondent does not propose to enter into an argument with Applicants as to how far one can (as Applicants do) properly assign "qualities and characteristics" to "groups", i.e., apart from the members constituting the groups. It is also not clear to Respondent precisely what Applicants intend to convey, for, apart from referring to one passage in the Counter-Memorial, they have not attempted to prove the sweeping allegation that it is a "fact" that Respondent has throughout its Counter-Memorial attributed to individuals "qualities and characteristics which may only properly be assigned to groups". The said passage in the Counter-Memorial reads as follows:

> "For the White group of South West Africa, which had the advantage of the education tradition of Western civilization extending over centuries, there was little difficulty in devising a syllabus suitable to its needs [2]."

Applicants say in regard thereto that Respondent ascribes to " 'White' children of school age, characteristics which may only be properly attributed, at all, to an entire culture seen in the perspective of hundreds of years" [1]. Their allegation is without substance. Respondent did not, and did not intend to, attribute "characteristics" to children of school age. What Respondent intended to convey was that when provision had initially to be made for the education of the children of the European population of the Territory, it was comparatively easy to devise a syllabus for them because they belonged to a group with a Western cultural heritage. There can surely be no doubt that Western culture, or civilization, plays a role in the determination of syllabuses for the children of a group which has a Western cultural heritage. In the case of the indigenous groups, Respondent pointed out in the Counter-Memorial [3] that there was no such tradition of Western education and, accordingly, there were far more problems in devising a proper syllabus. Perhaps Respondent can illustrate what was intended to be conveyed by making the following respectful submission, viz., that the Americans responsible for the education of American children in Liberia [4] will have little difficulty in framing proper syllabuses and teaching materials for those children, but that they will find it a matter of some difficulty to do the same in the case of the indigenous children of the country, particularly if there is to be compliance with the requirement that "[t]hroughout the textbooks the African child studies should run the fabric of African life and culture" [5].

Without substance, also, is Applicants' further allegation that "[w]hen Respondent refers to individual human beings, it is in the large" [1]. In order to substantiate this sweeping allegation, they refer to the following sentence in the Counter-Memorial: "The members of the White group were derived entirely from peoples and communities regarded as bearers of Western civilization [6]." In this sentence, which occurs in a paragraph

[1] IV, p. 369.
[2] III, p. 363.
[3] *Ibid.*, pp. 363-364.
[4] *Ibid.*, p. 382.
[5] *Ibid.*, p. 380.
[6] *Ibid.*, p. 354.

dealing with the "Varying Stages of Advancement of the Different Groups" [1], Respondent spoke "in the large" because it referred to all the members of the White population—and it used the word "The" (which is omitted from Applicants' quotation) before the words "members of the White group" to make that clear.

In another passage quoted by Applicants from the Counter-Memorial in this same connection [2], Respondent pointed out, while dealing with *differences in the social and economic levels of development of the various population groups at the inception of the Mandate*, that in the case of the "indigenous groups" there was an absence of a tradition of education and also, because of their background and tradition-bound economies, an absence of "those qualities and incentives which characterize a modern economy and which make for the creation of economic opportunities and potentialities". Respondent says that its speaking "in the large" in this regard is wholly justified in the light of circumstances as they existed at the time, for, if considerations of the kind mentioned did not apply to every single member of the groups concerned, the exceptions must have been very few.

In regard to the aforegoing Respondent says, furthermore, that it is wrong to suggest that its policy of separate development of the various groups has no regard to the abilities or needs of individuals comprising such groups. Thus, e.g., when speaking of opportunities for advanced employment or economic activity, as created by separate development, regard is obviously had to individuals who may have special endowments.

27. Having alleged that Respondent "expresses its policy in terms of 'groups' " [3], and that it regards even South African tribes as "national units" or "national groups" [3], Applicants make the surprising allegation that Respondent's approach is one which—

> ". . . classifies *all 'Natives' or 'Bantu' into one large homogeneous mass*, without regard to the fact that 'Natives' may and do differ extremely *inter se*, as do any other human beings [4]". (Italics added, save in the case of *inter se*.)

The allegation regarding Respondent's alleged approach is in conflict with Applicants' earlier allegations. It is also, of course, in conflict with the true situation, for Respondent's policy of the separate development of the Native, or Bantu, groups is based on the very fact that the Natives, or Bantu, do not constitute a homogeneous society, and in fact makes provision, in as far as is practicable, for their development as separate communities. Applicants' further allegation that Respondent has no regard to the fact that Natives differ among themselves, is not true. Respondent appreciates that individuals of all groups differ amongst themselves, and says that its policy of separate development of the different groups has regard to that fact.

28. In the same paragraph in which they allege that Respondent's approach is to classify "all 'Natives' or 'Bantu' into one large homogeneous mass", Applicants make the further allegation that "Respondent's only acknowledgement in practice" of the different "levels and

[1] **III**, p. 354, heading *(a)*.

[2] **IV**, p. 369, and *vide* **III**, p. 383.

[3] **IV**, p. 368.

[4] *Ibid.*, p. 369.

stages of development" of the various groups is ". . . to permit the children of different 'Native' groups to be instructed in different 'mother tongues' " [1].

It is not appreciated how the use of the mother tongue as medium of instruction can be said to be in recognition of the fact that the groups are at different levels of development. Respondent stated in the Counter-Memorial that mother-tongue instruction was sound educational policy [2], and that experts accepted "as axiomatic, on psychological, sociological and educational grounds, that the best medium for teaching a child is his mother tongue" [3]. This aspect of Applicants' allegation is, however, of little importance. What is important, in view of the attitude taken up by Applicants elsewhere in their Reply, is that the allegation involves an admission that Respondent's policy of mother-tongue instruction in fact serves the differing needs of the children of the different Native groups. Furthermore, the allegation that Respondent "permit[s]" the children of the different Native groups to be taught through the medium of their own language implies not only that Respondent is doing something which it ought to do, but also that it is acting in accordance with the wishes of the parents of the different Native groups.

Respondent points out that the attitude here displayed by Applicants is in direct contrast to what Applicants allege in regard to mother-tongue instruction in another part of the Reply dealing with education [4]. There they allege, *inter alia*, that mother-tongue instruction constitutes "separation of 'Native' children by linguistic classification" [5]; that it renders the Native inhabitants of the Territory ever less "able to stand by themselves . . ." [6], that it "thwart[s] the social progress of 'Natives' by isolating them from each other" [7], and that it "perpetuates, rather than improves, existing deficiencies" [8].

As to Applicants' allegation that there is no acknowledgment in practice by Respondent (save to "permit" the use of mother-tongue instruction) of different levels and stages of development among the Native groups, that "the Herero are lumped together with the Dama, the Ovambo with the Bushmen" [1], etc., Respondent says that it is not true. Respondent in fact, wherever practicable, differentiates in various respects between Herero, Nama, Dama, Bushmen, etc., not only because of different stages of development, but because of the extensive differences between them (of which level of development is only one)—which differences also result in a desire on the part of the groups to preserve their separate identities. The provision of separate schooling facilities, including mother-tongue instruction, is one example of such differential treatment. Provision and protection of different homelands and reserves, and of specific forms of self-rule, are other instances. Such separate provision extends also to housing in Native urban areas. Respondent points out, furthermore, that its policy of separate development aims at a situation which

[1] **IV**, p. 369.
[2] **III**, pp. 357 and 358-359.
[3] *Ibid.*, p. 377.
[4] *Vide* **IV**, pp. 374-383.
[5] *Ibid.*, p. 374.
[6] *Ibid.*, p. 375.
[7] *Ibid.*, p. 378.
[8] *Ibid.*, p. 380.

is the direct opposite of any "lump[ing] together" of different population groups [1].

29. Applicants make the following further allegation: They say that Respondent avers that it is following a policy in the Territory—

> "... which accords the highest recognition to the identity and cultural heritage of each of the Native groups, and that its policy endeavours, as far as possible, to provide for the particular needs of all the groups [2]",

but they add that "Respondent nevertheless does not attempt to provide for the 'particular needs' of *individuals comprising* the groups" [3].

The only "evidence" advanced by Applicants to support this allegation, which is not true, is the remainder of the paragraph in the Counter-Memorial from which the above-quoted passage is taken, and which follows immediately thereon. It reads as follows:

> "To achieve this object, every endeavour has been made to enable the children of each of the groups to be educated separately in their own language and by their own teachers. This in itself is a vast undertaking but, in Respondent's view a necessary one. Syllabuses have been designed to fit the cultural and historical background of all the Native groups, and parent communities in these groups have been given an active share in the education of their children. These essential foundations having now been well-laid, the groups themselves are being afforded every opportunity to co-operate in their own development to the highest level they can attain [4]."

This passage does not, in Respondent's submission, afford the slightest justification for saying that Respondent "does not attempt to provide for the 'particular needs' of *individuals comprising* the groups". Respondent was dealing with the educational facilities provided for the children of the different groups, and not with the position of the various individuals within each group. No educational system can make provision for all the needs of every single individual it seeks to serve. The passage from the Counter-Memorial quoted above reveals clearly that Respondent caters for the needs of the members of the groups by giving them their education in their own language, through teachers who speak their language, and in accordance with syllabuses which take account of the culture and historical backgrounds of the various groups and their members. The position is the same in the case of all the population groups in the Territory, and there is accordingly no justification for saying that Respondent "does not attempt to provide for the 'particular needs' of *individuals comprising* the groups".

Similar considerations apply in regard to Applicants' allegation that "[t]he limit of the horizon for a 'Native' is, in fact, 'the highest level [his group] can attain', rather than the highest level *he* can attain" [3]. The allegation is made *apropos* of Respondent's statement that "the groups themselves are being afforded every opportunity to co-operate in their own development to the highest level they can attain", but there was no

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[1] *Vide* **II**, p. 474.
[2] **IV**, p. 370, with reference to **III**, p. 540.
[3] **IV**, p. 370.
[4] **III**, p. 540.

intention on Respondent's part to distinguish between groups and the members of groups, or to deal with any particular level of development which any individual could attain. The intention was to convey that measures had been taken which would enable Native groups (which term, in the context, includes the members of such groups) to co-operate in their own development to the highest level of which they were capable.

30. Applicants allege that "[t]he policy of differentiation by the exclusive arrangement of individuals into groups is rigidified by its ready suitability for the development of the policy outlined in Part (B) of this Chapter" [1]. This means, if Respondent understands it correctly, that Respondent classifies the population into groups so that it can develop a policy of oppression relating to groups. The true position, as shown before, is that Respondent's policy of differentiation is based on the fact that the population is in fact composed of different groups, that there are differences between those groups, and that these facts are to be duly recognized in formulating a policy best suited to the well-being and development of all concerned.

Applicants allege, furthermore, that Respondent's policy, as described by them, "enables Respondent to adopt differentiated policies of expenditure, always to the overwhelming disadvantage of the 'Native' groups" [1]. They also say, in this regard, that whilst they agree that "[c]olour and racial origin *per se* do not determine the distribution of educational facilities or differential expenditures on education in South West Africa" [2] the "[d]istribution of facilities and differential expenditures . . . are, in fact, determined by the *weight given by Respondent* to colour and racial origin" [2]. As stated before, Respondent's policy is based on the existence of different groups and of differences between such groups. It is in no way based on financial considerations. It is not true to say that "[d]istribution of facilities and differential expenditures" are determined by the "weight" which Respondent gives to "colour and racial origin". In its Counter-Memorial Respondent dealt at length with circumstances which have affected the extension of educational facilities in the case of the Native and European groups, and it is not intended to repeat what is there stated. Respondent likewise dealt with the question of differential expenditures in the case of European and Native education, and with the factors which play a part in that connection [3], and refers to what is there stated.

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[1] **IV**, p. 370.
[2] *Ibid.*, p. 367.
[3] **III**, pp. 382-390 and pp. 532-537.

CHAPTER III

NATURE OF EDUCATION IN THE TERRITORY

A. General

1. In this chapter Respondent deals with section (B) of Applicants' chapter on education, being the section headed "Nature Of Education In The Territory" [1]. This section consists of an introductory portion [2], and three numbered sub-sections under the following titles:

"(1) Segregation by Race" [3];
"(2) Separation by Tribe" [4]; and
"(3) Limitation of Objectives in Syllabus" [5].

2. In their aforesaid introductory portion Applicants say:

> "If the conditions in 1920 were those of divided and underdeveloped 'groups' in a difficult situation, as Respondent is at pains to point out, surely the conferral of the Mandate was intended to remedy this situation [6]",

and they then proceed to allege that, instead of remedying the position,

> "... Respondent's policies systematically foster and accentuate the differences between population 'groups' rather than the similarities which such 'groups' might have developed over forty-three years of social, economic, and cultural co-existence [6]".

Respondent's educational policy in South West Africa, Applicants say, "segregates all of the inhabitants by race" [6], and "separates the 'Native' inhabitants by tribe" [6]. The policy, they also allege, "prepares the 'non-European' inhabitants for a subordinate role in the social, economic, and cultural life" [2] of the Territory.

3. The aforementioned allegations, as developed in the above-mentioned sub-sections in order to show, as they allege, that "[s]uch segregation, separation, and limitation are all in violation of the duty of Respondent to 'promote ... the material and moral well-being and the social progress of the inhabitants' of South West Africa" [7], will be dealt with below by Respondent under the headings "Segregation by Race", "Separation by Tribe" and "Limitation of Objectives in Syllabus".

Before doing so, however, Respondent makes the following observations regarding Applicants' aforementioned broad averments:

(a) In regard to Applicants' allegation that the Mandate intended that conditions which existed in 1920 should be remedied, Respondent is in agreement with the proposition that its duties involved the improvement of the conditions of the "underdeveloped 'groups' ",

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[1] IV, pp. 370-386.
[2] *Ibid.*, pp. 370-371.
[3] *Ibid.*, pp. 371-374.
[4] *Ibid.*, pp. 374-383.
[5] *Ibid.*, pp. 383-386.
[6] *Ibid.*, p. 370.
[7] *Ibid.*, p. 371.

a duty which Respondent has, in its submission, performed to the best of its ability. In so far, however, as Applicants suggest that Respondent was obliged to "remedy this situation" by eliminating the differences between the various population groups in an effort to integrate all the groups into a single community, the suggestion is denied. As Respondent has already indicated, the authors of the Mandate themselves recognized the diversity which characterized the population of the Territory, and contemplated that there would be differential treatment of the various population groups [1].

(b) It is denied that Respondent's policies in the Territory foster or accentuate differences between the population groups. The truth is that Respondent's policies have, *inter alia*, by recognizing and paying due heed to differences between racial and cultural groups inhabiting the Territory, promoted the peaceful development and co-existence of such groups. In regard to education, Respondent has shown in its Counter-Memorial [2] that sound principles underlie its policy of providing separate facilities for the different population groups.

(c) Respondent denies that its educational policy in the Territory "prepares the 'non-European' inhabitants for a subordinate role in the social, economic, and cultural life of South West Africa" [3]. This broad and sweeping charge is also made by Applicants in earlier portions of their Reply [4] and has already been dealt with by Respondent [5].

B. Segregation by Race

4. Applicants allege that Respondent's system fosters "racial and tribal feelings" [6], and they dispute Respondent's averment that a system of mixed schooling would "lead to dissatisfaction and group friction . . . [and] result in the neglect of the needs of all the groups and in irreparable harm to the Territory" [6]. They say that Respondent, by maintaining its present system, "is inevitably setting the stage for more profound dissatisfaction and group friction than any yet manifested" [6].

Respondent does not appreciate what precisely is intended to be conveyed by this allegation. Whilst it is clear that it involves a prediction of dissatisfaction and friction to come, it is not apparent to what "dissatisfaction and group friction" Applicants refer as having occurred in the past and which, according to their prediction, will become "more profound" at some time in the future.

In support of their prediction of future dissatisfaction and group friction in South West Africa, Applicants rely on the following statement made by a former Chief Justice of South Africa, Mr. Justice Centlivres, in 1956, regarding separate universities in South Africa [6]:

"As far as the present writer is aware there was neither in 1948 nor

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[1] Sec. B, paras. 11-15, *supra*.
[2] **III**, pp. 353-382.
[3] **IV**, pp. 370-371.
[4] *Vide*, e.g., **IV**, pp. 272, 364 and 365.
[5] *Vide* sec. E, *supra*, and Chap. II, paras. 5 *et seq.*, *supra*.
[6] **IV**, p. 371.

in any subsequent year any unpleasant relationship between Europeans and non-Europeans in those universities which admitted both Europeans and non-Europeans. In these racially mixed institutions the relationship has always been satisfactory . . . On the other hand experience has shown that when the policy of segregated university institutions is applied, there is a very real possibility of trouble . . . [1]."

5. Respondent says the following in regard to the above statement:

(a) The writer's reference to 1948 is no doubt to be explained by the fact that the present Government came into power in that year. The impression is created that it is only the present Government which saw any reason for separation in university facilities. In this regard Respondent points out that in 1945, when General Smuts' United Party was in power, there was wide approval in Parliament of the view that the Government should consider the advisability of recommending the application of the principle of segregation to institutions for higher education. In the course of a debate in the House of Assembly Dr. Louis Bosman, a member of the United Party and at that time also member of the Council of the University of Cape Town, said, *inter alia*:

> ". . . neither the European nor the non-European is very happy at the same university. The non-European does not feel at home because he thinks he is treated with disrespect . . . and the . . . European feels awkward at the fact that he cannot fraternise with the non-European . . . [2]"

(b) No mention is made by the writer of the fact that there was little or no contact between Europeans and non-Europeans in those spheres where friction would be most likely to arise, viz., in the intimate, personal contact spheres. So, e.g., there was no mixed sport, no mixed social gatherings such as dances, and no mixed boarding facilities. Furthermore, by reason of the small numbers of non-Europeans at the mixed universities [3], contact in any sphere was at all times on a small scale.

(c) Mr. Justice Centlivres' views, it may be mentioned, are not supported by Dr. Moffat, a professor at the University of Cape Town for many years. He is reported to have said:

> "The non-European students who are at present at some of the Universities or colleges which are really European, are in the university but not of it. They do not share in the university life to the full and therefore do not drink of the essence of university life which should have no dilution by reason of race or colour. It seems to me that in South Africa, with its declared policy of segregation in so far as it can be observed, the full life of university life can be obtained by the non-European only in a university for non-Europeans. The college at Fort Hare is doing this to some extent and is developing a distinct university, if one may judge from what lecturers there tell us. This could never come at a mixed college where the non-European will always be up

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[1] IV, p. 371.

[2] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 53 (1945), Col. 5517.

[3] *Vide* III, pp. 482-483.

against a colour bar, with the development of an inferiority complex or a rebellious resentment, neither of which is consistent with the university outlook [1]."

(d) There is no elaboration by Mr. Justice Centlivres of the cryptic statement that "experience" has shown that "when the policy of segregated university institutions is applied, there is a very real possibility of trouble".

No particulars are given of such alleged "experience". Mr. Justice Centlivres' statement (made in 1956) could not, with any justification, have been made regarding experience in South Africa. Furthermore, South Africa's experience of separate university institutions since the passing of the Extension of University Education Act in 1959 [2] in no way supports the "experience" referred to by Mr. Justice Centlivres.

(e) Finally, Applicants make no attempt to show how the statement, which concerns the limited field of mixed universities in South Africa, is relevant to the many complex conditions and considerations which govern the schooling of the children of the different population groups in South West Africa.

6. Applicants make the further statement that—

"Respondent's *de jure* segregation of school children by race and by tribe could only be permissible if the segregation were accomplished *de facto* by applying a test of individual ability, not one of race or 'group' [3]."

This statement does not make sense. It is logically impossible for "*de jure* segregation . . . by race and by tribe" to be "accomplished *de facto*" on a basis of individual ability tests. However, in view of Applicants' reference to separation on grounds of ability, Respondent points out that the Counter-Memorial [4] clearly reveals that Respondent's system of having separate schools for the children of the different population groups is not based on tests of individual ability. It is accordingly not appreciated why Applicants proceed to argue about the unlikelihood of all "able" children being in the White group, and all "slow" children in the Native or Coloured groups, etc. [3]

Respondent denies that separation "could only be permissible" if based on ability tests. Indeed, one of the major disadvantages of mixed schools would be that children of all groups would be hampered as regards educational development to the best of their respective abilities. The circumstances and considerations which govern Respondent's system have been dealt with in the Counter-Memorial, and Respondent denies that the system is in any way a violation of the terms or the spirit of the Mandate.

In the same context Applicants refer again, in a footnote [5], to a portion of a paragraph in the report of the Eiselen Commission dealing with the

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[1] In a Memorandum submitted to a Commission of Inquiry into the training of Medical Students in South Africa as referred to by the Deputy Minister of Education, Arts and Science in the House of Assembly on 8 April 1959; *vide U. of S.A., Parl. Deb., House of Assembly*, Vol. 100 (1959), Col. 3246.

[2] *Vide* III, pp. 479-485 (paras. 30-36).

[3] IV, p. 371.

[4] III, pp. 353-382.

[5] IV, p. 371, footnote 6.

"basic physical and psychological endowment" of European and Bantu children. As shown above [1], Applicants do not mention that the Commission found that cultural differences were so profound as to call for differentiation in the education of European and Bantu children.

7. On the same subject Applicants also say that "[s]egregation on racial grounds has been condemned in all civilized nations, at least since World War II" [2], and in this regard they refer to a passage in a lecture by Professor C. W. de Kiewiet in which he said, in 1960, that the South African law providing for separate universities runs counter to "... the growing conviction in the modern world that the benefits of civilisation must be made equally available to all men regardless of race or creed [3]".

Amongst the benefits of civilization mentioned by Professor de Kiewiet is education. In this regard Respondent says, as has already been explained, that its policy aims at making available adequate educational facilities to all the inhabitants of the Territory, "regardless of race or creed", but that, for sound reasons, it provides such facilities on a basis of institutional differentiation between the various groups. Professor de Kiewiet avoids the various considerations underlying Respondent's policy of separate development, also in the educational field, and appears to rest his criticism on the following statement, which Applicants do not quote, viz.:

> "It is an evasion to explain that the access denied here at Cape Town will be supplied somewhere else. The explanation may be honestly meant, but it cannot be implemented [4]."

The record refutes this allegation. As has been indicated, provision has been made for separate university facilities for the different population groups in South Africa [5].

8. In the same context Applicants say further that "[s]egregation on racial grounds"—

> "... is excluded, for example, from the educational policies of Territories subject to Trusteeship Agreement under Chapter XII of the United Nations Charter, or subject to reporting as Non-Self-Governing Territories under Chapter XI [2]".

In support of this allegation Applicants include in the documentation of these proceedings an Annex 5, headed "Racial Separation In Education In Dependent Territories, As Viewed By The United Nations" [6]. Respondent will deal with this Annex in a separate chapter hereinafter [7]. At this stage it is only necessary to answer certain specific allegations made by Applicants regarding the attitude of the Permanent Mandates Commission and the League Council regarding Respondent's policy of having separate schools in South West Africa for European, Coloured and Native children.

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[1] *Vide*, Chap. II, para. 15, *supra*.

[2] IV, p. 372.

[3] *Ibid.*, footnote 1.

[4] De Kiewiet, C. W., *Academic Freedom*: The Second T. B. Davie Memorial Lecture Delivered at the University of Cape Town on 26 July 1960 (1961), p. 18.

[5] III, pp. 476 and 486.

[6] IV, pp. 398-403.

[7] Chap. V, *infra*.

In the Counter-Memorial Respondent demonstrated that the Permanent Mandates Commission and the Council of the League were at all times fully aware of Respondent's aforesaid policy [1]. Respondent also pointed out that these bodies at no time suggested that its policy was not in keeping with the terms of the Mandate, and Respondent made the submission that these bodies, being fully aware of the "vast differences between the various groups in their respective levels of civilization, their traditions and cultural backgrounds", "appreciated and did not oppose Respondent's view that the interests of the various groups could best be served in separate schools" [2]. Respondent also referred, in this regard, to the attitude adopted by the Permanent Mandates Commission towards Respondent's policy of mother-tongue education [3].

It was also demonstrated, by reference to the Minutes of the Permanent Mandates Commission, that separate facilities for different population groups also existed in other mandated territories during the lifetime of the League [4].

Applicants challenge Respondent's assertion that the Permanent Mandates Commission knew and tacitly approved of its said policy [5]. They say that Native education was, during the existence of the Commission, "almost completely in the hands of the missions", and they argue that—

> ". . . as a result, it can hardly be said that Respondent had, at that time, a '*policy of having separate schools* in South West Africa for European, Coloured and Native children' which was susceptible of tacit or express approval by the Permanent Mandates Commission [6]".

There is no substance in Applicants' contention. At the risk of labouring a point which, in Respondent's submissions is obvious from what is said in the Counter-Memorial [7], Respondent adds the following to illustrate that it was the policy from the outset to have separate schools for European, Coloured and Native children:

(a) The Education Proclamation, 1921 [8], made provision for the establishment of schools for European children [9], and also for the establishment of mission schools for non-European children [10]. Such schools for non-European children had to be classified by the Director of Education as mission schools for Coloured pupils,

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[1] **III**, pp. 372-374.
[2] *Ibid.*, p. 374
[3] *Ibid.*, pp. 359 and 374.
[4] *Ibid.*, pp. 374-375.
[5] **IV**, pp. 372-373. Applicants, allegedly to avoid the creation of a "misleading impression" by Respondent, say in footnote 2 at **IV**, p. 372 that the "dates of the P.M.C. material quoted by Respondent [are] 1923, 1928, 1939, 1928, and 1930, respectively". Why there should be any danger of a "misleading impression" is not clear. Respondent mentioned the dates in question. Furthermore, 1939 was, for practical purposes, the final year of the active existence of the Commission and the League.
[6] **IV**, p. 373.
[7] **III**, pp. 353 *et seq.*
[8] *Proc.* No. 55 of 1921 in *The Laws of South West Africa 1915-1922*, Vol. I, pp. 632-683 and *vide* **III**, p. 351.
[9] *Ibid.*, secs. 20-31, pp. 639-642.
[10] *Ibid.*, secs. 105-112, pp. 666-667.

or as mission schools for Native pupils, and had to be aided accordingly [1].

The proclamation prohibited any European child from attending a non-European school, save with the consent of the Administrator [2].

(*b*) The Education Proclamation, 1926 [3], which superseded Proclamation No. 55 of 1921, made provision for the establishment of schools for European children [4], and for the establishment, recognition and control of non-European schools [5]. It empowered the Administrator to establish government schools for Coloured pupils [6], and gave permission to churches and missions to establish mission schools for Coloured or Native pupils [7]. Mission schools had to be classified by the Director of Education as mission schools for Coloured pupils, or as mission schools for Native pupils [8].

In 1934 the Administrator was empowered to establish government schools for Native pupils [9], and the first government Native school was established in 1935 [10].

(*c*) The following are additional references to Respondent's annual reports to the League, and to proceedings of the Permanent Mandates Commission:

(i) In 1931 mention was made of schools for Coloured pupils, and of the fact that the syllabuses used in such schools were different from those used in Native schools [11].

(ii) In 1933 [12], and again in 1934 [13], it was reported that there were "separate schools" for Coloured children, and that the medium of instruction in such schools was one of the official languages. In the 1934 report it was stated that there were, in that year, 10 schools for Coloured children, with an enrolment of 565 pupils.

(iii) It was mentioned on more than one occasion in annual reports that Coloured pupils were not allowed to attend European schools [14]; that Coloured pupils were sometimes, because of practical difficulties, obliged to attend Native schools [13]; and that the admission by missionaries of Native pupils to classes which had been established for Coloured children led to protests by Coloured parents [15].

Respondent therefore denies Applicants' allegations that "Respon-

[1] *Proc.* No. 55 of 1921, sec. 110 *(a)*, p. 667.
[2] *Ibid.*, sec. 106, p. 666.
[3] *Proc.* No. 16 of 1926 in *The Laws of South West Africa 1926*, Vol. V, pp. 132-226.
[4] *Ibid.*, secs. 29-36, pp. 146-150.
[5] *Ibid.*, secs. 122-133, pp. 194-198.
[6] *Ibid.*, sec. 122, pp. 194-196.
[7] *Ibid.*, sec. 123, p. 196.
[8] *Ibid.*, sec. 131, p. 198.
[9] *Proc.* No. 10 of 1934 in *The Laws of South West Africa 1934*, Vol. XIII, pp. 120-122.
[10] III, p. 425.
[11] *U.G.* 21—1931, p. 55.
[12] *U.G.* 16—1933, p. 144.
[13] *U.G.* 27—1934, p. 29.
[14] *U.G.* 25—1936, p. 39.
[15] *U.G.* 31—1937, p. 38.

dent's policy was, in fact, developed only after the Second World War", and that "[i]t has never been reviewed, with Respondent's cooperation, by an administrative supervisory organ" [1].

9. Another example referred to by Applicants in support of the contention that segregation on racial grounds has been condemned "in all civilized nations, at least since World War II", is given by them in the following terms:

> "Intensive efforts made in recent years in the United States to bar racial segregation from public education through the medium of judicial action are worthy of note in this connection [2]."

In this regard they cite passages from the case of *Brown* v. *Board of Education* [2] in support of the proposition that "separate educational facilities are inherently unequal".

This case is also referred to in other parts of the Reply and has already been dealt with by Respondent elsewhere in this Rejoinder [3].

In this section of the Rejoinder Respondent comments as follows on the decision in the said case and the reliance placed thereon by Applicants in the present context:

(a) This case involved the interpretation and application of a part of the 14th Amendment to the United States Constitution providing, *inter alia*, that "... no State shall ... deny to any person within its jurisdiction the equal protection of the laws".

Applicants say that the Mandate is a "constitutional-type document", that the obligations contained in Article 2 thereof are more affirmative and explicit than the "general injunction of the 'equal protection' clause of the Fourteenth Amendment", and that Respondent's policy of segregation in the educational system of the Territory "is more affirmative, explicit and far-reaching than was the racial bar struck down by the *Brown* decision" [4]. The suggestion seems to be that this decision must, therefore, be determinative of Respondent's powers and duties under the Mandate. Respondent rejects the suggestion. Save for certain specific provisions [5], the Mandate contains no provisions limiting or prescribing Respondent's powers of legislation and administration [6]. Respondent, while subject to the general duty of promoting to the utmost the material and moral well-being and the social progress of the inhabitants of South West Africa, has a discretion as to the particular methods it deems best to apply in order to carry out that duty. In particular, the Mandate contains no provision which can possibly be construed as requiring that there is to be a mechanical abstention from differential treatment of the various population groups. On the contrary, two provisions explicitly prescribed such differentia-

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[1] **IV**, p. 373. In regard to the comment of the Special Committee for South West Africa (**IV**, p. 373, footnote 7) relative to Respondent's alleged basic policy in the educational field, reference may be made to what has already been stated in Chap. II, paras. 5 *et seq.*, *supra*.

[2] **IV**, p. 372.

[3] *Vide* sec. B, para. 29 and sec. E, Chap. X.

[4] **IV**, p. 373.

[5] Articles 3-5 of the Mandate for German South-West Africa.

[6] **II**, pp. 387-389, and sec. C, paras. 20-21, *supra*.

tion [1]. Differential treatment in general may well be, and in Respondent's opinion is, best able to do justice to, and between, the different population groups in South West Africa and their members [2].

(b) The Court's decision must be viewed in the context in which it was given, viz., that of present day American society. This is a society in which the Negroes are, on the whole, one with their White fellow citizens in culture and language, and where racial origin constitutes the only difference between them [3]. It is noteworthy that the Court at no time referred to any other factors—such as language or culture—as possibly being of significance in deciding the issue before it, which was formulated by the Court as follows:

> "Does segregation of children in public schools *solely on the basis of race*, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? [4]" (Italics added.)

The Court was, in other words, concerned with the question whether the race factor itself—i.e., unaccompanied, and uncomplicated, by considerations such as culture and language—could justify segregation. And, also, with the question of the effect of separation on Negroes in a situation where only their different physical appearance distinguished them from their White fellow citizens. Furthermore, no policy of development of the Negroes as a separate nation, in a territorial entity of their own, entered into the question. Answers given to such questions in the American context will, it is obvious, not necessarily be valid in situations where different circumstances apply, e.g., in a truly heterogeneous country like South West Africa, in respect of which it has been shown that there are various population groups which are intent on maintaining their separate identities, and which differ from one another not only in origin, but also in matters of culture and language. Separation between the said groups is effected not solely on account of difference in race, but on account of all the differences which characterize them. And the ultimate aim is separate nationhoods. In such totally different circumstances, where the different population groups have never formed one community, are desirous of maintaining their separate identities, and are, in fact, separate communities developing into separate nations, the following finding of the Court in the *Brown* case cannot automatically be applied to the situation:

> "To separate [children] from others of similar age and qualifications solely 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 [5]."

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[1] Articles 3 (concerning liquor) and 4 (concerning military training) of the Mandate for German South-West Africa.

[2] *Vide* sec. E, *supra*.

[3] *Vide* sec. E, Chap. XI, *supra*.

[4] *Brown* v. *Board of Education of Topeka*, 347 U.S. 493 in *United States Supreme Court Reports*, Lawyers' Edition, Book 98 (1954), p. 880.

[5] *Brown* v. *Board of Education of Topeka*, *op. cit.*, p. 881.

(c) The Court stated that its finding as to the effect of segregation and the resultant feeling of inferiority on the part of Negro children was "amply supported by modern authority" [1], and these authorities are mentioned in a footnote (numbered (11)) to the Opinion.

Respondent points out that scientists in the United States have seriously questioned the evidence on which the Court relied in making its finding, even in the American context. So, e.g., it has been stated that the evidence of Professor Clark, which constituted an important part of the Appellants' case, misled the Courts [2]; and, also, that the evidence which was put before the Court was unscientific and inconclusive, and that it did not justify the finding made by the Court [3]. It has been argued, furthermore, that whilst scientific knowledge on the subject in issue is incomplete and inconclusive [4], "whatever evidence *is* available *tends* to support racial separation in the schools at least throughout childhood and adolescence" [5]. It has also been stated that—

> "[m]inority children of distinctive appearance can only suffer serious personality disabilities as a consequence of congregation. If the evidence available to the Court in *Brown* v. *Board of Educ.* demonstrates anything at all, it demonstrates that the personality impairments suffered by Negro children is *(sic)* less in a racially insulated environment than with congregation—at least during critical phases of personality formation [6]."

It would appear, therefore, that the Court's finding, in so far as it is based on or stated to be supported by modern science, is in dispute amongst scientists in the United States. How the dispute will ultimately be resolved amongst scientists is a matter for the future.

In all the circumstances Respondent denies the implication that the *Brown* case can in any sense be regarded as amounting to a condemnation of Respondent's policies.

10. The *Brown* case is the subject of two further statements by Applicants.

The first is the following:

> "The reasoning of the United States Supreme Court is relevant as a response to Respondent's query why 'the existence of similar [but separate] institutions for Coloured and Native students should be styled [by Applicants, in their Memorials], "a reminder of opportunities denied" to non-European students ...' The 'opportunities denied' ... include the opportunity not to be segregated against one's wishes, the opportunity to be a citizen of equal standing with

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[1] *Brown* v. *Board of Education of Topeka*, *op. cit.*, p. 881.

[2] Van den Haag, E., "Social Science Testimony in the Desegregation Cases—A Reply to Professor Clark", *Villanova Law Review*, Vol. 6 (1960), p. 69.

[3] Ross and van den Haag, "The Fabric of Society" (1957), quoted by Gregor, A. J., "The Law, Social Science, and School Segregation: An Assessment", *Western Reserve Law Review*, Vol. 14, No. 4 (Sep. 1963), p. 625.

[4] Gregor, A. J., "The Law, Social Science, and School Segregation: An Assessment", *Western Reserve Law Review*, Vol. 14, No. 4 (Sep. 1963), p. 624.

[5] *Ibid.*, p. 626.

[6] *Ibid.*, p. 632.

a 'European', and the opportunity to live one's life freely in an open society [1]." (Footnotes omitted.)

This statement represents an attempt by Applicants to introduce an argument on the lines of the so-called "intangible considerations" as referred to in the *Brown* case. What the term "opportunities denied" is now alleged to include, was not expressly stated in Applicants' Memorials, nor was it in any way implied. The gist of Applicants' complaint in their Memorials was that the exclusion of non-European students from certain South African universities had left them with fewer university institutions which they could attend—institutions which were allegedly of inferior quality and which could, furthermore, only be attended on permission obtained from South African authorities [2].

The "intangible considerations" aspect is obviously a new one which Applicants now seek to introduce into the case. Respondent says that there is no substance in Applicants' argument. The advantages and disadvantages of so-called open universities in the South African context were duly weighed before it was decided to establish separate higher education facilities for non-European students [3], and it was considered that such separation would constitute a significant gain for the non-European groups. Respondent says, furthermore, that as far as students—European and non-European—from South West Africa are concerned, the overriding consideration is whether Respondent provides them with sufficient facilities of high quality for higher education. This, Respondent submits, it does [4].

The second statement made by Applicants reads:

> "A reflection of the proposition that separate facilities are inherently unequal was contained in the Report of the Eiselen Commission, where it stated that:
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> 'The Bantu have, for numerous reasons, come to feel that *any differentiation in education must to be [sic] their detriment.* Much evidence to this effect was given before this Commission, particularly by Bantu teachers. Reference to previous commissions shows that this attitude has persisted from early times ' [5]."

Applicants assign to this extract from the Commission's report a meaning which it does not have, and which it was not intended to have. Respondent points out in this regard:

(a) The extract does not refer to Respondent's system of having separate schools for European and Native children, as Applicants suggest [1]. It refers to differences in curricula, syllabuses and examinations [6].

(b) The Commission indicated that the attitude of the Bantu, as perceived from evidence heard by it, had a largely economic motivation [7]. The Commission—otherwise than in the *Brown* case—

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[1] IV, p. 373.
[2] I, p. 157.
[3] III, pp. 482-486.
[4] *Ibid.*, pp. 476, 485-486.
[5] IV, pp. 373-374.
[6] *Vide U.G.* 53—1951, p. 43, paras. 232-235.
[7] *Vide* heading to paras. 230-235 and paras. 232 and 235 of *U.G.* 53—1951, pp. 42-43.

did not deal with the question whether there was "detriment" in fact; nor did it express any view as to whether the "feeling" of the Bantu was in any way justified.

(c) Applicants' approach, as stated before, involves the proposition that equal treatment means the same treatment. It entails, in the case of South West Africa, that every population group should be given exactly the same education as every other group, even if it causes detriment from an educational point of view. This proposition Respondent cannot accept. There are cultural, linguistic and economic differences which show that equality is not necessarily the same as identity.

11. Applicants allege, furthermore, that "[t]he practice of segregation by race is, moreover, uneconomic" [1].

This is a new allegation which was not made in the Memorials. Applicants now say that the said "practice" produces duplication of administrative machinery and personnel, etc., and that, since Native children are restricted to facilities intended for Natives, they "go without schooling in situations where there may be facilities for other 'groups', but inadequate facilities for 'Natives' " [1].

In support of their allegation regarding duplication of machinery and personnel, Applicants quote a passage from a book written and published in South Africa by the so-called 1961 Education Panel [2]. By quoting *ipsissima verba* from the Panel's report, entitled "Education for South Africa", without any qualification or explanation, Applicants convey the impression that the passage was descriptive of the position in South Africa. But it is nothing of the kind. It is a description of a system which is alleged to obtain in the Province of Quebec, Canada. The full passage from which Applicants have extracted only a part, reads as follows:

> "Two possible solutions have been tried and both warrant consideration for South Africa. The one consists in separate educational administrations for the separate groups, each administration itself being centralized. This system has been adopted in the Province of Quebec, where there are separate Directors of Education for Catholic and Protestant education, each with a separate administration. This system has found favour nowhere else as far as we know and seems to us to suffer from several serious disadvantages. It underlines group differences to an extent that seem unfortunate in a country where the different groups must co-operate and it involves

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[1] IV, p. 374.

[2] *Education for South Africa:* The 1961 Education Panel, First Report (1963). In the introduction to the report of the Panel it is stated that "the membership of the Panel ... includes also psychologists, scientists, religious leaders, professional men and business men ..." (p. xiv). Twenty-eight members subscribed to the report. The Chairman of the Panel is the Hon. O. D. Schreiner, who is also Chairman of the Institute of Race Relations (*vide* sec. E, Chap. VI, para. 20, *supra*). Several other members of the Panel are members of political parties opposed to the present Government in South Africa, or are otherwise known to be outspoken opponents of the Government. Two well-known members, Mr. H. F. Oppenheimer and Prof. P. V. Pistorius, are members of the Progressive Party (*ibid.*, para. 15). The sympathies of another prominent member, the Hon. A. van der S. Centlivres, also lie with this party (*ibid.*). Outspokenly anti-Government is another prominent member, Mr. Leo Marquard. Another member, Mrs. U. M. Weiss, is a member of the opposition United Party.

the duplication of all administrative personnel, and hinders the pooling of experience even at a high level [1]."

Moreover, the said Panel did not, as Applicants appear to suggest, advise any system of joint education. It recommended some form of decentralization of the control of education to small local authorities, as is found in some Western European countries, in the belief that such a system would contribute to the "amelioration of actual or potential inter-group conflicts" [2] and encourage "a far closer association between the public and the school systems than exists in South Africa at present" [2]. Such an association, it believed, "would be in the true interests of national unity, that is an identification of the members of all groups of themselves not only with the group but also with the country as a whole" [2].

Furthermore, not only did the said Education Panel not advise joint education, but it expressed itself against uniformity. Noting that South Africa "has problems which are peculiar to itself arising out of its character as a country of many racial, language and cultural groups" [3], it stated:

"One of the principal motives underlying education, which we have not yet had occasion to mention, is the handing on from generation to generation of the distinctive culture of the group as expressed in language, literature, traditions and customs. In more primitive communities indeed, this is the only purpose of education...

We do not wish to embark upon speculation as to the reasons for the tremendous importance which human beings attach to their group cultures, but it is an observed phenomenon universal in both time and space, that the tenacity with which people defend their culture against any form of attack is comparable to that with which they defend a deeply held religion, and indeed the two issues are often inseparably linked. There are few cases in history where a language or culture has been successfully destroyed by persecution or pressure by any means short of the massacre or physical expulsion of the persecuted group...

This being so it must be accepted as a first principle, that no effort will be made to destroy or impose modifications upon the culture of any group in South Africa. The whole of history in South Africa and in the world shows that any such attempt would in all probability fail, while it would create bitterness and strife in the country so violent as to make mutual co-operation between the groups impossible and to interfere most seriously with prosperity and progress [4]."

12. In regard to Applicants' aforementioned allegation that its system is "uneconomic", Respondent concedes that a system of separate schools for the different population groups must, from the nature of things, be somewhat more uneconomical than a joint system of integrated schools would be—that is, if such latter system were feasible. The question of economy is, however, only one of many factors which have to be considered, and, relevant as it may be, it cannot in the South West Africa context outweigh the advantages of a system of separate facilities for the

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[1] *Education for South Africa, op. cit.*, p. 57.

[2] *Ibid.*, p. 58.

[3] *Ibid.*, p 54.

[4] *Ibid.*, pp. 54-55.

different population groups. Nor is it of nearly sufficient weight to justify consideration of a system of mixed facilities, such as boarding facilities, as is suggested by Applicants. This suggestion is completely unrealistic, and runs counter to all social traditions in the Territory. If the suggestion is that, despite these considerations, an integrated system should nevertheless be enforced, Respondent is convinced not only that any such course will fail, but that its attempted implementation will entail costs far in excess of such extra expenditure as may at present be involved in maintaining separate educational facilities [1].

13. It remains to deal briefly with an allegation made by Applicants in a footnote on page 374 of the Reply [2]. They say that "[a]s a result, *inter alia*, of Respondent's segregation policies, 56.36 per cent. of the 'Native' children in the Police Zone do not receive any education at all, whereas 99.66 per cent. of the 'European' children attend school". This is a grossly unfair statement which creates a totally distorted impression of the true position, despite the use of the words *inter alia*. Applicants completely ignore the many factors which have in the past affected, and still affect, attendance figures in the case of Native pupils, not only in South West Africa but throughout Africa, and they completely ignore the fact that there has in South West Africa been a steady increase in the percentage of Native children who attend school. Respondent's policy of separate facilities is no more responsible for the fact that 56.36 per cent. of Native children in the Police Zone do not attend school than it is for the fact that 99.66 per cent. of European children attend school. It would be equally wrong to say that, because there is no system of separate facilities in Liberia or Ethiopia, no more than 23 per cent. of children of school age attend school in Liberia [3], and no more than 5 per cent. in Ethiopia [4].

C. Separation by Tribe [5]

14. Applicants' treatment of what they style "Separation by Tribe" appears, on analysis, to be an attack on Respondent's policy of mother-tongue instruction in so far as it affects the Native population groups of South West Africa. In order to avoid repetition and to facilitate its answer to various allegations made by Applicants, and also to remove in advance at least some of the wrong and misleading impressions which Applicants create in the Reply either by mis-statements or omissions of material facts, Respondent proposes first of all to repeat, very briefly, some of the main points made by it in dealing with its policy of mother-tongue instruction. Thereafter Respondent will deal with the various allegations made by Applicants.

15. The following is a summary of statements made by Respondent in the Counter-Memorial regarding mother-tongue instruction:

(a) Respondent stated that the multiplicity of languages spoken in the Territory called for a policy of differentiation not only as between the White, Coloured and Native groups, "... but as far as

[1] *Vide* in this regard sec. E, Chap. XI, para. 32 for an indication of the immensity of the expenditure entailed in enforcing educational integration in the U.S.A.

[2] Footnote 3.

[3] III, p. 445.

[4] *Ibid.*, pp. 445-446.

[5] IV, pp. 374-383.

practicable, also as between the various Native groups" [1], and added that, quite apart from practical considerations,

> "... sound educational policy required that separate schools be provided for the children of the various Native groups in which they could be taught in the vernacular by teachers of their own group within their own social and domestic milieu [2]".

In regard to the merits of a system of mother-tongue instruction, Respondent said, *inter alia*:

> "Experience has shown that pupils absorb much more when instruction is given them in their home language, than when it is done in a language not their own, and, also, that children who are first taught to read and write in their own language generally learn a foreign language more easily and quickly than others [3]."

Reference was also made to a publication issued by the United Nations Economic and Social Council in 1956 in which it is stated that educational experts—

> "... accept as axiomatic, on psychological, sociological and educational grounds, that the best medium for teaching a child is his mother tongue. Consequently, they recommend that every effort should be made to provide education in the mother tongue to as late a stage of education as possible [4]."

(b) Respondent referred to the report of the 1958 Commission of Inquiry into Non-European Education in South West Africa, in which was recommended—

> "... the use of the vernacular as medium of instruction in the sub-standards (*i.e.*, the first two years' schooling), and as far as possible also in Standards I and II [5]".

It was indicated in this regard that the said standards are very important as far as the Natives are concerned, since so many of them leave school after only a few years. It was therefore stated that the courses in these standards aimed at making—

> "... the largest possible number of children of school-going age literate in their mother tongue and at providing them, at the same time, with a knowledge of Afrikaans and English [5]".

In making its aforesaid recommendation, the said Commission mentioned that it had considered recommending the introduction of the home language as a medium of instruction in the higher primary standards, but that it had decided against it because of the as yet insufficient development of the Native languages as "literary and written languages", and because the "necessary subject terminology for higher classes" still had to be developed [6].

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[1] III, p. 356.

[2] *Ibid. Vide* also p. 362.

[3] *Ibid.*, p. 359.

[4] *Ibid.*, p. 377. Applicants make no mention of, and completely ignore, this and other similar expressions of opinion as to the value of mother-tongue instruction.

[5] *Ibid.*, p. 358.

[6] *Ibid.*, p. 361 and *vide Report of the Commission of Inquiry into Non-European Education in South West Africa*, Part I (1958), pp. 115-116. (Unpublished.)

It is clear that the Commission considered the introduction of the mother tongue as a medium of instruction in the higher primary classes as an aim, or ideal, to be achieved in future: hence, *inter alia*, its recommendation to establish a Bureau for Native Languages [1].

And Respondent gave expression to an even more distant aim, or ideal, when it stated in the Counter-Memorial:

> "It is the ultimate aim that the vernacular be used as the medium of instruction in all standards. But this will take time, and will only become possible when the various Native languages have been sufficiently developed to be used as teaching languages in all the standards, and when sufficient Native teachers with post-Matriculation qualifications become available for the teaching of secondary classes [2]."

Respondent also indicated that the further development of the Native languages would require the co-operation of the Native groups concerned. It stated that active steps were being taken by the Administration to effect the further development of these languages as teaching languages, and to prepare suitable school books in each of them, and concluded:

> "In the final result, however, it will be for the groups themselves to contribute to the development of their languages to meet all educational needs [3]."

This statement means, and was intended to mean, that whilst the Administration will, through the means of the Bureau for Native Languages, take the initiative and make every effort to develop the Native languages into vehicles for more advanced education than is possible at present, the outcome of the scheme for the development of these languages will, in the final result, depend on the co-operation of the people most closely concerned, viz., the Native groups themselves, for it is only with their willing co-operation that it will be possible to develop the languages to the point where they can be used to meet all needs, i.e., education at all levels. In some instances the final stages of development may come about only after responsibility for education has been taken over as part of self-government by the particular Native group, as is already the case with the people of the Transkei in the Republic of South Africa [4].

(c) In regard to the Commission's aforementioned recommendation as to the use of the mother tongue as medium in the lower primary standards, Respondent stated:

> "The recommendation as to mother-tongue instruction did not constitute an innovation of principle as far as Native education in the Territory was concerned, but endorsed a policy and aim which had for a long time been pursued by the Administration, namely, that instruction in the lower standards

[1] **III**, p. 361.

[2] *Ibid.* The above-quoted passage, as will appear hereafter, forms the basis of most of Applicants' attack on Respondent's policy of mother-tongue instruction.

[3] *Ibid.*, p. 416.

[4] *Vide* **II**, p. 480 (para. 38), and also para. 25, *infra*.

should, as far as possible, be in the pupil's home language [1]."

Respondent pointed out that, whilst various practical difficulties had hampered development [2], progress had nevertheless been made in carrying out this policy, and it mentioned the fact that—

> "[t]hus far Ndonga, Kuanyama, Kuangali, Herero, Nama and Tswana have achieved the status of school languages, but, because of insufficient development as yet, mother-tongue instruction is generally not yet feasible beyond the Standard II level in these languages [3]".

(d) It was indicated, furthermore, that Respondent's aforesaid policy of mother-tongue instruction "was in accord with the views held by the Permanent Mandates Commission" [4], and Respondent referred, by way of illustration, to a report by one of the members of the Commission and to certain discussions in the Commission [5].

(e) Finally, Respondent mentioned that there are at present practical difficulties in the way of teaching every child in the Territory through the medium of his home language. It was pointed out that such difficulties existed especially in certain parts of the Police Zone, the position being generally much easier in the northern territories where large areas are inhabited by people speaking the same language [6]. In this regard Respondent indicated that every effort is nevertheless made ". . . to ensure that as many pupils as possible are taught through the medium of their own language by teachers of the same language group" [6], and that—

> "[w]herever circumstances allow it to be done, the vernacular is used as the sole medium of instruction in the sub-standards, and as the most important medium in Standards I and II. During the third and fourth years (*i.e.*, Standards I and II), an official language is gradually introduced as medium [7]."

In dealing with measures taken by the authorities in the Territory to accommodate children of a particular language group in a school or class of their own, Respondent pointed out that difficulties which arise in areas which are inhabited by members of more than one language group are often alleviated by the fact that pupils and teachers know more than one Native language [8]. In the rare

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[1] **III**, p. 359. Applicants, it will be indicated in para. 17 below, wrongly state that Respondent's policy is a recent one, and they create the misleading impression that Respondent also regards it as a new policy: *vide* **IV**, p. 375 and footnote 1.

[2] **III**, pp. 360 and 415-416.

[3] *Ibid.*, p. 416.

[4] *Ibid.*, p. 359.

[5] *Ibid.* Applicants create the misleading impression that Respondent's contention is that the Commission approved of mother-tongue instruction at all levels (i.e., including the secondary school): *vide* **IV**, p. 378. This was never Respondent's contention: secondary education for Native pupils was not in issue in the days of the Commission. Applicants also say (somewhat half-heartedly: *vide* **IV**, p. 378) that the Commission approved rather of the study of the vernacular than of its use as a medium of instruction. Respondent will demonstrate below (*vide* para. 20) that it approved of the use of the mother tongue as medium of instruction.

[6] **III**, p. 360.

[7] *Ibid.* In the higher primary standards (i.e., Standards III-VI) an official language is at present the sole medium of instruction *(ibid.)*.

[8] *Ibid.*, p. 362.

case where no Native language can be used as medium, an official language is used [1].

16. As already stated, Applicants' treatment of what they term "Separation by Tribe" [2] appears, on analysis, to be an attack on Respondent's policy of mother-tongue instruction in so far as it affects Native education in the Territory. This attack rests mainly on the following contentions regarding Respondent's policy:

(a) it "thwart[s] the social progress of 'Natives' by isolating them from each other, and from the modern world" [3];

(b) it is "impractical and unworkable" [3];

(c) the policy "as currently practised and as intended to be applied" [4] has "at least four major defects" [4];

(d) the "evils" [5] of mother-tongue instruction "in primary and secondary schools in South West Africa" [5] are "compounded in South Africa at the university level by the evils of 'Bantu education' in *different* 'mother tongues' " [5].

Respondent now deals with the allegations made by Applicants in support of their charges as summarized in *(a)* to *(d)* above.

I. The Charge that the Policy "Thwart[s] the Social Progress of the 'Natives' "

17. In the Counter-Memorial Respondent showed that its policy of mother-tongue instruction is, at least as far as instruction in the lower primary standards is concerned, an old one [6], and that it was, also, in accord with the views of the Permanent Mandates Commission [7].

In the Reply Applicants adopt an approach which amounts to the following:

They say, firstly, that Respondent's policy, as applied in the Territory, is a recent one [8]; and, secondly, that Respondent's reference to a report [9] by Mme Wicksell, a member of the Permanent Mandates Commission, does not support a policy of mother-tongue instruction "at all levels"—a contention which was never advanced by Respondent—and that Respondent's references in the Counter-Memorial to the Minutes of the Commission do not support a policy of mother-tongue instruction "as recently introduced into the Territory" [10]. Then, thirdly—perhaps because they realize that they cannot substantiate these statements, or show that Respondent's policy as applied at present is unsound—Applicants

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[1] **III**, p. 362.

[2] **IV**, p. 374.

[3] *Ibid.*, p. 378.

[4] *Ibid.*, p. 380.

[5] *Ibid.*, p. 382.

[6] **III**, p. 359 and *vide* para. 15 *(c)*, *supra*.

[7] *Ibid.*, and *vide* para. 15 *(d)*, *supra*.

[8] *Vide* reference to "the system . . . which Respondent has tried in South Africa and has now applied in South West Africa" (**IV**, pp. 374-375), and to "developments" which are alleged to have taken place "since the dissolution of the League of Nations . . ." (*ibid.*, p. 380).

[9] *Vide* **IV**, p. 378, and **III**, p. 359.

[10] **IV**, p. 378.

proceed to attack what they describe as "the central, and most objectionable feature, of the whole plan of educational *apartheid*" [1], and which appears to be something which is not yet in existence, but which is, at this stage, nothing more than a distant aim, or ideal, viz., "the ultimate aim that the vernacular be used as the medium of instruction *in all standards*" [2].

18. Applicants make no attempt to substantiate their above-mentioned allegation that Respondent's policy of mother-tongue instruction as now applied in the Territory is a new one, and they fail to deal specifically with the statement in the Counter-Memorial, noted above [3], to the effect that the recommendation of the 1958 Commission of Inquiry into non-European Education in South West Africa regarding the use of the vernacular as medium of instruction in the sub-standards and, as far as possible, also in Standards I and II, "did not constitute an innovation of principle . . . but endorsed a policy and aim which had for a long time been pursued by the Administration".

Respondent repeats its statement that the policy as at present applied in the Territory is not a new one. Whilst more concerted efforts have admittedly been made in recent years to ensure that in practice as many young pupils as possible are taught through the medium of their home language, and, also, to impress upon teachers the value of such teaching, such efforts in no way amount to the introduction of a new policy. At present, too, there is more official action than in the past to develop some of the Native languages through the agency of a Bureau for Native Languages [4], but this is, in essence, nothing more than an officially organized scheme to carry on and further a process of language development which was begun years ago and which, as has been pointed out [5], resulted in certain languages being developed to a stage where they could be used as school languages.

19. Applicants say, as was indicated above [6] that the report by Mme Wicksell, a member of the Permanent Mandates Commission, to which Respondent referred in the Counter-Memorial on the question of mother-tongue instruction, "cannot be reduced to authority in support of tribal vernacular instruction at all levels" [7].

Respondent never referred to the report as an "authority" for mother-tongue instruction "at all levels" [8]. Without going into any detail, it may be mentioned that there was, in the days of the Mandates Commission,

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[1] IV, p. 375.

[2] *Ibid.*, and *vide* III, p. 361.

[3] *Vide* para. 15 *(c)*, *supra* and III, p. 359. In addition to what has already been said in this regard, Respondent points out that in 1929 South Africa's representative Mr. Smit, informed the Permanent Mandates Commission that the Territory could not obtain trained teachers from South Africa because "the medium of instruction in the schools was the home language of the pupils" and "the Union natives had no knowledge of the native languages of South West Africa". (*P.M.C.*, *Min.*, XV, p. 73.) In 1935 it was stated in Respondent's annual report that "[t]he principle of mother-tongue instruction is adhered to in all the schools for native scholars . . ." (*U.G.* 26—1935, p. 41 (para. 294)).

[4] III, p. 361.

[5] *Ibid.*, p. 416 and *vide* para. 15 *(b)*, *supra*.

[6] *Vide* para. 18, *supra*.

[7] IV, p. 378.

[8] *Vide* III, pp. 359-360 and also para. 15 *(d)*, footnote 5, *supra*.

no secondary education for Natives in the Territory and that the question of medium of instruction did not arise in regard to such education. It is significant, furthermore, that whilst Applicants go to the length of disputing a contention which was never advanced by Respondent, they remain silent as to what was actually stated in the report on the question in issue, viz., that African schools were often handicapped by a multiplicity of languages, sometimes even to the point where it became "necessary . . . to carry on instruction in a foreign language . . ." [1]. This indicates clearly, in Respondent's submission, that the said report favoured the view that the instruction of the young should not be in a "foreign language", except as a last resort.

20. In regard to Respondent's quotations from the Minutes of the Permanent Mandates Commission [2], Applicants argue that they "stand, rather, for a different and laudable objective, that of *'more systematic instruction* in the mother tongue' " [3]. Applicants say, if Respondent understands them correctly, that the quotations show that the Commission approved of the study of the Native languages, rather than of their use as media of instruction—even in the lower standards. In support of this argument they refer to the fact that Lord Lugard, who, in 1934, congratulated the Administration on its "encouragement of the mother tongue" [4], stated in his book, published in 1922 [5], that "[n]o greater benefit" could be conferred on the African "than the teaching of English as a universal medium". According to Applicants the inference must therefore be drawn that Lord Lugard merely commended encouragement given to the *study* of the Native languages. In Respondent's submission, however, the passage quoted by Applicants from Lord Lugard's book [3] is inconclusive, since it is not clear that he had in mind the question of the medium of instruction to be used in schools when he used the words quoted by Applicants.

But this argument need not be prolonged. The real question must obviously be not so much what the quotations cited by Respondent in its Counter-Memorial indicate, but rather what the views of the Commission in fact were. This appears clearly, in Respondent's submission, from certain Minutes of the Commission regarding education in another mandated territory, viz., New Guinea. It is reported that in 1932 Mlle Dannevig stated that she—

> ". . . wished to remove any misunderstanding which might subsist after the discussion in the Commission the previous year concerning the teaching of English to the smaller children. It must not be understood that the Commission in any way recommended such teaching. On the contrary, *the policy advocated by the Mandates Commission in all mandated territories was that the smaller children should receive instruction solely in the native tongue. That, she noted, was also the view of the missions.* There seemed to be a difference of opinion among the missions on this point [6]." (Italics added.)

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[1] **III**, p. 359.
[2] *Ibid.*, pp. 359-360.
[3] **IV**, p. 378.
[4] **III**, p. 360.
[5] *Vide* **IV**, p. 378, footnote 5.
[6] *P.M.C., Min.*, XXII, p. 67.

A reference to the proceedings of the Commission in the previous year shows that the Chairman of the Commission indicated that the missions were "opposed to English as the language of instruction" [1] and that the reason therefor possibly was that it "helped their work to teach in the vernaculars" [1].

In Respondent's submission it is clear from the aforegoing, and from what is stated in the Counter-Memorial in this regard, that the Permanent Mandates Commission approved of the principle of mother-tongue instruction, at least in the early standards.

21. In this and in the next succeeding paragraphs Respondent deals with Applicants' charge concerning the alleged "central, and most objectionable feature, of the whole plan of educational *apartheid*", but, before discussing the various specific allegations made by Applicants in this connection, Respondent makes the following general observations:

(a) In their Memorials Applicants made no mention whatsoever of any feature or detail of Respondent's policy of mother-tongue instruction. The policy as actually applied at present was, therefore, apparently not considered objectionable. This is probably also the reason why Applicants in the Reply launch their major attack not so much on the policy as it is applied at present as on what is, to their knowledge, only an "ultimate aim" [2] of the policy. Respondent has already shown [3] that achievement of this aim, or ideal, depends, *inter alia*, on the development of the languages concerned and on the co-operation and efforts of the people concerned.

(b) Educationists hold the view that if a Native language is sufficiently well developed and possesses the necessary reading material to serve as a teaching language at all levels, no valid objection can, on educational grounds, be taken to its use in all standards. Respondent has already shown that educational experts "recommend that every effort should be made to provide education in the mother tongue to as late a stage of education as possible" [4], and attention is now furthermore drawn to the following statements made by Unesco experts in the same connection:

> "On educational grounds we recommend that the use of the mother tongue be extended to as late a stage in education as possible [5]."
>
> "We must here lay down as a general principle what must have already been made apparent by our general approach to the problem: that in order to ease the burden on the child, the mother tongue should be used as the medium of instruction as far up the educational ladder as the conditions referred to on page 50 permit (in other words that the transfer to a second language, if necessary, should be deferred to as late a stage as possible); and that authorities should do everything in their power to *create* the conditions which will make for an ever-increasing extension of schooling in the mother tongue, and

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[1] *P.M.C. Min.*, XX, p. 25.

[2] *Vide* **III**, p. 360, and **IV**, p. 375.

[3] **III**, p. 416 and *vide* also para. 15 *(b)*, *supra*.

[4] *Ibid.*, p. 377.

[5] Unesco, *The Use of Vernacular Languages in Education* (1953), pp. 47-48.

make the transition from mother tongue to second language as smooth and as psychologically harmless as possible [1]."

"If the mother tongue is adequate in all respects to serve as the vehicle of university and higher technical education, it should be so used [2]."

(c) Respondent fully appreciates that since the Native languages of the Territory largely have local currency only [3], as thorough a knowledge as possible of English—being a world language—is necessary, and, because of its wide use in South West Africa and South Africa, also of Afrikaans. It follows that educational authorities in the Territory will at all times have to direct their attention to maintaining properly balanced language curricula, having regard to the fact that whilst the mother tongue constitutes the best vehicle of instruction from an educational point of view, a sound knowledge of English and Afrikaans is, at the same time, essential for other purposes, *inter alia*, to facilitate access to world culture and knowledge.

22. In referring to Respondent's "ultimate aim that the vernacular be used as the medium of instruction *in all standards*" [4] and to efforts which are being made to develop the Native languages of the Territory, Applicants say—in two footnotes [5]—that although German needs no such development as is contemplated in the case of the Native languages, it is nevertheless not Respondent's present policy, nor stated to be a future aim, to give German pupils all their instruction in German. Applicants do not say what inference they draw from this fact. It is difficult to conceive that they are in any way concerned about the education given to German pupils, and the suggestion would accordingly seem to be that Respondent's policy of mother-tongue instruction in the case of the Native groups is not bona fide intended to serve the best interests of these groups. If so, the suggestion is denied. As has been indicated in the Counter-Memorial [6], certain political considerations have played a part in the case of the German section of the population. It was indicated [6], too, that certain changes were brought about in 1960 as a result of recommendations made by an Education Commission, and the position will no doubt be reviewed in future in the light of all relevant circumstances. It cannot therefore be assumed that the position in regard to German pupils will remain as it is at present.

23. Various statements [7] made by Applicants amount to a complaint regarding what they term the "artificial development" [8] of the Native languages, and the "forced nature" [9] of Respondent's system of mother-tongue instruction. These allegations, as will be obvious from what has

[1] Unesco, *op. cit.*, p. 52.
[2] *Ibid.*, p. 69, para. 6.
[3] Some of the languages spoken in Ovamboland and in the Okavango are also spoken in Angola, while Silozi, spoken in the Caprivi, is also spoken in Northern Rhodesia.
[4] **IV**, p. 375. (Italics added by Aplicants.)
[5] *Ibid.*, footnotes 3 and 5.
[6] **III**, p. 495.
[7] *Vide* **IV**, pp. 375-376.
[8] *Ibid.*, p. 375.
[9] *Ibid.*, p. 376.

been stated above, are without substance. Respondent has clearly demonstrated that it is in the best interests of the Native children themselves to be taught through the medium of their own language. If it is a good thing for a child to be taught in his home language—as educationists say that it is—it surely follows that the development of that language, and the preparation of books and other teaching matter therein for the purposes of such instruction, cannot be wrong.

The idea that Native (African) languages should be developed to meet new demands, including their use as media of instruction, is not limited to South Africa or South West Africa, as can be demonstrated from the monograph of the committee of Unesco experts to which reference was made above [1]. Holding the view that "there is nothing in the structure of any language which precludes it from becoming a vehicle of modern civilization" [2], these experts deal with various aspects of language development. In regard to the preparation of teaching material, they say, *inter alia*, that in a country which "contains a complex linguistic situation" it may be found "highly desirable" to establish "a bureau or institute, to supervise the choice of languages for regional use and the preparation of scientifically prepared pedagogical material" [3]. In connection with vocabulary development, in contradistinction to spontaneous vocabulary growth, they say that—

> "... in the event of new departures in education and culture, including particularly the introduction of the mother tongue into the school for the first time or the attempt to develop scientific and technical literature and training in a language which has previously been little used in this way, then the need arises for conscious planning of vocabulary development [4]",

and in regard to the organization of vocabulary development they say, *inter alia*:

> "Where the problem is to develop a simple vocabulary for primary school purposes, it probably can be done by a small committee of experts acquainted with both the subject-matter and the native culture, and advised by one or more linguistic scholars of a practical turn of mind. Where the aim is to develop the use of a language for technical purposes, a permanent commission or society would be in order [5]."

24. In dealing with the so-called "artificial development" of the Native languages, Applicants rely on a view expressed by a former inspector of schools, Mr. G. W. Sneesby [6]. The relevant passage in the Reply reads as follows:

> "An ex-Inspector of Schools has queried whether it might not have been better to have allowed the Bantu languages in South Africa to develop in the natural course of events, rather than to engineer an artificial development thereof necessary for such

[1] Unesco, *The Use of Vernacular Languages in Education* (1953), *vide* para. 21, *supra*.

[2] *Ibid*., p. 49.

[3] *Ibid*., p. 64.

[4] *Ibid*., pp. 64-65.

[5] *Ibid*., p. 66.

[6] *Vide* **IV**, p. 375.

languages to be used as instructional medium for arithmetic, social studies, environmental studies, and other subjects [1]."

What Applicants say in regard to Mr. Sneesby's query is apparently their version of the following passage in Mr. Sneesby's article:

"A very great problem arising from the use of the vernacular as medium throughout the primary school course, quite apart from its introduction as medium for the secondary school course, is the lack of suitable terminologies for the various school subjects. Departmental committees have been established for the various languages and these committees have made considerable progress in the compilation of the required terminologies for many of the school subjects. Already a number of terminologies have been published in Xhosa, Zulu and Sotho and some progress has also been made in Tsonga and Venda. What does cause the observer some disquiet is the feeling that the various languages are not really being allowed to develop in the natural order of events *pari passu* with the gradual development and advancing civilisation of the peoples concerned, but that a kind of artificial forced development of the languages is taking place [2]."

Respondent has already dealt with the general issue of the development of Native languages and with the views of experts in regard thereto [3], and Mr. Sneesby's view should be considered in the light thereof. Respondent says, furthermore, that it fully appreciates that there should not be an unrealistic gap between the general level of development of a people and new ideas or nations which it is sought to introduce. The Unesco experts to whom reference has already been made refer to this problem in a passage dealing with planned vocabulary development. They say, *inter alia*:

"Those who undertake such work should avoid the kind of wasted efforts which in the past has frequently resulted from an impractical approach to vocabulary building and which produced thousands of words for notions which people were not discussing or which went against the tendencies in popular usage [4]."

In Respondent's submission the "disquiet[ing]" aspect referred to by Mr. Sneesby is not a substantial one. Respondent's educational experts are engaged on enlarging existing vocabularies to give expression to ideas or notions which come into play in school courses, and in Respondent's submission such language development, if sufficiently practical and realistic, has great educational value.

25. In regard to their complaint of the "artificial development" of Native languages, Applicants also rely on a statement in the report of the Commission of Inquiry into the Teaching of the Official Languages and

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[1] **IV**, p. 375. After the words "and other subjects" in the quotation above there appears footnote 6, being a reference to Sneesby, G. W., "The Vernacular in Bantu Education in the Union of South Africa", *Oversea Education*, Vol. XXXIII, No. 2 (July 1961), p. 75.

[2] Sneesby, G. W., "The Vernacular in Bantu Education in the Union of South Africa", *Oversea Education*, Vol. XXXIII, No. 2 (July 1961), p. 80. Applicants refer to p. 75 (**IV**, p. 375, footnote 6), but no such statement appears on that page.

[3] *Vide* para. 21, *supra*.

[4] Unesco, *The Use of Vernacular Languages in Education* (1953), p. 65.

the Use of the Mother Tongue as Medium of Instruction in Transkeian Primary Schools [1]. They say that—

> ". . . the Transkei Commission was of the opinion that, although education by the mother tongue was 'essential' in the early stages, it was improper as the medium in the secondary schools:
>
> > 'If this is ever to come about, it must come about as a result of a natural development. The inadequacy of the vocabulary, text books, and reference books is a very real and important obstacle in the way of its introduction as a medium of instruction in the secondary school' [2]."

Applicants' reference to the report of the Transkei Commission is no doubt intended by them to show that the Commission rejected language development of the kind fostered by Respondent and that it favoured "natural development". The Commission did not reject such language development. It is clear from its report that the expression "natural development" was not intended to exclude such development. This appears clearly from the following paragraphs in the Commission's report:

> "The case therefore for education through the medium of the mother tongue is so strong that it cannot be challenged. Indeed, if the mother tongue is not a suitable medium of instruction then it must either be developed to become a suitable medium or the people must adopt another mother tongue. As the Commission found no evidence to lead it to assume that the Xhosa people want to change their mother tongue, the only way out is to develop the mother tongue. This development cannot be effectively done by a language committee creating new words unless the people whose language it is want their language to grow and are not over critical of new words merely because they are strange. *If the people are prepared to co-operate with a language committee or language academy such a committee or academy can play a very useful part in the development of the language* [3]."
>
> "The Commission wishes to point out that a Committee whose activities are so firmly linked with a State Department will always be subject to some suspicion. Therefore *the Commission welcomes the pending establishment of an independent Xhosa Language Academy* that will be more representative [4]." (Italics added.)

Applicants' allegation that it was, in the opinion of the Transkei Commission, "improper" to use the mother tongue as medium of instruction in secondary standards creates a misleading impression by reason of their failure to say what the Commission's actual conclusion was. This conclusion, reached on the evidence before the Commission, was ". . . that for several years to come no attempt must be made to intro-

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[1] *R.P.* No. 22/1963. The passage quoted by Applicants is part of para. 6 *(a)* of sec. E of the report (p. 17, 1st Col.).

[2] **IV**, pp. 375-376.

[3] *R.P.* No. 22/1963, sec. E, p. 18 (para. 7 *(e)*).

[4] *Ibid.*, p. 18 (para. 7 *(f)*).

duce the vernacular as a medium in the Secondary Schools" [1], and it shows that the Commission did not, as Applicants suggest, hold the view that it was not proper, or that it would never be possible, to use the vernacular as medium in secondary classes. It may be noted that this conclusion immediately precedes the passage quoted by Applicants.

Dealing with the alleged "forced nature" of Respondent's policy of mother-tongue instruction, Applicants next cite the following passage from the report of the above-mentioned 1961 Education Panel [2]:

> "It must also be accepted, however, just as there is no place for trying to change cultures from outside, so there is none for trying to preserve them from outside. All cultures must and do change and if they did not they would ultimately perish through losing touch with contemporary needs. The decision as to how fast and in what direction a culture shall change, what its attitude should be to other languages for example, is a decision belonging to the bearers of the culture alone. In our opinion, therefore, *White-inspired attempts to insist upon the preservation of Bantu languages are as misplaced as White attempts to eliminate such languages would be.* The decision as to how Bantu languages as a medium of culture and learning shall develop belongs to the Bantu; or, to be more accurate, the decision as to each particular language belongs to those whose language it is."

It will immediately be observed that the passage in no way deals with the merits or demerits of mother-tongue instruction. Apparently it is quoted by Applicants as a basis for suggesting that Respondent should not contribute to the preservation of the Native languages of the Territory by using them as media of instruction; that Respondent should allow such languages, and the culture of those who speak them, to perish if they cannot, without Respondent's aid, cope with modern needs; and that Respondent should leave all decisions as to the use, preservation and development of the indigenous languages to the groups concerned. Respondent rejects all suggestions of this kind, and denies that its obligations under the Mandate in any way oblige it to act as Applicants seem to suggest.

Applicants seem to suggest, furthermore, that Respondent is guilty of "attempts to insist upon the preservation of Bantu languages" [3] when the Bantu groups themselves are not in favour of their preservation. The suggestion is completely unfounded. Quite apart from all that has been said above in regard to mother-tongue instruction and Respondent's efforts to develop the Native languages, Respondent says that it is not aware of a single Native group in South West Africa which is in any way desirous of abandoning, or in any other way losing, its own language.

In this context Respondent showed in the Counter-Memorial that there

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[1] *R.P.* No. 22/1963, sec. E, p. 17 (para. 6 *(a)*). The Commission, it may be pointed out, recommended that the mother tongue be used as medium through Standard IV; that the new medium (an official language) be introduced in respect of some subjects in Standard V, and in respect of other subjects in Standard VI; and that the mother tongue be used as medium in scripture right through: *ibid.*, p. 19 (para. 9 *(l)*).

[2] IV, p. 376 and *vide* para. 11, *supra*. (Italics added by Applicants.)

[3] *Vide* the italicized portion of the above-quoted passage from *Education for South Africa*: The 1961 Education Panel, First Report (1963), p. 56 and para. 11, *supra*.

has in recent years been a new interest in African States in preserving and reviving African culture, and in according such culture a proper place in education at all levels [1]. It cannot be assumed, as Applicants seem to do, that similar sentiments do not, or will not in future, operate in South West Africa, and in all the circumstances Respondent cannot countenance any suggestion which involves that a language should be allowed to die if it cannot survive without Respondent's assistance. In this regard Respondent draws attention to the following passage from a British educational report which was quoted by a member of the Eiselen Commission:

> "*We need not emphasize the importance of beginning the education of little children in the medium of their mother tongue* and with the material of Native folk-lore, music, games and living tradition. We feel it almost equally that *long after the pupil has passed over the medium of English and has set himself assiduously to study English literature, and European art, music, history and thought of all kinds, he should in this alien field continue to draw inspiration from his Native heritage of thought*—in whatever forms, such as music, visual arts and crafts, proverbial wisdom, historical traditions, or social institutions, the thought of his people has expressed itself in the past or can be hoped to express itself in the future. We recognize that *in some areas where there are many languages and perhaps many cultures, it will be difficult to apply this principle; but such difficulties do not lessen its importance. We believe it to be of the highest importance that the feeling of spiritual continuity between one generation and another should be maintained: and we see no other way than this of maintaining it. This, in our view, is the answer to the doubt that is sometimes expressed whether Native languages and cultures are educationally worth retaining; whether it would be better to let them die and concentrate on European culture. It is not so much a question of whether a particular language*, or matrilineal inheritance of collection of proverbs, or a set of folk idioms in music or the visual arts *should be carefully preserved by European servants* and handed over to the educationists to be pre-digested into intellectual pabulum for the children in school. *The question, rather, is whether in these things a people can preserve its contact with the past; whether its further growth will continue to be nourished from its ancient roots. A culture once dead cannot be resuscitated: let us beware of lightly allowing a culture to die* [2]." (Italics added.)

26. In speaking of the alleged "forced nature" of Respondent's system of mother-tongue instruction, Applicants also say that—

> "Respondent has not consulted the 'Native' groups in the Territory with respect to their wishes on vernacular instruction *in all standards* [3]" (italics added),

and then, apparently to support this statement, they add:

> "Indeed, the present Chief Minister of the Transkei has stated that

[1] **III**, pp. 377-381.

[2] Para. 20 of Prof. Murray's remarks, p. 176 of *U.G.* 53—1951, being a quotation from *Education for Citizenship in Africa* (Col. 216, p. 7).

[3] **IV**, p. 376.

the Transkei would abolish Xhosa as medium of instruction after Standard II [1]."

The latter statement is not directly relevant to conditions in South West Africa: further reference thereto is, however, made below [2]. As far as the Territory is concerned, it is correct that the Native groups have not yet been consulted in regard to the use of the vernacular as medium of instruction in all standards, i.e., including secondary standards. This question, as has been pointed out [3], was not in issue when the Commission of Inquiry into Non-European Education in South West Africa heard evidence and brought out its report in 1958. The Commission considered introducing mother-tongue instruction throughout the primary school course, but decided against it on practical grounds and recommended:

"*(a)* that only the home language be used as medium of instruction in Sub. A and B;

(b) that the home language should be used as far as is practicable also in Stds. I and II as medium of instruction, but that at this stage Afrikaans should supplement them in order to surmount technical problems;

(c) that Afrikaans should provisionally be the medium of instruction in all standards from Std. III upwards [4]."

In evidence before the Commission there were urgent requests from Native parents that "their languages should have equal treatment with the official languages" [5], and in regard to the specific question of medium of instruction the Commission reported;

> "All were agreed that the home language only should provisionally be used in the beginners classes and that Afrikaans should be the medium in the higher classes [6]."

Respondent has already indicated [7] that the use of the vernacular as medium of instruction in secondary standards is, at this stage, no more than a distant ideal, the achievement of which will, *inter alia*, depend on the co-operation of the Native groups concerned in developing the Native languages to become fit vehicles for such instruction. Respondent states, furthermore, that no final decision as to the use of the vernacular at secondary level will be taken until after due consultation with all those who have an interest in Native education, including parent communities, school boards and committees, teachers' organizations, and the missions.

27. The charge is also made that the use of the mother tongue at all levels lowers the standard of the official languages, and that this is a serious matter particularly as far as English is concerned [8].

In this connection Applicants refer, firstly, to the following statements

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[1] IV, p. 376.

[2] *Vide* paras. 30 and 31, *infra*.

[3] *Vide* para. 15 *(b)*, *supra*, and *Report of the Commission of Inquiry into Non-European Education in South West Africa* (1958), Part I, para. B. 124, pp. 115-116.

[4] *Report of the Commission of Inquiry into Non-European Education in South West Africa* (1958), Part I, p. 116 (para. B. 124).

[5] *Ibid.*, p. 80 (para. B. 106 *(c)*).

[6] *Ibid.*, p. 81.

[7] *Vide* para. 15 *(b)*, *supra*.

[8] *Vide* IV, pp. 376-377.

in an article by J. W. Macquarrie, who is described as an "authority on 'Bantu Education' ":

> "The introduction of a third language may well prove to be the most calamitous blow struck at Bantu education ...
>
> It will be seen, in brief, that the language provisions minister to the twin gods of apartheid and tribalization. They aim at producing an African tolerably fluent in his own language, if he stays long enough at school, and able to communicate to a strictly limited degree in the two official languages with officials and other casual contacts [1]."

Mr. Macquarrie's article [2], as will be obvious even to the cursory reader, is couched in terms emotional and exaggerated to a degree which makes proper assessment impossible, and the result is, to say the least, a sad lack of objectivity in his whole approach.

It should be noted at the outset that although Applicants apparently refer to the passages [3] quoted by them as dealing with mother-tongue instruction, this is not the case. They deal merely with the "introduction of a third language" which, it is alleged, "may well prove to be the most calamitous blow struck at Bantu education". It appears from the article that the third language to which Mr. Macquarrie refers is the second official language which, as appears from what the author himself says in his article [3], is *usually Afrikaans*. Mr. Macquarrie's complaint is that the introduction of the second official language leaves less time for the study of the first official language [4]. Applicants are, therefore, in effect complaining of the introduction of Afrikaans as a third language besides a Native language and English—a complaint which can hardly be reconciled with their alleged concern about the standard of Afrikaans.

The first sentence of the second part of the quotation contains a statement unworthy of serious reply.

Respondent also rejects the statement that—

> "[the language provisions] aim at producing an African tolerably fluent in his own language, if he stays long enough at school, and able to communicate to a strictly limited degree in the two official languages with officials and other casual contacts [4]".

This is untrue. Respondent's aim is that Native pupils should have a thorough knowledge of their own language. Native languages are used as media of instruction in primary standards, and are furthermore studied as subjects. Equally unfair and unwarranted is Mr. Macquarrie's assumption that, because Afrikaans has been introduced for study as second official language, Respondent must be taken to aim at nothing higher than that Native pupils should be able "to communicate to a strictly limited degree in the two official languages with officials and other casual contacts".

Applicants link this last statement by Mr. Macquarrie with an allegation previously made by them [5] in connection with a passage in the

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[1] IV, p. 376.

[2] Macquarrie, J. W., "The New Order in Bantu Education", *Africa South*, Vol. I, No. 1 (Oct.-Dec. 1956), pp. 32-42.

[3] *Ibid.*, pp. 40 and 41.

[4] *Ibid.*, p. 41. Mr. Macquarrie calls English the *lingua franca* of South Africa's Bantu groups. This statement is certainly not true for all parts of South Africa. It would be quite untrue of South West Africa.

[5] *Vide* Chap. II, para. 19, *supra*.

report of the Eiselen Commission. The paragraph in the report—of which paragraph Applicants quote only part—reads as follows:

> "We also wish to point out that witnesses, particularly the Bantu, laid great stress on the need to teach both official languages. We are therefore of the opinion that provision should be made for instruction in both these languages even in the lower primary school, and this should be done in such a way that the Bantu child will be able to find his way in European communities; to follow oral or written instructions; and to carry on a simple conversation with Europeans about his work and other subjects of common interest [1]."

It is quite clear that the Eiselen Commission referred to the minimum education it thought should be possessed by those Native pupils who did not proceed beyond the lower primary school [2]. The paragraph does not deal with education beyond that level, i.e., four years at school. This is apparent not only from the terms of the paragraph itself, but also from another passage in the Commission's report to which Applicants themselves refer [3], in which the Commission recommended that provision be made for the study of the official languages to serve, *inter alia*, "as a means of securing contact with the knowledge of the wider world" [4]. The latter recommendation clearly envisages a more profound knowledge of the official languages than was referred to in the case of pupils who leave school during or at the end of the lower primary course (i.e., four years' schooling).

28. Applicants make the following further allegation in regard to mother-tongue instruction in secondary standards and its alleged effect on the study of English:

> "A natural result of mother-tongue instruction at secondary levels is the decline of English. Thus, the 'Native' inhabitants of the Territory are becoming ever more isolated from the world which initially committed them to the care of Respondent. If Afrikaans, and, *a fortiori*, English, are taught as foreign languages to South West African children, the effects will be far-reaching [3]."

The alleged increasing isolation of the Native inhabitants of the Territory from the rest of the world is stated to be the result of mother-tongue instruction "at secondary levels". This is, to say the least, a curious statement, for, to the knowledge of Respondent, there is no mother-tongue instruction at secondary levels in South West Africa. In fact, as has been shown [5], the mother tongue is at present not used as medium in Native

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[1] *U.G.* 53—1951, p. 146 (para. 924) and *vide* Chap. II, para. 19, *supra*.

[2] In dealing with the curriculum of the lower primary school, Prof. Murray, a member of the Commission, quoted the following passage from the *Memorandum on Educational Policy in Nigeria*, 1945:

> "The essential aims of the curriculum of the junior primary school would comprise religious instruction, the study of the vernacular, a command of arithmetic sufficient for the needs of everyday life, ability to read, write and speak simple English and the arousing of an intelligent interest in the pupil's environment . . . The Committee would bear in mind that a four-year course can only cover the bare essentials and would be enjoined to ensure that the syllabus is not over-weighted." (*U.G.* 53—1951, p. 172 (para. 16).)

[3] **IV**, p. 377.

[4] *Vide U.G.* 53—1951, p. 132 (para. 776 *(c)*).

[5] **III**, p. 361 and *vide* para. 15 *(c)*, *supra*.

schools beyond Standard II, save that it is so used for religious instruction up to Standard VI in the northern territories. Inasmuch as Applicants are, in effect, attributing results to a system which is not in operation, there is no substance in their allegation that the Native inhabitants of the Territory "are becoming ever more isolated from the world". And for the same reason there is no factual basis for their prediction as to "far-reaching" effects in the future.

As far as the future is concerned, Respondent has already made it clear that it is fully aware of the value of English and Afrikaans to the Native inhabitants of the Territory, and of the necessity of giving Native pupils thorough instruction therein [1].

Applicants, it will be observed, complain of the future effects [2] of teaching "Afrikaans, and, *a fortiori*, English" as "foreign languages" to Native pupils. Since Native pupils have home languages other than English and Afrikaans, it is not appreciated how these two languages can be taught to them as anything but "foreign languages"—in the same way as English is taught as a "foreign language" to an Afrikaans-speaking pupil. Applicants' complaint is, indeed, an incomprehensible one. Taken literally, it seems to involve the proposition that steps should be taken to ensure that English or Afrikaans becomes the mother tongue of all Natives in the Territory—a proposition which Respondent rejects as involving nothing less than the disappearance of the Native languages. But perhaps Applicants intend to say no more than that English should be used as medium because instruction in any other language causes "the decline of English". If this is what Applicants intend, Respondent says, firstly, that due regard should at all times be had to the generally admitted value of mother-tongue instruction; that the standard of English attained is only one factor—albeit an important factor—of a school education; and, also, that it is wrong to assume that English can only be taught (and learnt) properly if it is also used as a medium of instruction in other subjects.

In regard to the last-mentioned point, viz., the use of English as a medium of instruction with a view to raising the standard of English, Respondent refers to the following passages from a paragraph in the *Report of the Commonwealth Conference on the Teaching of English as a Second Language*, held at Makerere College, Uganda, in 1961:

"*(a)* Although one of the reasons for using English as a medium is the advantage it provides in teaching the language, its employment as a medium is uneconomical of time and effort if it is regarded as a substitute for well planned instruction in English as a subject."

"*(c)* The use of English as a medium requires, in the teacher, greater control over the language, greater ability to operate within the range of language available to the pupils, and more teaching skill than is required to teach the language as a subject, especially at the early stages. If he is not thoroughly at home in the subject he is teaching through English, he may be pressed to rely more than is desirable on his textbook,

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[1] III, pp. 364-365 and *vide* para. 21 *(c)*, *supra*.

[2] *Vide* "the effects will be far-reaching", IV, p. 377.

with the result that the English the pupils are taught will become bookish and stilted [1]."

It may be noted in this regard that the Transkei Commission of Inquiry, which is referred to by Applicants in the Reply [2], rejected what it described as "the educationally unsound and mistaken notion, that a foreign language can only be taught thoroughly if it is also used as a medium of instruction" [3], and that it also said—

"[i]f the knowledge of a foreign language must improve then it is educationally sounder to increase the time allocated to the teaching of the language rather than to resort to measures that *may* have the desired effect in so far as the knowledge of the language is concerned, but may have other undesirable results . . . [4]".

29. In support of their aforementioned statement that "[i]f Afrikaans, and, *a fortiori*, English, are taught as foreign languages to South West African children, the effects will be far-reaching", Applicants quote the following passage, which is alleged to have been made by a petitioner before the Special Committee on Apartheid:

"This means that the standard of English and Afrikaans remains very low making it even more difficult for the African to fit into an economy run by Whites who do not speak tribal languages, and even to communicate with Africans of other tribes [5]."

Respondent says the following in regard to this quotation:

Firstly: The words ascribed to the petitioner are apparently not the words actually used by him. The passage in the document from which Applicants quote does not appear in the official record of the *oral proceedings* before the Committee concerned. The only passage in this record which resembles the one quoted by Applicants reads as follows:

"In the primary schools, instruction was given in the language of the tribe; the non-White child therefore had a very inadequate knowledge of English or Afrikaans, which greatly impeded his adaptation to modern life and prevented him from communicating with Whites and with members of other tribes [6]."

Secondly: The petitioner spoke of what were, according to him, conditions in South Africa. He made no mention of South West Africa.

Thirdly: The petitioner made no mention of the fact that English and Afrikaans are taught as subjects from an early stage in all Native schools, and created the false impression that Native pupils are left to themselves to pick up such English and Afrikaans as they can so as to be able to adapt themselves "to modern life", or to communicate with Whites, or other Natives. He also failed to make any mention of the generally admitted value of mother-tongue instruction.

Fourthly: If the aforesaid official record is to be trusted, the petitioner is a dishonest man, and thoroughly unreliable. According to this record

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[1] *Report of the Commonwealth Conference on the Teaching of English as a Second Language*, held at Makerere College, Uganda (1 to 13 Jan. 1961), p. 23 (para. 65 (1) *(a)* and *(c)*).

[2] IV, p. 376, footnote 1.

[3] *R.P.* No. 22/1963, sec. E, p. 16 (para. 5 *(b)*).

[4] *Ibid.*, pp. 16-17 (para. 5 *(d)*).

[5] IV, p. 377.

[6] *U.N. Doc.* A/AC. 115/SR. 21, 22 Aug. 1963, p. 10.

he made certain statements which are palpably false, and which the Applicants would gladly have incorporated in their Reply if they had thought that there was any chance of their being believed. Thus, according to the record the petitioner made the following completely false statement:

> "African children were educated only in tribal life and traditions, with deliberate exclusion of the cultural heritage and the scientific and technological discoveries of the Whites . . . [1]"

In Respondent's submission, the petitioner on whom Applicants rely can in no way be regarded as authority for the above-mentioned statement in support of which he is quoted by them. Nor can what he is quoted as having said be accepted as authority for the following statement by Applicants, which follows immediately upon the said quotation, viz.:

> "This is hardly promotion 'to the utmost', or otherwise, of the social progress of the inhabitants. Not only will children be 'retribalized', not only will they be cut off from the outside world, but they will be divided from one another [2]."

It is not clear what Applicants wish the word "retribalize"—the inverted commas are theirs—to mean, save that the word would seem to involve a contemplation that children are not "tribalized" at present. In any event, if Applicants intend to suggest that Native children are, or will be, cut off from modern education, the suggestion is denied.

In this same connection Applicants make the following novel and startling statement: "A policy of division such as this naturally saps the energies and the powers of 'Native' opposition to the policies of the Respondent" [3]. The question immediately arises why such an accusation should merit nothing more than a bald statement in a footnote. The statement is a shameless and untrue one, and is rejected by Respondent [4].

30. In support of what they predict will be the result of Respondent's policy of mother-tongue instruction, i.e., isolation from the "outside world" and "from one another", Applicants also quote what purports to be a newspaper version of a statement made by Mr. Matanzima, now Chief Minister of the Transkei. Applicants quote him as saying that—

> ". . . although Xhosa would be the official language of the Transkei, it would be *abolished* as a medium of instruction after Standard Two; the Government's insistence on Xhosa as a medium of instruction was 'a sore point with the people' (Johannesburg *Star*, air mail edition, 27 January 1962). Africans do not want to be linguistically isolated from one another, let alone from the world [2]."

Applicants clearly wish it to be inferred that Mr. Matanzima regarded mother-tongue instruction above Standard II as a factor which isolated Natives from one another and from the world; and, secondly, that he actually said "Africans do not want to be linguistically isolated from

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[1] *U.N. Doc.* A/AC. 115/SR. 21, 22 Aug. 1963, p. 10.

[2] IV, p. 377.

[3] *Ibid.*, *vide* footnote 3.

[4] It seems likely that Applicants were inspired to make the allegation by the aforementioned petitioner who, after stating that "African children were educated only in tribal life and traditions", went on to say, *inter alia*, that "Such an education . . . prevent[ed] the non-Whites from uniting", *U.N. Doc.* A/AC. 115/SR. 21, 22 Aug. 1963, p. 10.

one another, let alone from the world". Respondent points out that a reference to the newspaper report referred to in the quotation [1] clearly establishes the following:

Firstly: Mr. Matanzima never said "Africans do not want to be linguistically isolated from one another, let alone from the world". Nor did he say anything remotely similar. In fact, he never referred to "Africans", or to "isolation" in any form.

Secondly: Mr. Matanzima said, according to the report, that ". . . there were neither text books nor terminology in Xhosa for it to be the language medium above Standard II" [1]. He never said, or implied, that to use Xhosa as medium of instruction would isolate the Xhosa from the world or from one another.

Thirdly: He said, according to the report, that "Children would be taught in English—or in Afrikaans if they understood it better" [1]. This shows, it is submitted, that Mr. Matanzima did not think that Xhosa children would be "cut off from the outside world" if they received their education through the medium of Afrikaans and studied English as a subject (i.e., as a "foreign language") [2].

Fourthly: As to the statement that the Government's insistence on Xhosa being the medium of instruction was "a sore point with the people", Respondent points out that a Commission of Inquiry was appointed by it in 1962 to inquire, *inter alia,* into the use of the mother tongue as medium of instruction in the schools of the Transkei, and that this Commission reported in October 1963 [3].

Respondent points out, furthermore, that recently Mr. Matanzima, referring to the decision taken by the Transkei Government in 1964 to introduce English or Afrikaans gradually as medium of instruction from Standard III, and to other educational matters in the Transkei, is reported to have stated, *inter alia:*

> "I also wish to reaffirm this Government's stand, namely, that we believe in mother-tongue education as the soundest educational policy. It is only because Xhosa is not sufficiently developed as a language to use as a medium for study in higher educational fields, that we of necessity must—for higher study purposes—switch over to one or other of the European languages.
>
> *Our ideal, however, is to develop Xhosa to such an extent that it will eventually be able to take its place among the languages of the world, also as a suitable medium for all higher education.* Then we will have full mother-tongue education, not only up to Standards three or five but right through to the end [4]." (Italics added.)

31. Applicants conclude the paragraph in which they refer to Mr. Matanzima with the following words:

> "C. W. de Kiewiet has identified the central problem when he stated that 'the whole myth of a separate native culture collapses when it is recognized that, for the African, progress and emancipation

[1] *The Star* (Air Edition), 27 Jan. 1962.
[2] *Vide* Applicants' remarks at **IV**, p. 377.
[3] The report of the Commission has been referred to *supra*; *vide* paras. 25 and 28.
[4] *Daily Dispatch*, 26 June 1964, p. 11.

depend upon *an escape from the tribe and a deeper entry into the life of the West'* [1]." (Italics added by Applicants.)

In the context in which it appears, this statement is a puzzling one: The "*central problem*" of *what* has been "identified"? The suggestion seems to be that Respondent holds the view (which is in truth a "myth") that there is a "separate Native culture" and that Natives should, therefore, be cut off from the advantages of modern education. If that is what Applicants intend to suggest, the suggestion is rejected. Respondent believes that there are—and has never heard it said that there are not—differences between the cultures of the West and of the indigenous African. It is well known, too, that differences in the culture of peoples are reflected in their education and educational systems [2], and whilst Respondent believes that a nation's, or group's, culture should not be destroyed, or allowed to die, without good reason, it certainly does not hold the view that cultural groups should remain, or be kept, at their traditional level of development and be denied the advantages of modern education. Dr. de Kiewiet's view seems to be different. To him the indigenous nations of Africa have no cultures of their own, or, in any event, no cultures worth preserving, not even as a foundation on which modern development can be based. As against the White man, he says, the African—

"... has nothing to resuscitate in protest ... except tribalism, no tradition to invoke higher or more dignified than the cruel sanctions of witchcraft and barbarism [3]".

That Applicants should now endorse such views relating to Africans is nothing less than astounding—views which are, also, in conflict with views expressed, or approved of, by various African States, including Applicants, on another occasion [4].

32. Applicants follow up their puzzling reference to de Kiewiet with a statement which is even more obscure. They say that Respondent "in effect concedes this evil of its plan" [5], but they do not say what the "evil" or the "plan" is. The concession is alleged to have been made by Respondent in quoting, in the Counter-Memorial, a recommendation of the Eiselen Commission advocating the "study of the two *official languages* ... as a means of communication with Europeans, as a help in economic matters, and *as a means of securing contact with the knowledge of the wider world* [5]". (Italics added by Applicants.)

It is clear that the Eiselen Commission thought that a knowledge of the official languages was necessary "as a means of securing contact with the knowledge of the wider world". There is no evil in this view, which is shared by Respondent. The charge that Respondent is conceding the "evil" of "its plan" by citing this view is one which Respondent cannot fathom.

In so far as it may be suggested that Respondent intends, by the use of Native languages as media of instruction, to hamper or prevent prowess in English and Afrikaans, the suggestion is denied. Without going into

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[1] **IV**, p. 377. The reference is to de Kiewiet, C. W., *The Anatomy of South African Misery* (1956), p. 54.

[2] *Vide* **III**, pp. 375-382.

[3] De Kiewiet, *op. cit.*, pp. 54-55.

[4] *Vide* **III**, pp. 377-382.

[5] **IV**, p. 377.

any detail on this aspect, Respondent points to the fact [1] that Afrikaans was introduced as a subject in the Native schools of the Transkei after the Bantu Education Act came into operation, and that the abovementioned Transkei Commission found—

> "... that the language syllabuses in Afrikaans as in English compare most favourably with those of the Provinces of the Republic and with that of the Department of Education, Arts and Science [2]".

The Commission also made mention of the "excellent guide to the teaching of English published by the Department" [3].

Applicants conclude their attack on Respondent's aforementioned "ultimate aim" to have mother-tongue instruction in all standards of Native schools by alleging that—

> "Respondent's avowed aim of making South West African tribal tongues the medium of instruction at all levels, while retaining the teaching of English and Afrikaans as 'foreign' languages,* is in direct contradiction to the purpose of the Mandate [4]."

Respondent has already dealt with the matters raised in this allegation, and once again denies that it is acting in violation of its obligations under the Mandate. The Mandate does not require that English be used as medium of instruction. The same applies to Afrikaans. There is no basis for the suggestion that a person can be taught to stand by himself "under the strenuous conditions of the modern world" if he studies through the medium of English or Afrikaans, but not if he studies these languages as subjects.

II. The Allegation that Respondent's Policy Is "Impractical and Unworkable" [5]

33. Applicants' general allegation that Respondent's policy of mother-tongue instruction is "impractical and unworkable" is denied.

It appears, on analysis of Applicants' complaint, that they do little more than refer to what Respondent itself stated in its Counter-Memorial concerning practical difficulties which are still encountered in its system of mother-tongue instruction [6], and to repeat a distortion in regard to Respondent's efforts at developing the Native languages of the Territory [7].

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[1] *Vide* also para. 45, *infra*.

[2] *R.P.* 22/1963, p. 11 (para. 13 *(a)*).

[3] *Ibid.*, p. 5 (para. 13 *(m)*).

[4] **IV**, p. 378. In their footnote * Applicants refer to the fact that the Odendaal Commission refers to English or Afrikaans as a "foreign" language (*R.P.* No. 12/1964, p. 261 (para. 1090)). There is nothing strange about the use of the word in this context: it is so used in contradistinction to "home language", or "mother tongue". It is—to mention only two examples—repeatedly so used in the report of the Transkei Commission to describe English or Afrikaans; it is also often so used to describe a language other than the vernacular in Unesco: *The Use of Vernacular Languages in Education* (1953).

[5] *Vide* para. 15 *(e)*, *supra*.

[6] *Vide* **III**, pp. 358-362 and Chap. V, pp. 414-416 in regard to the system of mother-tongue instruction and language difficulties generally. Applicants also refer to a passage in the Odendaal Commission's report which adds nothing to the matter.

[7] **IV**, p. 380 and *vide* also para. 15 *(b)*, *supra*.

Respondent does not propose to deal again with the aforementioned practical difficulties. It will, in the paragraphs which follow below, *(a)* point out that such difficulties inevitably occur in multi-lingual countries where a system of mother-tongue instruction is followed; *(b)* analyse briefly Applicants' basic approach to the matter in issue; *(c)* illustrate that Applicants, whilst eager to exaggerate the difficulties referred to by Respondent, remain silent about certain factors mentioned by Respondent, and about the advantages of the system; and *(d)* show, by reference to what has already been said, that Applicants distort what Respondent stated in its Counter-Memorial in regard to the development of Native languages.

(a) It is hardly necessary to state that a system of mother-tongue instruction produces practical difficulties in multi-lingual countries, and especially where there is a multiplicity of languages in any given area. Where it is impracticable to give every child an education through his mother tongue, measures must necessarily be taken which will serve the best interests of the greatest number of pupils.

Respondent considers that its approach to the matter is, in all the circumstances, an eminently reasonable one, and that it is moreover, in accord with the views of educational experts in this regard. Thus, in a book already referred to, a committee of Unesco experts say the following on the subject:

> "If a given locality has a variety of languages it may be difficult to provide schooling in each mother tongue simply because there are too few students speaking certain of the languages. In such cases it may be necessary to select one of the languages as the medium of instruction, at the cost of using a language other than the mother tongue of some of the students. Before accepting this necessity, the school should seek ways and means to arrange instruction groups by mother tongue. If mixed groups are unavoidable, instruction should be in the language which gives the least hardship to the bulk of the pupils, and special help should be given those who do not speak the language of instruction [1]."

(b) Applicants' present complaint is not that the mother tongue will, at some time in the future, be used in secondary standards. They attack mother-tongue instruction even in the lower primary standards because, as appears from the Counter-Memorial, not all Native children are being taught through the medium of their own

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[1] Unesco, *The Use of Vernacular Languages in Education* (1953), p. 51. *Vide* also the following passage in an article by J. Berry, in which it is stated that common features in Bantu languages result in the Bantu quickly learning their neighbours' language:

> "Speakers of Bantu languages ... share many similar morphemic and phonaesthetic habits ... Under these conditions language learning is not difficult. The African as a rule acquires his neighbours' language painlessly and in a surprisingly short time. And once acquired, this second language serves him in a way that English never will: lexically and syntactically, it is by far the better equipped of the two to express the needs and desires of his daily life ..." (*African Languages and English in Education*: Educational Studies and Documents, June 1953, No. II. Unesco Education Clearing House, p. 42.)

language [1]. Applicants' criticism on this basis seems to involve an approach on their part that if all children cannot receive the benefits of mother-tongue instruction, no children need receive such benefits, and that all of them might as well be taught through the medium of English or Afrikaans. Respondent rejects such an approach, and says that practical difficulties which prevent a comparatively small number of Native children from being instructed through their mother tongue cannot validly be advanced as an excuse for depriving all children of the benefits of mother-tongue instruction.

Furthermore, basic to Applicants' approach to the whole matter is, as has already been shown [2], the notion that the Native languages are not worthy of preservation or development. As indicated above [2], Respondent rejects this view.

(c) Applicants, noting, as Respondent itself states in the Counter-Memorial [3], that only some (the major) Native languages have been developed as school languages, and that instruction through them is at present not yet feasible beyond the Standard II level, state—no doubt with a view to being sarcastic—that "[a]s a result, the inhabitants are being held in suspension while their languages are being 'developed' into vehicles suitable for general communication" [1].

What Applicants do not appreciate is that the children of the language groups concerned are being taught through the language they know best—the medium which experts consider best on educational, sociological and psychological grounds [4]. Furthermore, the fact that these languages are being further developed for instruction in higher standards at a later stage derogates nothing from the fact that pupils are at present being educated through their mother tongue at those levels where the language is a suitable medium, and through the medium of Afrikaans or English at higher levels. And as to those pupils who are stated to be held "in suspension" in language groups to which they do not naturally belong [5], Applicants exaggerate the position, and they also misrepresent certain facts, as will appear from a reference to the facts as stated in the Counter-Memorial [6]. Respondent does not intend going into any detail in this connection, and briefly points to the following merely to illustrate how Applicants create warped images in their treatment of the matter:

(i) They place unjustified emphasis on situations which affect only small, sometimes very small, numbers. They say, e.g., that "various other children, not Tswana, are being instructed in Tswana" [7], when they know that Tswana is the medium of instruction in only two schools in the whole Territory, with the result that very few non-Tswana children are affected [8].

(ii) They make allegations which are not true, or which are so

[1] *Vide* **IV**, pp. 378-379.
[2] *Vide* paras. 25 and 31, *supra*.
[3] **III**, p. 416.
[4] *Ibid.*, p. 377, and *vide* para. 21, *supra*.
[5] **IV**, p. 379; *vide* also p. 381, where Applicants deal with the same matter in discussing their alleged fourth defect of mother-tongue instruction.
[6] *Vide* **III**, pp. 356, 358-363, 414-416, *vide* also **II**, pp. 315, 318 and 323.
[7] **IV**, p. 379.
[8] **III**, p. 363.

formulated that they inevitably create a false impression. So, e.g., they state that children whose mother tongue is Sikololo or Silozi (the general language of the Eastern Caprivi) [1] are taught in Kuangali, Ndonga and other languages of the peoples of South West Africa [2], when the fact is that Silozi is the only Native language used as school medium in the Eastern Caprivi [3]. Djiriku [4] children, they say [2], are instructed in Kuangali, etc., when the fact is that Kuangali "was, and still is, generally used by the Kuangari... and Djiriku with local dialectical versions" [5]; and it is totally wrong to create the impression that children of the Okavango or of Ovamboland are taught through the medium of Herero, Nama or Tswana [6]. Kuangali, it may be mentioned, was developed as a *lingua franca* for Okavango schools by the missionaries.

Respondent points out, furthermore, that Applicants make no mention of the fact that in areas which are occupied by members of more than one linguistic group, pupils often understand the language of co-pupils who belong to a different language group, and that teachers, too, often have a sufficient knowledge of the languages involved to be able to explain lessons to all the pupils in a class in their own language. Respondent referred to this fact in its Counter-Memorial [7], but Applicants omit all reference thereto [8], presumably because of their approach that Native children should be taught through the medium of English or Afrikaans, and not a Native language [9].

(d) Applicants refer, finally, to efforts which are being made in the Territory to develop the Native languages [10]. In doing so, they quote one sentence from the Counter-Memorial, some of the words of which they italicize, and they ascribe thereto a meaning which it does not, and was not intended to, bear. The sentence reads as follows:

> "In the final result, however, it will be for the groups themselves to contribute to the development of their languages *to meet all educational needs* [11]." (Italics added by Applicants.)

The meaning Applicants ascribe thereto is that the Natives are "*left to develop* their own languages 'to meet all educational needs'" [12],

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[1] *Vide* II, p. 315 (para. 16).

[2] IV, p. 381.

[3] II, p. 315.

[4] One of the Okavango tribes.

[5] II, p. 318.

[6] IV, p. 381. Respondent deals hereafter (*vide* para. 36) with Applicants' allegation concerning Native students attending universities in South Africa; *vide* IV, p. 379, footnote 3.

[7] *Vide* III, pp. 360-361.

[8] IV, p. 379. Applicants quote from the Counter-Memorial a passage preceding, and a passage following, the relevant portion; *vide* second of quoted portions at footnote 2.

[9] One of Applicants' complaints is that Native pupils are being isolated from one another, but apparently they object to any medium of communication between them save English, or Afrikaans.

[10] IV, pp. 379-380.

[11] *Ibid.*, p. 380 and *vide* III, p. 416.

[12] IV, p. 380. (Italics added.)

i.e., that their whole future education depends entirely on their own efforts at developing their languages. That this is not so, and that Applicants' interpretation amounts to a distortion of what is stated in the Counter-Memorial (both in the passage referred to by Applicants, and elsewhere)[1], has already been indicated by Respondent.

III. THE ALLEGATION THAT RESPONDENT'S POLICY HAS "AT LEAST FOUR MAJOR DEFECTS"

34. The alleged defects are stated to be the following:

"(1) it perpetuates, rather than improves, existing deficiencies;
(2) it 'retribalizes' the 'Natives';
(3) it tends to aggravate the very problems which are asserted to justify its adoption; and
(4) it is inadequate to provide even the limited educational opportunities it professes to offer [2]".

It appears on an analysis of these allegations [3] that they amount, in essence, to a repetition of Applicants' complaints which have already been dealt with above [4]. Respondent's treatment thereof at this stage will accordingly be brief.

35. *(a)* In dealing with the first alleged defect of Respondent's policy of mother-tongue instruction, Applicants once again complain of Respondent's "ultimate aim" [2] in regard to the use of the mother tongue in all standards, and they allege that a policy with such an "ultimate aim" involves "abandonment of Respondent's duty to promote the social progress [2] of the Native inhabitants of the Territory. Respondent rejects the allegation, and refers to what it has already said in this regard.

(b) In regard to the policy's alleged second defect, Applicants say that it—

> "... serves to foster tribal differences in the Territory and, as such, to aggravate the very situation which Respondent asserts as a justification for the policy of 'self-determination' of the individual tribes as separate units [2]".

The policy, they also say, "... exacerbates factors which are alleged by Respondent to create a need for tribally separated schools to begin with" [2], and they complain of the alleged "circularity and fallacy" of Respondent's "reasoning" [2].

There is no substance in Applicants' allegations, nor in their final remark about Respondent's alleged "reasoning". Basic to Applicants' complaint, as has been indicated [5], is the philosophy that all group differences should be wiped out, no matter what the wishes of those directly concerned may be, and that all groups and their members should be transformed into one homogeneous English- or Afrikaans- (but preferably English-) speaking mass. This approach is, in Respondent's submission, a superficial and unrealistic one.

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[1] *Vide* **III**, p. 360 and *vide* para. 15 *(b)*, *supra*.
[2] **IV**, p. 380.
[3] *Ibid.*, pp. 380-383.
[4] *Vide* paras. 17-33, *supra*.
[5] *Vide* paras. 25 and 31, *supra*.

Respondent's policy, on the other hand, is a realistic and liberal policy which gives due recognition to the fact that the Territory has long been populated by different ethnic and cultural groups. In recognizing differences—in this case, linguistic differences—between such groups, Respondent cannot fairly be said to "aggravate" or "exacerbate" any situation. Respondent says, also, that there is no policy of self-determination for individual tribes, only for different ethnic groups.

(c) Applicants' treatment of the third alleged defect of Respondent's policy is linked with allegations which have been dealt with above [1], but they go somewhat further now and seek to develop a "vicious circle" argument in which mother-tongue instruction is, in effect, labelled as the origin and source of all the difficulties which have ever attended the extension of Native education in the Territory. They say:

> "... 'mother-tongue instruction' automatically creates a shortage of teachers and materials, and also lays a heavy burden on the administration of the separate educational facilities. This functional slowing-down of the educational process must in turn lower the level and extent of education, and as a result the 'Native' communities, being relatively uneducated, do not appreciate the value of education. This, in turn, aggravates the conditions to which Respondent's reaction is to institute vernacular instruction [2]."

This argument purports to be based on information supplied by Respondent [3], but the facts furnished in the Counter-Memorial [4] justify neither the allegations made nor the conclusions drawn by Applicants. Applicants wrongly identify the policy of mother-tongue instruction with various unconnected factors which have served to retard Native education, and fail to take into account the historical, sociological, psychological, geographical and financial factors which have played a role in the development of Native education. In Respondent's submission a perusal of the relevant portions of the Counter-Memorial [4] will clearly show that Applicants' argument is without substance, and Respondent does not propose dealing with it any futher save to point out that, in the final stage of their argument, i.e., when trying to complete their so-called "vicious circle", they distort the meaning of words used in the Counter-Memorial. They say, in effect, that Respondent employs mother-tongue instruction "since the majority of Native pupils leave school after the first few years of schooling" [5]. Respondent said, in the relevant passage in its Counter-Memorial [6], that the 1958 Commission of Inquiry recommended mother-tongue instruction in the sub-Standards and, as far as possible, also in Standards I and II. These courses, Respondent stated, were the most important ones as far as

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[1] *Vide* para. 33, *supra*.

[2] *Vide* **IV**, pp. 380-381. (Footnotes omitted.)

[3] *Ibid.*, p. 381, footnotes 1-5.

[4] *Vide* **III**, pp. 407-421 in regard to factors which have served to retard Native education.

[5] **IV**, p. 381, footnote 5, referring to **III**, p. 358.

[6] **III**, p. 358.

Natives were concerned "since the majority of Natives leave school after the first few years of schooling".

Misleading, too, is Applicants' use of the statement in the Counter-Memorial [1] that "[t]he extra year in the case of Native pupils is necessary largely because of language difficulties". Applicants seek to create the impression that mother-tongue instruction brings about an extra year at school, while this is not so. Extra time is needed primarily because of difficulties encountered by Native pupils in studying two languages foreign to them, viz., English and Afrikaans. Furthermore, the extra year is occasioned not only by language difficulties, but also, as indicated in the Counter-Memorial [2], "in order to bring the standard of their work on a par with that of European students".

In conclusion: Respondent denies Applicants' allegation regarding "deprivation of education" in the case of Native children [3]. Respondent rejects the suggestion that it was intended in the Counter-Memorial to "excuse" its conduct and to offer "explanations" for that purpose, and denies that anything said by it in the Counter-Memorial "reinforce[s]" Applicants' allegations [4].

(d) The fourth alleged defect of Respondent's mother-tongue instruction policy, viz., that it "cannot possibly accommodate all the 'Native' children. It cannot even accommodate all the 'Native' languages" [4], covers part of the complaint which has been dealt with, and Respondent refers to what has already been said [5].

IV. The Allegation that the "Evils" of the Policy Are "Compounded in South Africa at the University Level"

36. Applicants allege, finally, that—

> "[t]he evils of 'mother-tongue instruction' in primary and secondary schools in South West Africa are compounded in South Africa at the university level by the evils of 'Bantu education' in *different* 'mother tongues' [6]",

and, after referring to the existence of three university colleges for "South African 'Bantu' " [6] (viz., The University College of Fort Hare, The University College of the North, and The University College of Zululand), they say:

> "In 1962 the first student from the Territory was admitted to the College of the North. Speaking Herero or Ovambo, he would pursue a course of 'higher education' in the company of Sotho-, Tsonga-, and Venda-speaking associates. This is the ***reductio ad absurdum*** of Respondent's educational *apartheid* policy [7]."

Applicants seem to labour under the mistaken impression that Bantu languages are used as media of instruction at the Bantu university

[1] III, p. 450; *vide* IV, p. 381, footnote 3.

[2] *Ibid.*, p. 450.

[3] IV, p. 381. As already noted (*vide* para. 21 *(a)*, *supra*), Applicants made no reference to Respondent's policy of mother-tongue instruction in the Memorials.

[4] *Ibid.*, p. 381.

[5] *Vide* para. 33, *supra*.

[6] IV, p. 382.

[7] *Ibid.*, pp. 382-383. Respondent points out that there are at present three Native students from the Territory at this institution.

colleges in South Africa [1], otherwise it is not clear why they should find it "absurd" for a Herero or Ovambo to attend lectures in the company of Sotho-, Tsonga- or Venda-speaking students—unless, of course, Applicants are deliberately misstating the position, as they do when speaking of mother-tongue instruction "in . . . secondary schools in South West Africa" [2]. In the Territory, as in South Africa, Native students in secondary classes are, at present, instructed through the medium of Afrikaans or English, which languages are also the media of instruction at the Bantu university colleges. Even if the Bantu languages should, at some time in the future, be made media of instruction in secondary schools, the position will still be that all Native students will study English and Afrikaans as subjects in all standards at school. There is, in Respondent's submission, nothing absurd in the position which Applicants so attempt to describe.

D. Limitation of Objectives in Syllabus

37. In the section of the Reply headed "Limitation of Objectives in Syllabus" [3], Applicants make the charge that Native education is "materialistic and utilitarian" [3].

To support their charge, Applicants first refer to passages in reports of two Commissions which dealt with Native education in South Africa [4], and to two passages in speeches made by Dr. Verwoerd in 1953 and 1954 [5]. Then, after saying that the Transkei Commission, ten years later, found, *inter alia*, that in the primary school syllabuses "too much time was devoted to the practical subjects" and "insufficient time . . . to the basic skills in the languages and arithmetic" [6], they proceed to deal with syllabuses in South West Africa.

An analysis of the various allegations made by Applicants in regard to syllabuses in the Territory [7] shows that the charge of being "materialistic and utilitarian" relates only to the education offered in primary schools [8]. In the case of secondary schools and other courses the complaint is not that Native education is "materialistic and utilitarian", but that fewer practical, industrial and commercial courses are available to Native than to European students [9]. "This situation", Applicants allege, "is a result of Respondent's larger policy concerning the position of the 'Native' in the 'European' economic world, or, in the alternative, the level of skill required or desirable in the development of the 'Natives' own 'communities' [10] ", and they refer to a part of their Reply [11] with which Respondent has already dealt [12].

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[1] **IV**, pp. 382-383. Respondent points out that there are at present three Native students from the Territory at this institution.

[2] *Vide* the first passage quoted in this paragraph.

[3] **IV**, p. 383.

[4] *Ibid. Vide* footnotes 2 and 4.

[5] *Ibid. Vide* footnotes 3 and 5.

[6] *Ibid.*, pp. 383-384; *vide* footnote 1 on p. 384.

[7] *Ibid.*, pp. 384-386.

[8] *Vide* allegations in regard to lower primary and higher primary courses; **IV**, p. 384.

[9] **IV**, pp. 384-386.

[10] *Ibid.*, p. 386.

[11] *Ibid. Vide* footnote 3.

[12] *Vide* Chap. II, *supra*.

The various allegations made by Applicants will be dealt with hereafter by Respondent under the following heads, viz.:

Reports and speeches referred to by Applicants [1];
Primary school courses [2]; and
Secondary school and other courses [3].

Before dealing with these various allegations, however, Respondent first gives, in the next succeeding paragraphs, a brief statement of its views on, and of the position of, practical subjects in primary schools, and, also, a brief exposition of the attitude of the Permanent Mandates Commission in regard to such subjects in Native education.

II. THE ROLE OF PRACTICAL SUBJECTS IN PRIMARY SCHOOLS

38. In Respondent's view primary school syllabuses should be so arranged as to strike a proper balance between, on the one hand, education which may be termed practical, or utilitarian, and, on the other hand, education which is usually described as literary, or academic. It is Respondent's submission, furthermore, that in South West Africa, as in South Africa, various factors operate to require that proper attention be given to practical subjects in Native primary schools. These factors may broadly be stated to be: the largely rural and non-technical background of the Native groups; the necessity for giving some useful education to the many Native pupils who, for a variety of reasons, leave school to take up employment after only a few years' study; and, also, the increasing demands which will in future be made on Native communities to improve their social and economic levels of development.

At least some of the aforementioned factors, it may be pointed out briefly, operate in other African countries to give their education a practical bias. So, e.g., a reference to the report of the proceedings of the "Conference of African States on the Development of Education in Africa", held at Addis Ababa in 1961 [4], shows that it was agreed, *inter alia,* by the members taking part—including both Applicants—that, because of early school-leaving in African countries,

> "... primary education should prepare children who would not go on to secondary education for productive occupations. In that connexion, it was stressed that primary education should be self-contained while being preparatory to secondary education and should have a practical bias. The same applied to middle or junior secondary schools which would gain by adopting an agricultural or technical bias ... [5]"

It has been pointed out by George A. Lipsky in regard to Ethiopia that "emphasis in elementary as well as in secondary schools" has long been on "academic subjects, such as arithmetic, science, history and geography", but that there has been a new approach recently. He writes:

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[1] *Vide* paras. 42-45, *infra.*
[2] *Vide* para. 46, *infra.*
[3] *Vide* paras. 47-49, *infra.*
[4] *Vide* III, pp. 378-379.
[5] UNESCO/ED/181, p. 36. *Vide* also III, pp. 378-379 (paras. 55 and 56) for views expressed at the said Conference in regard to adapting curricula to rural and village life, and spending less time on subjects not related to African needs.

"Plans to adapt the curricula to local educational needs have been in progress since the 1950's. In the elementary grades, more time is to be devoted to health, education, and handicrafts. Courses emphasizing basic technical and economic skills, particularly in agriculture (truck gardening, poultry and cattle raising) and home economics, are contemplated . . . Local traditions are to be retained through handicraft instruction, such as pottery and basket weaving. In the secondary curriculum, academic subjects will be taught on simpler levels, and practical subjects, such as woodworking, metalwork, and needlework (for girls), will be added [1]."

39. Because of various practical considerations, which need not be discussed here, somewhat less time has at all times been devoted to practical subjects in the Native primary schools of South West Africa than in the Bantu schools of South Africa. This is still the position today, despite certain changes which were brought about in this regard when new syllabuses were introduced for Native schools in the Territory in 1961-1962 [2]. The time previously allotted to handwork subjects was then increased by 60 minutes per week (from 90 to 150 minutes per school week) in all the primary standards, and reduced by 30 minutes (from 90 to 60 minutes per week) in the sub-standards. In the case of Ovamboland and the Okavango territory, where great interest is displayed in the traditional crafts and where local inhabitants make articles for which there is a ready market in the rest of the Territory, it was decided to allot 60 minutes per week more to practical subjects than in schools in the Police Zone (making a total of 210 minutes per week); however, as a result of various difficulties there is, in practice, little or no difference in the time actually spent on practical subjects in the various regions [3].

40. At the present time there is little difference in the time allotted to practical subjects in European and Native primary schools in the Territory. As will be indicated in more detail below [4], the actual position is that Native pupils spend more time than European pupils on practical subjects in Standards I and II, whereas the converse position applies in the other Standards. In all cases, however, the differences in time are small. In this regard it will be shown below [4] that Applicants' charges in the Reply [5] regarding practical subjects in European and Native schools are completely unfounded, being based on a wrong interpretation given by them to particulars contained in the Counter-Memorial.

II. ATTITUDE OF THE PERMANENT MANDATES COMMISSION

41. The Permanent Mandates Commission often stressed the value of instruction in practical subjects as a means of uplifting the indigenous populations in mandated territories. In 1924, at its Fourth Session, it expressed the view that—

"... by making character-training and discipline, the teaching of agriculture, animal husbandry, arts and crafts, and elementary

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[1] Lipsky, G. A., *Ethiopia: Its People, Its Society, Its Culture* (1962), pp. 97-98.
[2] *Vide* **III**, p. 448.
[3] Departmental information.
[4] *Vide* para. 46, *infra*.
[5] **IV**, p. 386.

hygiene, the keynote of educational policy, the gradual civilisation of the native populations as well as the economic development of the countries will be furthered in the best possible manner [1]".

And on several occasions thereafter the Commission reminded Respondent that, in its view, Native education in South West Africa was not sufficiently practical. In 1938, according to the Minutes of the Commission, Mlle Dannevig stated that in her view the Native schools gave "perhaps . . . too literary an education", and that they had not "developed a practical side, so far as she could see" [2]. Mr. te Water, Respondent's representative, is reported to have agreed that—

> ". . . the education in both the Government and mission schools was much too clerical, and they had been, in his opinion, validly criticised on that account [2]".

The topic was again discussed in 1939. Mlle Dannevig is recorded as having said that—

> "[i]t had also been stated on a previous occasion that native education was somewhat too theoretical, and that efforts would be made to give it a more practical character [3]."

In answer to her question whether "anything had been done in that respect", South Africa's representative, Mr. Andrews, replied, according to the Minutes, that—

> ". . . the comments made at previous examinations had not been lost sight of, and had been passed on to the proper quarter. There was general agreement on the point that a practical rather than a purely literary bias should be imparted into native education [3]."

III. Reports and Speeches Referred to by Applicants

42. The brief passage quoted by Applicants from the report of the Interdepartmental Committee on Native Education (1935-1936) [4]—a passage extracted from two paragraphs in the report [5]—creates the impression that the Committee expressed the view that the nature, or content, of education given to Natives in South Africa was such that it "prepared" them "for a subordinate society". This is not correct. The point the Committee sought to make was that—

> ". . . the two social orders for which education is preparing White and Black are not identical and will for a long time to come remain essentially different [6]",

[1] *P.M.C., Min.*, IV, p. 184. This view, described as a "general resolution on education policy" was again referred to by Mme Wicksell in 1927: *vide P.M.C., Min.*, XII, p. 181. At the 26th Session Mlle Dannevig stated, according to the Minutes, that the Natives of the Territory should not receive "a literary education, but practical instruction in agriculture, hygiene and cognate subjects suited to the needs of the present development of the different tribes, which would make them better and more useful subjects of the community" (*P.M.C., Min.*, XXVI, p. 59).

[2] *P.M.C., Min.*, XXXIV, p. 91.

[3] *P.M.C., Min.*, XXXVI, p. 38.

[4] *U.G.* 29—1936.

[5] *Ibid.*, pp. 87-88 (paras. 458 and 459).

[6] *Ibid.*, p. 87 (para. 457).

and that those who regulated education should take account of circumstances as they existed. In this regard it said, *inter alia*:

> "The general standpoint that the Committee takes is that a nation's educational system is the reflex of her history, her social forces and the political and economic situations that make up her existence. The same applies to the system of Native education, which is the product of many factors not easily changed overnight. It does not, therefore, help much to envisage Native education as operating in *vacuo* and striving after transcendental ideals . . . [1]"

In dealing with the content and methods of instruction in Native schools, the Committee, which did not formulate any syllabuses for use in schools, adverted, *inter alia*, to the fact that the "school life of most Native children [was] very short, hardly three years" [2], and stated that it was therefore of fundamental importance that "*education must be made worth-while for the children as far as it goes*" [3]. It pointed out that:

> "[t]oo often children are taught content material merely as a preparation for a more advanced stage of education which only one or two per cent. will in actual fact ever reach. Experience shows that this one or two per cent. are usually selected pupils above average ability who could easily make up afterwards these small deficiencies in their fund of knowledge when they get to the advanced stages where such knowledge may be required [2]",

and expressed the view that "work should be so organized that the interests of the majority are considered first" [4], but that "[a]t the same time there should be facilities by which future leaders of the Native people can be trained" [5].

In regard to the place to be awarded to "manual work and crafts in the primary school" [6], the Committee stated that the "wisdom of introducing manual training in the elementary school has been recognised by the leading educational philosophers" [6], and that "some types of manual work" [7] had been introduced into most Native schools. Its introduction had, on the whole, not been an "unqualified success" [7], and Native opinion was that it did not have either the educational or economic value which had originally been hoped for [7]. The Commission stressed the educational value of such subjects if properly taught [8], and pointed out that—

> ". . . the object of manual and handicraft work for children at the elementary stage *is not direct training for occupation in the industrial field*—though it is quite conceivable that such elementary training may predispose boys or girls having talent in making things with their hands, to take up work in this direction later on [9]".

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[1] *U.G.* 29—1936, p. 89 (para. 463).

[2] *Ibid.*, p. 93 (para. 480).

[3] *Ibid. Vide* also p. 106 (para. 532): ". . . *the Native school must be so planned as to make it worth-while for the children as far as they go.*"

[4] *Ibid.*, p. 93.

[5] *Ibid.* (para. 481).

[6] *Ibid.*, p. 92 (para. 474).

[7] *Ibid.* (para. 475).

[8] *Ibid.*, p. 93 (paras. 478-479).

[9] *Ibid.*, p. 92 (para. 477).

The Committee's approach to the question of providing education for Native pupils, both for the majority who left school during the first few years and for the minority who did not, was, in Respondent's submission, a reasonable and realistic one. Nothing said in its report can in any way justify Applicants' sarcastic remark to the effect that a "limitation on the education of 'Natives' " is "intended to encourage them to undertake occupations in the service of their own 'communities', or to obtain the training necessary for a continuing position as labourer in the 'White' industrial world" [1].

43. In support of their allegation that Native education is "materialistic and utilitarian", Applicants also cite the following passage from a paragraph in the report of the Eiselen Commission:

> ". . . it is essential to consider the language of the pupils, their home conditions, their social and mental environment, their cultural traits *and their future position and work in South Africa* [2]". (Italics added by Applicants.)

It is, presumably, the italicized words which are regarded as sinister by Applicants. No objection can be taken thereto, in Respondent's submission, and it is not appreciated why an educational policy should be criticized for having regard to the "future position and work" of those who attend school, especially in the case of a comparatively underdeveloped community which it is sought to develop, *inter alia,* through the agency of the schools. The Eiselen Commission advocated a system of education which would, apart from its value to the individual, play an important part in the general development of the Bantu people of South Africa. It stated in this regard:

> ". . . Bantu development and Bantu education must be largely synonymous terms. Education is more than a matter of schooling; indeed, in the education of a society to make a tremendous cultural leap such as the South African Bantu are called upon to make, the schooling of children, though of the utmost importance, must be regarded as only a part of a larger process. School education, if it is to be co-ordinated and in harmony with social development, must be seen as one of the many educational agencies and processes which will lead the Bantu to better and fuller living [3]";

and it proposed the following definition of the aims of Bantu education:

> "*(a)* From the viewpoint of the whole society the aim of Bantu education is the development of a modern progressive culture, with social institutions which will be in harmony with one another and with the evolving conditions of life to be met in South Africa, and with the schools which must serve as effective agents in this process of development.
>
> *(b)* From the viewpoint of the individual the aims of Bantu education are the development of character and intellect, and the equipping of the child for his future work and surroundings [4]."

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[1] **IV**, p. 383.
[2] *Ibid.*, The reference is to *U.G.* 53—1951, p. 130 (para. 765).
[3] *U.G.* 53—1951, p. 130 (para. 764).
[4] *Ibid.* (para. 765).

This proposed definition is followed by the following paragraph, part of which is the passage quoted by Applicants:

> "To harmonize the individual and social viewpoints as stated above it is essential to consider the language of the pupils, their home conditions, their social and mental environment, their cultural traits and their future position and work in South Africa [1]."

It is clear, in Respondent's submission, that Applicants' reference to the Report of the Eiselen Commission in no way supports the charge they attempt to establish.

44. Applicants' reference to Dr. Verwoerd's 1954 speech in the South African Senate [2] is incomplete and misleading. From all that Dr. Verwoerd said on that occasion in regard to the "internal reformation of Native education into Bantu education" [3], Applicants quote only one sentence, viz., "[t]he school education must also equip him [i.e., the Bantu pupil] to meet the demands which the economic life in South Africa will make on him". They thereby create the false impression that this sentence contains a statement of, if not the only, then certainly the chief, aim of Bantu education. Dr. Verwoerd stated that, to carry out this "reformation", various requirements [3] would have to be met. One of these—and it is part of what he said in this regard that is quoted by Applicants—he described as follows:

> "Secondly, *(a)* The Bantu pupil must get knowledge, training and an attitude in school which will be useful and advantageous to him and at the same time benefit his community. *(b)* The subject-matter must be put to him in such a way that he can understand it easily and make it his own so that he can benefit and serve his community in a natural way. *(c)* The school education must also equip him to meet the demands which the economic life in South Africa will make on him [4]."

Whilst Dr. Verwoerd no doubt stressed the economic aspect, neither the passage quoted, nor the speech from which it is taken, affords justification for the suggestion that he thought that the aims of Bantu education should be purely economic or utilitarian. The stress which Dr. Verwoerd laid on the economic aspect was, in Respondent's submission, entirely justified, particularly when regard is had to the plan for Bantu community development, to which reference has already been made [5], and to the fact that so many Native pupils leave school after only a few years' schooling. As has been indicated before [6], Dr. Verwoerd made special reference to the large number of Native pupils who leave school before completing even the lower primary course, and who therefore have to be taught some Afrikaans and English during their first years at school so as to assist them in finding employment. This does not mean, however, that he thought that all school education should be of a practical nature, or be directed to preparing pupils for their future occupations. In an

[1] *U.G.* 53—1951, p. 130 (para. 765).

[2] **IV**, p. 383; and *vide* Chap. II, paras. 5, 7-11, *supra*.

[3] *U. of S.A.*, *Parl. Deb.*, *Senate*, Vol. II (1954), Col. 2606; *vide* Chap. II, para. 10, *supra*.

[4] *Ibid. Vide* also Chap. II, para. 10, *supra*.

[5] *Vide* Chap. II, paras. 5 *et seq.*, *supra*.

[6] *Ibid.*, para. 7, *supra*.

earlier speech in Parliament on Bantu education Dr. Verwoerd stated that there would be "a healthy differentiation in forms of education" [1], and that provision would be made not only for those who would become industrial or agricultural workers, but also for those who sought to enter the higher professions [2].

Applicants also quote the following words, used by Dr. Verwoerd in 1953: "What is the use of teaching a Bantu child mathematics, when it cannot use it in practice? That is quite absurd [3]." These words form part of the speech which Dr. Verwoerd made in Parliament in introducing the Bantu Education Bill in the House of Assembly [4], and in which he indicated, *inter alia*, why there were, in practice, certain differences in the content of education as given to European and Bantu children. He said:

> "Then I still want to add that it is sometimes said that there is no difference between European and Native education. Of course there are certain fundamental educational principles which are common to all types of education, but forgetting for a moment those principles, when you come to practical teaching, there are definitely differences with which one has to reckon. What is the use of subjecting a Native child to a curriculum which in the first instance is traditionally European, in which one learns of the Kings of England and how much wheat Canada has exported and through which our children are taught these general facts as a means of building up a fount of knowledge? What is the use of teaching the Bantu child mathematics when it cannot use it in practice? That is quite absurd. In other words, your teaching should begin where all education should begin, namely with the known facts or common knowledge. The common knowledge of the white child is different from that of the Bantu child. Everybody who has had anything to do with intelligence tests knows that when you try to apply an intelligence test based on the common knowledge of children of a certain community, the test can be a complete failure and give entirely wrong results in respect of children not falling within the same group of common knowledge . . . The same applies to education. It is therefore also correct to say that Bantu education must of necessity be different, because it has as its starting point other sources and other kinds of knowledge [5]."

As appears from the quotation above, Dr. Verwoerd said, in effect, that there were two reasons why Bantu education must, in practice, be different from European education. The first reason involved the educational principle that, in the process of early education, a child should be led from what is known and familiar to it to what is unknown [6], and he stated in this regard that what was known and familiar to Bantu and European children was not the same. The second reason, which must be viewed against the background of the role envisaged for education in a

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[1] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 83 (1953), Col. 3581; and *vide* Chap. II, para. 17, *supra*.

[2] *Ibid.*, Col. 3580, and *vide* Chap. II, para. 17, *supra*.

[3] **IV**, p. 383, quoting from *U. of S.A., Parl. Deb., House of Assembly*, Vol. 83 (1953), Col. 3585.

[4] *Vide* Chap. II, para. 4, *supra*.

[5] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 83 (1953), Cols. 3584-3585.

[6] *Vide* also *U.G.* 53—1951, p. 131 (para. 773), and Chap. II, para. 15, *supra*.

comprehensive plan for the social, economic and political development of the comparatively under-developed Bantu communities of South Africa [1], was that those Bantu communities had certain specific needs, and that certain types of knowledge, commonly sought in European communities, might be quite inappropriate to meet those needs, or to contribute to the kind of development which was most urgently required [2].

Although Dr. Verwoerd referred to mathematics by name, he did not thereby intend to say that mathematics was, in fact, a subject which could not usefully be studied in Bantu schools, or which would not be taught in such schools. He referred to it merely as an example of a type of knowledge which might be useless, i.e., "if [the child] cannot use it in practice". That this is so, is supported by the position which mathematics occupied in 1953, when Dr. Verwoerd spoke, and the position which it occupies today. In 1953 mathematics was not, as it still is not, taught in any primary schools, European or Bantu, in South Africa. At that time it was offered as a subject in Bantu secondary and high schools, and the position is still the same today.

45. With reference to Dr. Verwoerd's statement which has been dealt with immediately above, Applicants say:

> "This philosophy was implemented so thoroughly that the Transkei Commission, ten years later, found, *inter alia*:
>
> '. . . much evidence of dissatisfaction with the syllabuses in the primary schools on the grounds that too much time was devoted to the practical subjects and religious instruction. It was asserted that an over-emphasis had been made on fitting the child at too early an age for his post-school life, to such an extent that *insufficient time was being allocated to the basic skills in the languages and arithmetic*' [3]." (Italics added by Applicants.)

Respondent rejects the allegation that any "philosophy" expressed by Dr. Verwoerd can rightly be related to the findings of the Transkei Commission [4]. Without going into detail, Respondent points out that Dr. Verwoerd at no stage indicated that English, Afrikaans or arithmetic had lost any of their value for the Bantu or that less time would in future be devoted thereto in Bantu schools. He stated in his aforementioned 1954 speech in the Senate that English, Afrikaans and arithmetic would be taught even in the lower primary classes [5], and that Afrikaans—one of the languages about which witnesses before the Transkei Commission had expressed their concern—had never been studied in the Bantu schools of the Transkei, but that it would be introduced as a subject in those

[1] *Vide* Chap. II, paras. 5 *et seq.*, *supra.*

[2] Dr. Verwoerd, in dealing with the same matter in his 1954 speech in the Senate, said:

> "The curriculum . . . envisages a system of education which starting with the circumstances of the community aims at meeting the requirements of the community . . ." *Vide U. of S.A., Parl. Deb., Senate*, Vol. II (1954), Col. 2611, and Chap. II, para. 11 *(c)*, *supra.*

[3] IV, p. 383.

[4] Whilst Respondent can appreciate how an alleged over-emphasis on practical subjects can be attributed by Applicants to an alleged utilitarian philosophy, it cannot understand how an alleged over-emphasis on religious instruction can be ascribed to the same philosophy.

[5] *U. of S.A., Parl. Deb., Senate* (1954), Vol. II, Col. 2609; *vide* also Chap. II, para. 11 *(b)*, *supra.*

schools [1]. On another occasion, as has been shown [2], Dr. Verwoerd stressed that education would be made suitable for various classes of men of the future, i.e., not only industrial and agricultural workers, but also professional men.

Respondent points out, furthermore, that syllabuses used in the Bantu primary schools of South Africa are revised from time to time by the General Planning Division of the Department of Bantu Education in order, *inter alia*, to ensure that a proper balance be maintained between the various subjects prescribed. The last revision in the case of lower primary and higher primary syllabuses took place in 1963, when certain changes were made, *inter alia*, in regard to practical subjects.

A comparison between the recommendations made by the Transkei Commission concerning certain subjects and the prescriptions of the aforesaid 1963 syllabuses reveals the following:

In regard to Standards I and II

(a) The Commission recommended that the number of practical subjects in Standards I and II be reduced from three to two, and that a total of 150 minutes per week be devoted to those two subjects [3]. The 1963 lower primary syllabus prescribes two practical subjects, and the time allocated thereto is 120 minutes per week [4].

(b) The Commission recommended that 240 minutes be allocated in each week to each of the languages (English, Afrikaans and Xhosa) and arithmetic [3]. The 1963 syllabus allocates 270 minutes to each of the official languages, 210 minutes to Xhosa, and 210 minutes to arithmetic [4].

In regard to higher primary standards

(a) The Commission recommended that the number of practical subjects be reduced from three to two, and that a total of 240 minutes per week be devoted to those two subjects [5]. The 1963 higher primary syllabus prescribes two practical subjects, and allocates a total of 240 minutes per week thereto [4].

(b) The Commission recommended that 270 minutes per week be allocated to each of the official languages, and 240 minutes to arithmetic [6]. The 1963 syllabus allocates 240 minutes per week to each of the official languages, and 205 minutes to arithmetic [6].

IV. Primary School Courses

46. Respondent now turns to Applicants' allegations in regard to the lower primary and higher primary syllabuses in the Native schools of South West Africa—i.e., to Applicants' effort to show that Dr. Verwoerd's alleged "materialistic and utilitarian" philosophy [7] has been so implemented in the Territory that Native children take more practical

[1] *U. of S.A., Parl. Deb., Senate* (1954), Vol. II, Col. 2611. *Vide* also *R.P.* 22—1963, p. 6 (sec. C, para. 1 *(c)*) where it is confirmed that Afrikaans was not studied in Transkei schools before 1955.

[2] *Vide* Chap. II, para. 17, *supra*.

[3] *R.P.* No. 22/1963, p. 14 (para. 8 *(b)*).

[4] Departmental information.

[5] *R.P.* No. 22/1963, p. 15 (paras. 8 *(d)* and 8 *(e)* (ii)).

[6] *Ibid.*, (para. 8 *(d)*).

[7] *Vide* IV, p. 383.

subjects than European children, and that the result thereof is that European children spend more time on other subjects while Native children "are kept busy with their manual subjects" [1].

Applicants' allegation in regard to lower primary school syllabuses is that European children take only one practical subject, whereas Native children take six [1]. In regard to the higher primary courses they allege that "the same pattern is present" [1].

Applicants' allegations, as has been stated above [2], are unfounded, being based on a wrong interpretation of particulars given by Respondent in the Counter-Memorial. In the case of European education it was stated in the Counter-Memorial that "girls and boys are offered different handwork subjects" [3], but no indication was given of what the term "handwork" included. In a list given of subjects comprising the primary course, the term "handwork" was used [3], without an indication of what it comprised. "Handwork" is, briefly put, a term which comprises various practical subjects which can vary from one school to another, depending on local circumstances. In the chapter on Native education in the Counter-Memorial, which contains far more detail than the chapter on European education, various practical subjects are listed in connection with both lower primary and higher primary courses [4], but this does not mean that they are all part of the curriculum at every lower or higher primary school. As in the case of European education, practical subjects are not the same in all schools, or in all parts of the Territory. The position will, therefore, be clear if one substitutes, as in the European school syllabuses, the term "handwork" for "cleaning work, weaving and claywork, needlework (girls), scrap work (boys), gardening" in the list of lower primary subjects, and for "gardening, tree planting and soil conservation (boys), wood, leather and scrap work (boys), needlework (girls), handicrafts" in the list of higher primary subjects [5].

Since the introduction of new primary school syllabuses in 1961-1962 the position in the lower primary schools is the following: In the sub-Standards European children spend more time on practical subjects than Native children, viz., 12.5 per cent. of the time in each school week as against 7.5 per cent. in the case of Native children in Sub-A, and 6.66 per cent. in Sub-B. In Standards I and II, Native children spend more time on practical subjects, viz., 12 per cent. of the school week as against 9.33 per cent. in the case of European children. In the higher primary standards more time is allotted to practical subjects in European schools than in Native schools, viz., 11.66 per cent. of the time in each school week as against 10 per cent.[6]

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[1] IV, p. 384.

[2] *Vide* para. 40, *supra*.

[3] III, p. 501.

[4] *Ibid.*, p. 449.

[5] *Drawing*, mentioned in the list of subjects of Native lower primary schools (III, p. 449) is taken also in European schools, but is not separately listed in the Counter-Memorial. It is taken in combination with handwork.

[6] Departmental information. This is the position relating to higher primary courses in the Police Zone. In Ovamboland and the Okavango the syllabuses formally provide for more time for practical subjects than is the case in European schools, but, as has been said (*vide* para. 39, *supra*), there is in practice little or no difference in the time spent on practical subjects in the Native schools of the Police Zone and the northern territories.

V. SECONDARY SCHOOL AND OTHER COURSES

47. Applicants point to the fact, which clearly emerges from particulars furnished by Respondent in its Counter-Memorial, that syllabuses in Native secondary schools offer fewer options to Native pupils than do syllabuses in European schools to European pupils. In this regard Respondent stated in its Counter-Memorial that secondary education for Natives was of fairly recent origin in the Territory, and that small numbers hampered subject differentiation [1].

Applicants say in this connection that the Committee on South West Africa, in its 1960 report,

> "... regret[ted] that the courses contemplated for 'Natives' [by the Administration, after the report of the Commission of Enquiry into Non-European Education had been considered in 1959] are based on syllabuses different from those offered for other sections of the population rather than on a system of education which would prepare them to participate more fully and on an equal basis in the political, economic and social life of the Territory [2]."

Assuming that the Committee intended to refer not only to syllabuses in primary schools, but also to the matter here in issue, viz., courses, and options, offered in secondary schools (which is not clear), the Committee's approach was quite obviously that there should be no separation in the education of Native and European children, but that there should be integration in the educational, political, economic and social spheres. This is a matter with which Respondent has already dealt, and it is not intended to repeat what has already been said. Suffice it to say that the Committee's suggestion is unrealistic and that it will, if any attempt is made to implement it, create a situation which will be to the detriment of all education in the Territory [3].

In regard to courses offered in secondary schools in the Territory, Applicants say, in a footnote [4], that Native students who may not wish to take agriculture as a subject are nevertheless obliged to do so at the Augustineum and at Onguedira, although the position is different at Doebra. This is true. As Respondent has indicated, lack of numbers has thus far restricted subject differentiation. It is incorrect to suggest, however, as Applicants do, that the first-mentioned schools should be regarded as agricultural schools of the kind Gammams and Stampriet had been [4], for the latter had been agricultural schools in which "cultural subjects" had played a minor, and supplementary, role.

48. In regard to secondary school courses it is pointed out that the Odendaal Commission has recommended that provision be made for three Junior Certificate courses, viz., a general course, a commercial and clerical course, and a technical course [5].

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[1] III, pp. 437 and 450. Respondent also pointed out that subject differentiation in European schools was of recent origin (*ibid.*, p. 501). It should, furthermore, not be thought that all European secondary schools offer the several types of courses referred to *(ibid.)*, numbers being there also a limiting factor.

[2] IV, p. 385.

[3] *Vide* III, p. 382.

[4] IV, p. 385, footnote 2.

[5] *R.P.* No. 12/1964, p. 257 (paras. 1064 *(c)*, *(d)* and *(e)*). In South Africa, it may be pointed out, there are three Junior Certificate courses of the same name for Bantu students.

The Commission mentioned the following as subjects which could be included in the various courses:

General course:

"... the mother tongue, Afrikaans, English, social studies, general arithmetic, religious instruction, physical training, singing and music, and subjects chosen from: a science, agriculture, mathematics, woodwork, arts and crafts, homecrafts, etc. [1]".

Commercial and clerical course:

"... basically the same as the General Junior Certificate Course, but with subjects chosen from the following: bookkeeping, commerce, typewriting, shorthand, commercial arithmetic and a science [2]".

Technical course:

"... basically the same as the General Junior Certificate Course, but with subjects chosen from the following: building construction, joinery, carpentry and cabinet-making, drawing and design, tailoring, wickerwork, leatherwork, mechanics, etc. [3]".

Consideration is at present being given to the introduction, at the earliest possible moment, of a Junior Certificate technical course as recommended by the Commission.

49. In regard to industrial and vocational courses Applicants point out, by reference to information which Respondent supplied in its Counter-Memorial, that there are fewer such courses available to Native pupils than to European pupils [4], Respondent has pointed out in this regard that not much interest is shown in those courses which are available to Natives [5].

Applicants also refer, in connection with the aforementioned courses, to loans and bursaries which the Administration makes available for study in South Africa [4]. They point out that there are six bursaries open to *all* students in the Territory [6]; they also say—correctly—that one bursary has since January 1964 been made available "to a deserving Native student" [7], but they add that a Native student's chances of winning a bursary are "practically limited to the one bursary" [7], and refer to a passage in the Counter-Memorial where Respondent stated that "thus far no Native student has *in any way merited* ... [one of the six bursaries open to all students]" [7]. It is not clear precisely what Applicants' complaint is, for they do not dispute that the merit bursaries—the number has since been increased to ten [8]—are open to *all* students in the Territory, or that one bursary has been established specially for Native students. Respondent points out, as has already been stated in the Counter-Memorial [9], that secondary education for Natives in the Territory is of fairly recent origin, and that few Native students have thus far been candidates for the Matriculation examination. It was in the light of these circumstances that it was decided to establish a bursary specially for Natives as from

[1] *R.P.* No. 12/1964, p. 257 (para. 1064 *(c)*).
[2] *Ibid.* (para. 1064 *(d)*).
[3] *Ibid.* (para. 1064 *(e)*).
[4] IV, pp. 385 and 386.
[5] III, pp. 466 and 467.
[6] IV, p. 385, and *vide* III, p. 477.
[7] IV, p. 385.
[8] Departmental information.
[9] III, pp. 449-451.

1964, and it has since been decided to institute a second such bursary as from 1965 for the same purpose [1], viz., to encourage Native students, who have thus far not succeeded in winning any of the merit bursaries open to all students.

Respondent points out that the Odendaal Commission, while noting that the demand for vocational training "has not been encouraging" [2], has nevertheless, in view of the general development programme which it proposes for the Native groups of the Territory, recommended that facilities be established for training in agriculture and animal husbandry, and also for various types of technical training. Its recommendations provide that—

> "[t]echnical training be continued at the Augustineum, notwithstanding the small numbers at present making use of such training, and also that provision be made for commercial subjects and, possibly, training in mechanics [3]."
>
> "Training in agriculture and animal husbandry be provided in collaboration with the Government departments concerned for *(a)* the Herero-Damara complex and *(b)* the Ovambo-Okavango complex [4]."
>
> "A technical training centre be established in Ovamboland (possibly on the same site as the Government training school) for formal technical training after Std. VI, initially concentrating on training in brick-laying, woodwork, tailoring, wickerwork, leatherwork, commercial subjects, mechanics, etc., with further provision for training as social workers, assistant stock and health inspectors and other courses for which the practical necessity may arise during the new phase of development [5]."
>
> "In addition to formal technical training, short directed courses be arranged, particularly for adult employees, to increase their efficiency in the practical performance of their duties, for instance courses in management and administration, commercial practice, mechanics, building, simple engineering, such as the construction and maintenance of ordinary roads, dams, etc. [6]"

50. In regard to the extension of educational facilities as proposed by the Odendaal Commission, Respondent draws attention to its decisions on the Commission's proposals. With respect to the nature of educational services, it was decided in general—

> ". . . to give effect to the Commission's recommendations concerning the extension and improvement of the nature of the educational services, whereby wider and better educational opportunities will be created, particularly for the non-White population groups [7]",

and to leave decisions concerning details to the educational authorities. In regard to the development of educational services generally Respondent's decision is that—

[1] Departmental information.
[2] R.P. No. 12/1964, p. 259 (para. 1079).
[3] *Ibid.* (para. 1080).
[4] *Ibid.* (para. 1081).
[5] *Ibid.* (para. 1082).
[6] *Ibid.* (para. 1083).
[7] *Vide* IV, p. 208.

"... provision will be made for more advanced and greater numbers of schools, hostel facilities and facilities for the training of teachers. This applies mainly to the areas of the non-White groups, where the Commission estimates that expenditure on schools, hostels and training centres will amount to R3,500,000 during the first five years [1]."

51. In conclusion: Respondent rejects Applicants' allegation that the present difference in facilities available to European and Native students in the Territory is due to any "larger policy" as described by Applicants [2]. Respondent has shown in the Counter-Memorial [3] that various factors have contributed to retard the development of Native education in the Territory, and it is denied that courses and bursaries at present available are the "result of Respondent's larger policy concerning the position of the 'Native' in the 'European' economic world, or, in the alternative, the level of skill required or desirable in the development of the 'Natives' own 'communities' [2]". The views expressed by Dr. Verwoerd in the passage quoted by Applicants from his 1953 speech in the House of Assembly [2] are to the same effect as some of the views expressed in his 1954 speech in the Senate [4], and have already been dealt with. As has been shown, Dr. Verwoerd stated that whilst the Bantu could not expect to be absorbed in the European community above certain levels, all doors were open to him in his community [4], the development of which was one of the aims of Respondent's policy [5]. In Respondent's submission there is no basis for Applicants' suggestion that there is a limit to the level of skill "required or desirable in the development of the 'Natives' own 'communities' ".

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[1] *Vide* **IV**, p. 208.
[2] *Ibid.*, p. 386.
[3] **III**, pp. 407 ff.
[4] *Vide* Chap. II, para. 8.
[5] *Ibid.*, para. 5.

CHAPTER IV

THE EXTENT OF EDUCATION IN THE TERRITORY

A. General

1. In section (C) of Chapter IV B.3.*c*.I of the Reply Applicants deal with the "Extent of Education in the Territory". In the introductory passage of the said section Applicants say that—

> "... the *extent* of education in the Territory is a violation by Respondent of its obligation to promote *to the utmost* the well-being and progress of the inhabitants [1]".

This charge is then particularized as follows:

> "Respondent has failed in this dynamic obligation in at least three respects: (1) it has adopted a policy of '*laisser-faire*', relying on the 'Native' population to take the initiative with respect to educational advancement; (2) it has failed to attempt to introduce compulsory education; and (3) it has spent, and continues to spend, disproportionately small amounts of money on 'Native' education as compared to 'European' education [2]."

Respondent deals with these allegations in the same order and under the same headings as Applicants, viz.,

Laisser-faire;
Compulsory education;
Disparity in expenditure.

B. Laisser-Faire

2. Under this heading Applicants deal with what they term—

> "... the implications and consequences of Respondent's policy of *(a)* ostensible compliance with the 'feelings' or 'wishes' of the 'groups' concerned, coupled with *(b)* reliance upon the initiative of such 'groups' in determining the extent of education in the Territory [2]".

Before commencing their discussion of the above matters, Applicants quote certain remarks made by a member of the Permanent Mandates Commission, M. Rappard, in 1930, concerning education in South West Africa [2]. These remarks were made in connection with one aspect of Native education, viz., the establishment of schools in the Native reserves of the Police Zone, which presented serious practical difficulties in the early years of the Mandate. As will be indicated below, the Chairman of the Commission seems to have held the view that M. Rappard's views were not justified.

3. In its report to the Council of the League for the year 1929 Respondent referred to the difficulties of establishing schools in the reserves in the following terms:

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[1] IV, pp. 386-387.
[2] *Ibid.*, p. 387.

"The difficulties in this connection may be summed up in the following points: (1) *Many of the inhabitants of the reserves lead a* nomadic life; (2) there is a good deal of opposition to education and schools; (3) schools for natives stand under the local control of missionaries and the mission societies do not see their way clear to erect buildings on ground which does not belong to them. The Administration, on the other hand, is not prepared to cede the necessary ground in reserves to mission societies, all the more because it would have to grant the same facilities to all the different mission societies once they have adopted the principle [1]."

The report mentioned that the following arrangement had been made for establishing schools:

"After detailed discussions and negotiations the Administration ultimately came to the following decision: If there is a desire for education in a reserve the parents have in the first instance to apply to the Local Council. If the Council approves of the application they may recommend it to the Administration and indicate at which centre the school is to be built and how large it should be. If the Administration agrees the building may be built out of the funds of the reserve [2]."

"If a school building has been erected in the manner indicated above the parents are at liberty, with the approval of the Administration, to invite a Mission Society to take charge of the school until such time as the Administration is prepared to establish Government schools for natives [3]."

After M. Rappard had expressed his views as recorded in the passage *quoted in the Reply* [4], *and in* answer to questions put by M. Rappard and other members of the Commission, Respondent's representatives, Messrs. te Water and Courtney Clarke, supplied the Commission with information regarding difficulties encountered in developing education in the Territory generally, and in the reserves in particular. Thereupon M. Rappard is reported to have—

"... repeated that the entire object of his remarks was to help the Administration in its extremely difficult task. He hoped that it would be able to assist the Missions still further and that the £10,000 granted for education would be appreciably increased [5]."

According to the Minutes the Chairman of the Commission then pointed out that—

"... the natives in South West Africa were for the most part in a very low state of civilisation. That being so, he did not think it wise for the Commission to show too great impatience or to be too exacting in so far as the education of natives in the reserves was concerned. Such education inevitably took a long time, and was at the moment in the hands of the Missions [6]."

The Chairman also indicated that he appreciated that existing conditions

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[1] *U.G.* 23—1930, p. 51 (para. 328).

[2] *Ibid.*, p. 51 (para. 329).

[3] *Ibid.*, p. 51 (para. 330).

[4] IV, p. 387.

[5] *P.M.C., Min.*, XVIII, p. 137. Mr. Courtney Clarke is reported to have replied "... that it would no doubt be increased as the country developed and as the financial position warranted" *(ibid.)*.

[6] *Ibid.*, p. 138.

ruled out rapid progress, particularly in the reserves. He is reported to have stated that—

> "[h]e quite understood Mlle Dannevig's desire for schools in the towns. That was certainly a recommendation which the Commission could make. He did not think, however, that it should be too insistent in regard to education as a whole, for the mandatory Power must be permitted to organise this branch of its activity calmly and surely. The suggestion of M. Rappard that a larger subsidy should be granted to the Missions might, no doubt, be considered; but it was too much to ask the Administration to undertake, under existing conditions, the direct education of natives in the reserves. The explanations of the accredited representative seemed to the Chairman to be very just and he did not wish Mr. te Water and Mr. Courtney Clarke to go away with the impression that the Commission was asking for the impossible [1]."

4. Respondent's report for the next year (1930) contained a review of education in the Territory. In the report it was stressed, *inter alia*, that—

> "[t]he educationist who wishes to achieve success must first gain the confidence of the natives. After the bitter wars of comparatively speaking recent years between European and native in this country this is not an easy matter . . . [2]."

The report also contained a memorandum by Dr. Vedder [3] in which he dealt, *inter alia*, with the establishment of schools in the reserves. In regard to the procedure of establishing such schools, he stated:

> "Now the usual arrangement is that the Mission has to erect the school building. Government is, however, not in the position to cede building sites in the reserves to a Mission, as this would be contrary to the Reserve Act. The Mission, on the other hand, cannot erect any building on rented ground. Nevertheless a way out of the difficulty has been found along the following lines:
>
> (1) The Council of the Reserve, which is composed of natives, may apply to Government for permission to erect a school building with money taken from the Reserve Fund, which building then solely and wholly belongs to the inhabitants of the Reserve.
>
> (2) The Council of the Reserve thereupon gets into touch with a Mission Society in order to obtain the teaching staff from it and to place itself under its special protection.
>
> (3) The Administration then treats such a school in exactly the same way as it does any other Mission school [4]."

Dr. Vedder also pointed out in this memorandum that a number of reserve schools had already been established in accordance with the said arrangement and that others would shortly be opened, but that difficulties of various kinds remained [4]. In this regard it was stated in the memorandum:

> "These difficulties have their origin not so much in the attitude of the Administration or the Mission, but in the peculiar attitude of the inhabitants of the reserves. The Hereros especially adopt a recalci-

[1] *P.M.C., Min.*, XVIII, p. 138.

[2] *U.G.* 21—1931, p. 51 (para. 313). *Vide* also III, p. 410.

[3] *U.G.* 21—1931, pp. 59-62. As to Dr. Vedder, *vide* III, p. 409.

[4] *U.G.* 21—1931, p. 60.

trant attitude in regard to this new branch of the school system. As the possibility is afforded them to lead their lives in the Reserves in the same manner as their forebears had done of yore, they think more of their cattle than of their children. They, moreover, fear that the schools in the Reserves will prevent them from employing their children as cattle herds. Hence the task has arisen for the Mission first of all to prepare the soil by their missionaries and itinerant teachers and to impress on the parents the significance of the school for their later lives [1]."

The last sentence in the passage quoted above is important as showing how, in the early years of the Mandate, development of education was in fact initiated—i.e., by the Missions. In the annual report in regard to which M. Rappard made his aforementioned remarks, Respondent stated, *inter alia*, that before schools could be established in reserves, Native parents had to show a desire for education and make application for a school to their local councils. Respondent never intended to suggest, however, that no measures were taken to arouse an interest in education among parent communities, or that nothing was done to persuade local councils to take steps to have schools established in their reserves. As is apparent from the situation as described by Dr. Vedder, a request from a reserve community or board for the establishment of a school was, of necessity, preceded by a good deal of external exhortation and persuasion.

5. The arrangement referred to in Respondent's aforesaid report [2] and in Dr. Vedder's memorandum was made because of the practical difficulties mentioned therein, and in order to avoid the possibility of dissatisfaction or subsequent lack of co-operation because of the use of land or money belonging to reserve inhabitants for a purpose of which they did not approve.

In Respondent's submission, therefore, there was no justification for M. Rappard's suggestion that the aforesaid arrangement pertaining to the establishment of schools in reserves "appeared to throw the initiative . . . of obtaining education on to the native". There was, likewise, no basis for his suggestion that the arrangement appeared to throw "the sole cost of obtaining education" on the Native. There is, also, no foundation for Applicants' treating M. Rappard's words as indicative of Respondent's "attitude toward 'Native' education" [3].

Applicants say that M. Rappard's remarks "treat two aspects of Respondent's attitude toward 'Native' education" [3]. "In the first place", they say, "Respondent has professed extraordinary solicitude concerning the attitudes of the 'Natives' toward education, and has shaped its policy in deference to such attitudes" [3]. The allegation is not substantiated in any way, and Respondent says that it has no substance.

Applicants do not mention the second aspect of Respondent's policy which the statement by M. Rappard is alleged to have "treated". Presumably it is Respondent's alleged "lack of initiative" [3]. This lack of initiative, Applicants say, reveals itself "with respect to methods of instruction, compulsory education, wider syllabuses, mixed schools and intensified education" [3]. What the expression "methods of instruction" is intended to signify, is not known; Applicants have nowhere dealt therewith. The

[1] *U.G.* 21—1931, p. 60.
[2] *Vide* para. 3, *supra*.
[3] IV, p. 387.

same applies to "intensified education" [1]. Applicants are saying, therefore, as Respondent understands them, that Respondent's alleged failure to provide "wider syllabuses" for Natives and to establish "mixed schools" is evidence of its "lack of initiative", i.e., its attitude of *laisser-faire*. The allegation is a curious one. Elsewhere in their Reply Applicants ascribe the alleged lack of "wider syllabuses" in the case of Natives to a conscious, or deliberate, policy of restricting opportunities for Natives [2]. Similarly, allegations previously made in regard to the policy of separation (also in education) cannot be reconciled with an allegation that such policy is the result of *laisser-faire* [3].

6. Respondent deals next with Applicants' allegations regarding alleged "implications and consequences of Respondent's policy of ... ostensible compliance with the 'feelings' or 'wishes' of the 'groups' concerned" [4].

Applicants' complaint in this connection seems to be that Respondent has not removed, or not done enough to remove, certain "attitudes" of the Native people in the Territory, including "attitudes" in regard to mixed schooling. In support of their complaint, Applicants refer to information which was supplied by Respondent in the Counter-Memorial when dealing with one of several factors which have served to retard the development of Native education in the Territory [5]. Whilst referring to such information, however, Applicants ascribe to Respondent allegations which it did not make, thereby creating a false impression of the present extent of attitudes unfavourable to education. They ascribe to Respondent a statement that "*the 'Natives' feel* little 'need' for schooling" [6], as if Respondent stated that all Natives (or Natives generally) still felt little need for education. Respondent neither said nor suggested any such thing. Whilst Respondent stated that there were still many parents who did not send their children to school, or else sent them to school for only short periods [7], it also showed that good progress had been made in the past, and that education was now being extended at an ever-increasing rate [8]. Applicants also make the untrue allegation that "[a]ccording to Respondent, the situation remains unchanged today" [9], i.e., unchanged from the earlier days of the Mandate when Respondent reported to the Permanent Mandates Commission on attitudes unfavourable to education among the Native communities of the Territory [10].

Having made these misleading statements, Applicants proceed to say: "That such attitudes should still exist to any significant degree, more than forty years after the Mandate's inception, is an accusation in itself [9]." And they add "... that Respondent should rely upon such attitudes to justify passivity and negligence compounds the offence" [9]. These

[1] Compulsory education is dealt with in paras. 14-21, *infra*.

[2] **IV**, pp. 383 and 386. *Vide* also p. 277, and **I**, p. 159 (para. 186).

[3] *Vide* **IV**, pp. 362-370; also p. 373, where it is alleged that Respondent's policy of having separate schools for European, Coloured and Native children was "developed only after the Second World War".

[4] **IV**, pp. 388-389 and *vide* para. 2, *supra*.

[5] *Vide* **IV**, p. 388, footnotes 1 and 2, and **III**, pp. 407-410.

[6] **IV**, p. 388. (Italics added.)

[7] **III**, pp. 393, 409 and 461.

[8] *Vide*, e.g., **III**, pp. 394, 443-444 and 461.

[9] **IV**, p. 388.

[10] *Vide* **III**, pp. 408-409.

allegations have no substance. Respondent does not propose to discuss the extent, or "degree", of such negative attitudes as were mentioned by it in the Counter-Memorial. It is unnecessary to do so. Respondent points to the progress which has been made, and which is continually being made. It appears from the progressively increasing percentage of Native children who attend school [1] that attitudes involving opposition to education are steadily being overcome.

Furthermore, for attitudes of the kind mentioned in the Counter-Memorial to remain in some strength among some inhabitants of the Territory even at the present time, is quite understandable when regard is had to conditions at the inception of the Mandate, and to the difficulty of removing such attitudes in conditions commonly found in Africa. That such attitudes are still common in Africa as a whole, appears clearly from the Counter-Memorial [2].

7. Applicants also quote a passage from Respondent's Counter-Memorial [3] dealing with expenditure on education. Its relevance to the matter in issue is obscure. The passage referred to "various factors and conditions which inhibited the introduction and development" of Native education [4], and not merely to "attitudes". For this reason alone it cannot validly be advanced as an illustration of Respondent's alleged reliance on negative attitudes displayed by Native inhabitants. The suggestion of such reliance is, in any event, denied, and Applicants' submission in regard to expenditure, made *a propos* of the passage quoted, is, in Respondent's submission, without substance.

8. Applicants conclude their allegations in this context by stating that—

> "[t]he extent to which Respondent has permitted its attitude of *laisser-faire* to limit the extent of education in the Territory—both with respect to isolating 'group' from 'group' and with respect to instituting enthusiasm for education—is made clear in Respondent's own words . . . [3]",

and then follow nine quotations from Book VII of Respondent's Counter-Memorial. These quotations are, therefore, advanced as evidence of the alleged extent to which education has been limited by Respondent's so-called policy of *laisser-faire*.

An analysis of the quotations reveals the following:

(a) Some of them (viz., the first, third, fourth and ninth) refer to separation in the education of the European, Coloured and Native groups. In the first it is stated that the introduction of a mixed school system at the inception of the Mandate would have run directly counter to the prevailing order and that it would, for that reason, have failed. It is not clear to Respondent whether Applicants' suggestion is that mixed schooling should have been introduced, even if failure was inevitable. If so, Respondent rejects the suggestion.

In the third, fourth and ninth quotations the desires of the inhabitants of the Territory are referred to as only one operative

[1] **III**, pp. 443-444 and 461. *Vide* also para. 21, *infra*.
[2] *Vide ibid.*, pp. 396-406.
[3] **IV**, p. 388.
[4] *Vide* **III**, p. 535 (para. 24 *(c)*), and the reference therein to pp. 407-421 (paras. 3-30).

factor in the system of separate education. This appears clearly if the quotations in the Reply are read in their full context in the Counter-Memorial [1].

Nowhere in the Counter-Memorial are the desires of the inhabitants referred to as the sole reason for separate educational facilities. Respondent says, furthermore, that it is in no way wrong to have regard to the wishes of the inhabitants in regard to separation in education.

(b) One quotation, the second, refers to the desires of Native groups to have separate facilities. Respondent repeats that there is nothing improper in paying regard to such desires on the part of the Native groups, and says, furthermore, that the matter is not concerned with any limitation of the extent of education.

(c) Of the remaining four quotations, two (the fifth and the seventh) refer to the fact that many Native parents still do not send their children to school because they see no good in schools. Respondent has already dealt with this matter [2].

One quotation (the sixth) refers to Respondent's statement that Native parent communities have on occasion asked for compulsory education, but that it almost invariably appeared that they did not appreciate what a system of compulsory education entailed, and that in Respondent's view the introduction of such a system before parent communities desired it and appreciated what it entailed, could "only create hardship and cause resentment" [3]. In Respondent's submission there is nothing improper in wishing to avoid hardship and resentment on the part of the Native inhabitants of the Territory. Furthermore, as has already been stated, the school attendance rate in the Territory is increasing at a satisfactory rate and when regard is had also to other difficulties, particularly the shortage of teachers, there can be no justification for a premature introduction of compulsory education.

The remaining quotation (the eighth) refers to an attitude found amongst parents in the Eastern Caprivi Zipfel that "by attending school their daughters become lazy, and, accordingly, less attractive to prospective husbands" [4].

Attitudes of this kind in regard to the education of girls are not easily rooted out amongst primitive communities, and are still prevalent in parts of Africa [5]. Respondent says that the fact that

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[1] *Vide* III, pp. 375-376 (paras. 49 and 50) in regard to the third quotation; *ibid.*, pp. 375-378 (paras. 49-54) and 381-382 (paras. 60-62) in regard to the fourth quotation; and *ibid.*, p. 513 (para. 5 *(b)* and the paragraphs referred to therein) in regard to the ninth quotation.

[2] *Vide* para. 6, *supra*.

[3] III, p. 393.

[4] *Ibid.*, p. 461.

[5] *Ibid.*, pp. 397-398. *Vide* also the following statement in the report of the Conference of African States on the Development of Education in Africa, held at Addis Ababa in 1961: "Research indicates that girls make up less than 30 per cent. of the present total African primary school enrolment and about 22 per cent. of the secondary school enrolment. Unfortunately, the factor of conservatism in certain areas has slowed the expansion of education for girls because of its imagined effect on established traditions." (UNESCO/ED/181, Chap. I, p. 6 (para. 21).) In the case of Liberia and Ethiopia girls made up 24 per cent. and 21 per cent., respectively, of

girls constitute 25 per cent. of the children who attend school in the Eastern Caprivi [1] shows, when regard is had to the brief history of education in that territory, that good progress has been made, and submits that Applicants' complaint is without merit.

9. In regard to Respondent's alleged reliance on the initiative of the groups, Applicants say that Respondent's policy is one of "professed reliance upon the initiative of the 'Natives' to promote their own material and moral well-being and advance their own social progress" [2]. Respondent never professed any such policy. Applicants, it seems, rely on the following statement in the Counter-Memorial for their aforesaid allegation:

> "Respondent's task is in essence one of advising, encouraging and assisting the various groups by providing facilities consistent with their needs and guiding them towards self-help. *Whether, and to what extent, the groups make use of the opportunities offered rests largely with themselves.* They will, however, continue to receive sympathetic assistance and guidance from Respondent [3]." (Italics added by Applicants.)

These words clearly do not mean, and were not intended to mean, that Respondent relies "upon the initiative of the 'Natives' to promote their own material and moral well-being and advance their own social progress". Nor do they afford any justification for saying that Respondent "appear[s] to throw the initiative . . . of obtaining education on to the native" [4]. Applicants' main objection is, apparently, to the words they have italicized, but in Respondent's submission no valid objection can be taken thereto. Surely it is true to say of any person who is given advice, encouragement, guidance, assistance and facilities consistent with his needs that it will rest largely with himself whether, and to what extent, he makes use of the opportunities offered to him [5].

Applicants, after quoting the words "appear[s] to throw the initiative . . . of obtaining education on to the native" from M. Rappard's aforementioned remarks [6], allege: "This applies not only to the interest shown by the 'Natives' in the education available but also, more specifically, to the system of 'community schools', to the question of compulsory education, and to the financing of education [4]." These allegations are denied.

10. In regard to the community school system, Applicants' complaint is that "[t]he 'Natives' have . . . been delegated the duty of promotion of their own social progress which, in the Mandate, was entrusted to Respondent" [7]. By quoting part of a sentence in one of a number of paragraphs dealing with the system of community schools, and by assign-

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primary school enrolments in the late 1950s. (Unesco: *Basic Facts And Figures 1960* (1961), p. 29.)

[1] **III**, p. 461.

[2] **IV**, p. 389 and *vide* p. 387 *(in fine)*.

[3] *Ibid.* Quoted from **III**, p. 537.

[4] **IV**, p. 389.

[5] If this is not so, the following statement in an official publication of one of the Applicant States makes no sense: "We cannot fight in raising the standards of our schools when we have teachers who . . . will not avail themselves of the opportunity to learn." *Vide* **III**, p. 424.

[6] *Vide* para. 2, *supra*.

[7] **IV**, p. 390.

ing thereto a meaning which it does not, and was not intended to, bear, Applicants try to create the impression that Respondent has done nothing less than to admit that it has rid itself of the duty to promote the progress of the Native inhabitants of the Territory, and that it has delegated that duty to the Natives themselves. The words they quote are:

"it is hoped that all Native parent communities will in time utilize to the full the opportunity which has been given them *of promoting education through their own efforts* [1]". (Italics added by Applicants.)

Respondent pointed out in its Counter-Memorial that the system of community schools gave parent communities an opportunity of playing a part in the development of education, and that it contributed, at the same time, to their social and political development. Respondent stated, *inter alia*,

"[t]he system of community schools offers Bantu parent communities the opportunity of playing an active part in the control of the education of their children, and at the same time affords them an excellent training ground in self-management and citizenship [2]",

and quoted from a book written by a foreign author in which the following is said about the system: "The system as a whole is thus certainly on this level, a positive contribution to the development of the body civic of the Bantu . . . [3]". The words quoted by Applicants appear in the following paragraph:

"After its experience thus far of community schools in Ovamboland, the Administration has every confidence that the system will be a success. School committees and school boards, acting under the guidance and with the advice of the Administration's officials, are doing good work, and it is hoped that all Native parent communities will in time utilize to the full the opportunity which has been given them of promoting education through their own efforts [4]."

It is clear from what has been stated above that Applicants' complaint is without substance.

Respondent says, furthermore, that its system of community schools serves as an instrument in developing Native communities to the point where they will be able "to stand by themselves" [5].

11. Applicants' next allegation reads as follows:

"Respondent admits that the 'Native' parents often cannot afford to bear the boarding expenses of their children at hostels and suggests that this, together with the problem of teacher shortage, is a reason why 'in the case of Native education such facilities have thus far been found practicable only to a very limited extent' [6]."

It is not stated in what respect Respondent is relying "upon the initiative" of the Native inhabitants. Presumably the suggestion is that a shortage of teachers and the inability of parents to pay boarding fees

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[1] IV, pp. 389-390. *Vide* III, p. 371.
[2] III, p. 370.
[3] *Ibid.*, p. 371.
[4] *Ibid.*, p. 372.
[5] Art. 22 (1) of the Covenant.
[6] IV, p. 390.

cannot be a valid reason for a shortage of boarding facilities. If so, the suggestion is clearly untenable.

12. Applicants purport to see a further example of "reliance upon the initiative" of Native inhabitants in the fact that in the Eastern Caprivi Zipfel each of the two main tribes "has shown itself prepared to grant bursaries from tribal funds to students who wish to be trained as teachers" [1]. Applicants say that this is "not altogether surprising, since Respondent itself has only granted two bursaries for such purpose" [2].

In the Counter-Memorial Respondent referred to the short history of education in the Eastern Caprivi, and to some of the difficulties which have retarded development [3]. It also referred to progress which had been made, and, as "[a]n indication of a growing interest in education" [4], it mentioned the aforementioned fact that the tribes had shown themselves prepared to grant bursaries to prospective teachers. This did not come about, as Applicants suggest, because of the small number of bursaries granted by Respondent, but was the result of efforts made by officials to arouse greater interest in education on the part of the Native authorities. Their willingness to assist education in the area shows that they are being helped to help themselves, and this, in Respondent's submission, constitutes progress [5].

13. Applicants conclude by saying:

> "Similarly, Respondent's complaints about 'lack of support' or 'lack of interest' in various educational ventures undertaken with respect to the 'Native' groups resound of *laisser-faire* and are wholly incompatible with the dynamic nature of the Mandate [6]",

and then they refer to certain features of Native education which were mentioned by Respondent in the Counter-Memorial, viz., early school-leaving; small numbers in the senior secondary course; small numbers in industrial courses; the slow response to opportunities offered for training as nurses; and early loss of interest in evening classes for adults.

It is not clear what Applicants intend to convey. In the Counter-Memorial Respondent referred to early school-leaving and other manifestations of lack of interest in education, but it is not appreciated how Respondent's references thereto—"complaints", according to Applicants—can be said to "resound of *laisser-faire*" and to be "incompatible with the dynamic nature of the Mandate". In Respondent's submission Applicants' allegation does not make sense. The fact that Respondent

[1] **IV**, p. 390, quoted from **III**, p. 462.

[2] **IV**, p. 390. *Vide* also **III**, p. 462.

[3] **III**, pp. 459-462.

[4] *Ibid.*, p. 462.

[5] A Junior Certificate course was introduced in the Eastern Caprivi in 1964 when a Form I class was instituted at the Roman Catholic school at Katima Mulilo. Each of the 10 pupils who enrolled received a bursary of R30 from the Department of Bantu Administration and Development. The cost of the buildings needed (R8,000) to accommodate the extra classes is to be paid by the said Department. The aim is, also, to institute teacher training at this school. For this reason Respondent has decided to award annually 15 bursaries of R30 each to students taking secondary courses at the above-mentioned school, and to do away with the two bursaries which are awarded at present for study in South Africa. Three more community schools were established in 1964, bringing the total number of schools to 20. (Departmental information.)

[6] **IV**, p. 390.

referred to difficulties which are encountered in regard to Native education does not mean that Respondent is in any way responsible, or that it admits responsibility, for such difficulties. Nor does it mean that Respondent in any way relies upon "the initiative" of the Native inhabitants.

C. Compulsory Education

14. Applicants commence their discussion of this subject with an allegation which is not borne out by the material quoted by them in support thereof. The allegation is probably made with the intention of creating the impression—an impression which would be entirely wrong—that the Permanent Mandates Commission held the view that the absence of compulsory education for Natives in South West Africa constituted a dereliction of duty on Respondent's part. Applicants' allegation reads as follows:

> "The Permanent Mandates Commission made clear its view that compulsory education for 'Natives' was an important aspect of the duty to promote the well-being and social progress of inhabitants of Territories under Mandate [1]."

In support thereof they quote the following two extracts from the Minutes of the Commission:

> "Mme Bugge-Wicksell said that she had no question to ask, but desired to express her admiration for the steps taken by Australia as regards education in the mandated territory [Nauru]. She was happy to note that there was compulsory education for children from 6 to 16 years of age and that the proportion of children who attended schools was 100 per cent.... [2]"
>
> "Mlle Dannevig drew attention to the provisions of Article 2 of the decree reorganizing official education in [French] Togoland ...
>
> 'School attendance may be made compulsory for all children between 7 and 12 years of age wherever the number of schools allows. It is always compulsory for the children of chiefs, notables and officials' [2]."

It is obvious from the passages quoted—and the context in which they appear in the Minutes of the Commission contains no contrary indication—that the Commission did not express the view, as alleged by Applicants, that it regarded compulsory education as an important aspect of the duty to promote the well-being and social progress of the inhabitants of territories under Mandate. It goes without saying that the Commission would have welcomed a situation in which compulsory education was feasible, as it expressly did in the case of Nauru, but that is a far cry from saying that it thought such education an important part of a Mandatory's duty, irrespective of what the circumstances in a particular territory might be. The Commission no doubt knew that circumstances in most mandated territories were such that compulsory education, as a system which could actually be put into practice, could be no more than a distant ideal. Indeed, on the occasion referred to in the second quotation above (i.e., regarding French Togoland), Mlle Dannevig immediately asked the question "... whether any part of the territory

[1] IV, p. 390.
[2] *Ibid.*, p. 391.

had enough schools to enable this to be carried out" [1]. The reply given to the question is recorded as follows in the Minutes, viz., "that the mandatory Power was anxious that there should be the greatest possible number of pupils and schools, and the only limits set to the realization of these aims were material possibilities" [2]. Respondent points out that in 1938—the quotation dates from 1934—only about 6.05 per cent. of the school-age population of French Togoland (or slightly less than 1.4 per cent. of the whole population) attended school [3].

The Permanent Mandates Commission, as stated above, no doubt welcomed the introduction of compulsory education—particularly where it could be made to work successfully in practice—but it would, in Respondent's submission, have been the first to admit that Nauru was an exceptional case. This small island, about 5,263 acres in extent and with a circumference of approximately 12 miles, had, in 1920, a population of only 1,084 [4], and it could not possibly have presented the difficulties found in a country like South West Africa—or French Togoland [5].

15. After their reference to the Permanent Mandates Commission, as set out above, Applicants proceed to say that—

> "[s]ince the dissolution of the League of Nations, the organized international community has frequently emphasized the importance and desirability of compulsory education [6]".

Applicants do not refer to any authority in support of this statement, but Respondent accepts that every responsible government fully realizes "the importance and desirability of compulsory education". Respondent would add, however, that every government must nevertheless have due regard to all factors which have a bearing on the question of compulsory education before deciding on its introduction.

Respondent points out in this regard that, according to a Unesco publication, only nine of some 40 African countries listed had a system of compulsory education pertaining to indigenous inhabitants (i.e., excluding Europeans, Asiatics and Coloureds) as at the end of the 1950s [7]. Respondent has not attempted to establish what percentage of school-age children attended school in each of these African countries at the time stated, but points out that in the case of one country mentioned as having

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[1] *P.M.C., Min.*, XXVI, p. 115.

[2] *Ibid.* The decree referred to in the quotation was intended to apply only to "official" (i.e., Government) schools, and not to mission schools. *Vide* "The mandatory Power had no means of influencing the missions . . ." (*P.M.C., Min.*, XXVIII, p. 64), and the statement that the missions themselves decided "where to exercise their activities". (*P.M.C., Min.*, XXXIV, p. 125.)

[3] In 1938 there were in Togoland 10,857 pupils in all types of schools. The population consisted of 780,170 Natives, 470 Europeans and 59 Syrians. (Respondent assumes the school-age population to constitute 23 per cent. of the total Native population: *vide* III, p. 462.) *Vide* also *Rapport annuel adressé par le Gouvernement francais au Conseil de la Société des Nations sur l'administration sous mandat du territoire du Togo pour l'année 1938* (1939), pp. 104 and 111-113.

[4] There were, also, 597 temporary Chinese workers on the island (including 2 women and 3 children). *Vide P.M.C., Min.*, II, p. 50.

[5] In 1962, it may be pointed out, the total population of Nauru was 4,849 (composed of 2,516 Nauruans, 1,173 other Pacific Islanders, 748 Chinese and 412 Europeans): *vide G.A., O.R., Eighteenth Sess., Suppl.* No. 4 (A/5504), p. 22.

[6] IV, p. 391.

[7] Unesco, *Basic Facts and Figures 1960* (1961), pp. 166-167.

compulsory education for children from 6 to 14 years of age, viz., Chad, it appears that only about 5.6 per cent. of the school-age population attended school in 1958, or about 1.3 per cent. of the total population [1]. In the case of Togo, referred to by Applicants [2], the corresponding percentages in 1958 would appear to have been about 28.6 and 6.6 [3].

16. Respondent has already referred to the question of compulsory education and school attendance in one of the Applicant States, Liberia [4], and it is not intended to repeat what has already been said. Respondent points out, however, that whilst this State, as one of the Applicants in these proceedings, stresses that "the organized international community has frequently emphasized the importance and desirability of compulsory education", a 1958 publication of Unesco, an agency of this organization, reveals that, because of local conditions, it would not serve any purpose to enforce this country's 50-year-old compulsory education law. It is said:

> "Compulsory education under the Education Act starts for all children at the age of 6 and ends at 16. Quite recently, the problem of compulsory education has shifted from one of attendance to that of providing accommodation and facilities. Consequently there is no obvious need for the enforcement of this law [5]."

Respondent points out that in 1961-1962 about 22 per cent. of the school-age children of Liberia attended school [6]. In 1958 the percentage must have been smaller [7]. A shortage of teachers, as Respondent has shown [8] has been one of the main difficulties—presumably it also played a significant part in the decision that there was no "need for the enforcement of this (i.e., the compulsory education) law".

The Ethiopian Government, Respondent assumes, has also been prevented by practical difficulties from showing in practice, viz., by passing and putting into effect a compulsory education law, that it is in full agreement with the emphasis which the "organized international community" has frequently placed on the "importance and desirability of compulsory education".

17. In the case of South West Africa, however, Applicants take up the attitude that no account should be taken of factors which have elsewhere been considered of sufficient weight to affect the question of compulsory education. They say, in effect, that the difficulties which have retarded development and, accordingly, affected the practicability of compulsory education, are either of Respondent's own making, or else the result of its

[1] Unesco, *Basic Facts and Figures 1960* (1961), pp. 29, 36 and 156. *Vide* the primary and secondary (including vocational) enrolments at pp. 29 and 36, and the total population figure at p. 156. Respondent assumes that the school-age population constituted 23 per cent. of the whole population. *Vide* III, p. 444.

[2] IV, p. 391.

[3] Unesco, *op. cit.*, pp. 30, 38 and 157: *vide* the primary and secondary (including vocational) enrolments at pp. 30 and 38, and the total population figure at p. 157. According to this publication, Togo has compulsory education for the sons of chiefs and officials (p. 167, and footnote 9 at p. 172). No mention is made of provisions of the kind referred to in the Minutes of the Permanent Mandates Commission: *vide* para. 14, *supra*.

[4] III, pp. 406 and 445.

[5] Unesco, *World Survey of Education—II:* Primary education (1958), p. 674.

[6] III, p. 445.

[7] In 1955 it was approximately 3.5 per cent.: *ibid.*

[8] III, p. 423.

own lack of initiative. And, *mirabile dictu*, they see fit to offer solutions to problems which they themselves have not yet managed to solve, and which, as Respondent has shown, are common and not easily solved in underdeveloped African countries having no tradition of modern education.

Applicants' allegations and suggestions in regard to what Respondent could or should have done in the Territory [1] are rejected. Save for what is said in the paragraph immediately below, Respondent does not propose to deal with each of these allegations or suggestions. They amount to repetition of what is contained in an earlier section of the Reply [2], and in no way controvert what is stated in the Counter-Memorial in regard to compulsory education and the various factors which have retarded education in South West Africa [3].

18. In a paragraph dealing with the shortage of Native teachers in the Territory, Applicants conclude their remarks with the allegation that—

> "... Respondent decries the lack of interest or of motivation on the part of the 'Natives' with respect to vocational, higher, or adult education; yet Respondent's *apartheid* policy with respect to job opportunities in itself places a damper upon any nascent enthusiasm among young 'Natives' to seek educational opportunities which, as Respondent concedes, would merely produce 'frustration' [4]". (Footnote omitted.)

This allegation is not directly relevant to the question of teachers, save in so far as it may relate to efforts made by Respondent to raise the qualifications of teachers in service by means of evening classes [5], Respondent denies, in any event, that statutory measures relating to "job opportunities" [6] have affected teacher training, or enrolments in the industrial or adult classes referred to in the Counter-Memorial [7]. Applicants' remark in regard to higher education is not understood. In the Counter-Memorial Respondent pointed to the fact that secondary education was of fairly recent origin in the Territory [8], and that the first students wrote the Standard X examination only at the end of 1960 [9]. Respondent points out, furthermore, that one cannot reasonably blame any apartheid measure if a student starts a teacher-training course and then drops out because he lacks the qualities needed to complete the course [10]. Applicants have previously dealt with the question of

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[1] IV, pp. 391-392.
[2] *Ibid.*, pp. 387-390.
[3] III, pp. 379-382 and 407-421.
[4] IV, p. 392.
[5] *Vide* III, p. 421 (para. 30).
[6] IV, p. 392, footnote 5.
[7] *Vide* III, pp. 417-421 (teacher training); pp. 466-467 (industrial courses); and pp. 489-490 (adult education).
[8] III, pp. 437-438 and 449-451.
[9] *Ibid.*, p. 526 (para. 18 *(c)*).
[10] *Vide* IV, p. 392, and the first italicized words in the first quotation in footnote 4. The second quotation in the footnote relates to the problem of raising the quality and qualifications of Native teachers, and not to the shortage of teachers, as Applicants suggest. Respondent indicated in the relevant paragraph in the Counter-Memorial that teachers (who were better qualified than those in the Territory) could not be imported from South Africa—hence the only solution was to raise the quality of teachers, and of education generally, in the Territory.

"frustration", and Respondent refers to what it has said in that regard [1].

19. Respondent points out that Applicants have apparently, as compared with the position taken up in the Memorials, considerably narrowed the scope of their complaint in regard to compulsory education in the Territory. In their Memorials Applicants complained that there was "compulsory education for all 'European' children of the Territory"[2], and education for "only a small fraction" [2] of the Native children. They stated that there was compulsory education for European children until the age of 16 [3], and that "by contrast, education for 'Native' and 'Coloured' children is not compulsory" [3]. Their complaint was, in other words, that the same system did not apply to Natives as to Europeans. Applicants now say, however, that they—

> "... have not insisted in their Memorials, nor do they now insist, that education be made compulsory for all the 'Native' children in the Territory [4]". (*Footnote omitted.*)

This statement is, in Respondent's submission, not in accordance with what Applicants stated in the Memorials. Applicants, presumably to support their allegation that they did not in their Memorials "insist" that education should be compulsory for all Native children, say that they "reaffirm their objection", as stated in the Memorials, to—

> "... a system of education in which a far smaller fraction of the 'Native' children within the Territory receive any schooling than in the case of the 'European' children of the Territory [5]." (Italics omitted.)

This passage, Respondent submits, does not support Applicants' aforesaid allegation.

20. Applicants' present attitude appears from the following paragraph in the Reply:

> "This Court is not asked to decide to what extent compulsory education ought to be introduced for the 'Native' children of the Territory, nor to what extent such a system ought to have been introduced in the past. Applicants submit, however, that the failure by Respondent, to introduce *any* compulsory education, on *any* level, for *any* population other than the 'European', is a manifest failure to promote the well-being or social progress of the inhabitants [6]."

Respondent agrees with what is said in the first sentence of the passage quoted above, i.e., that the honourable Court is not called upon to decide to what extent compulsory education should have been, or should now be, introduced. The contention advanced in the second sentence of the passage, however, is, in Respondent's submission, without substance. In Respondent's submission, the Court will have regard to the question whether the well-being or social progress of the inhabitants of the Territory has in fact been promoted, and will not make the existence or

[1] Chap. II, paras. 5-20 *supra*. *Vide* also sec. E, Chap. X, *supra*.

[2] I, p. 160.

[3] *Ibid.*, p. 153.

[4] IV, p. 391. In footnote 6 on p. 391 of the Reply Applicants refer to I, pp. 153, 154, 160 and 165-166 of the Memorials. Respondent finds no support for Applicants' present statement on these pages.

[5] IV, p. 391.

[6] *Ibid.*, p. 392.

otherwise of a compulsory education law its criterion of progress. Respondent has shown in the Counter-Memorial, and again in the preceding paragraphs, that the existence of a compulsory education law in a country does not necessarily afford a guide to the extent of the progress which has been made in that country.

Respondent points out, furthermore, that Applicants are not quite correct when they say that Respondent has not "introduced" compulsory education for any population group other than the European. As was pointed out in the Counter-Memorial [1], the Education Ordinance of 1962, which came into operation in December 1963, gives the Administrator of the Territory the power to introduce, on the recommendation of the Education Department, compulsory education at any state school for Coloured children.

21. Applicants conclude with the allegation that—

> "... Respondent's total failure to narrow the educational discrepancy between the 'European' and the 'non-European' children of the Territory has violated its obligations under Article 2, paragraph 2, of the Mandate [2]".

There is no substance in the allegation. Applicants have not proved any failure of the kind referred to, let alone a "total failure", and Respondent submits that there has not been any such failure. Respondent does not propose to deal with this allegation in any detail. It refers the honourable Court to details given in the Counter-Memorial which show that rapid increases in school attendance have indeed "narrow[ed] the educational discrepancy between the 'European' and the 'non-European' children of the Territory". In regard to Coloured children it was stated that more than 80 per cent. attended school [3], and in regard to Native children it was illustrated that there had been substantial progress, particularly since 1951. It was shown, *inter alia*, that the increase in the number of Native children attending school was about 54 per cent. during the years 1951-1960 as against an increase of about 17.4 per cent. in the total population [4], and that about 44 per cent. of all Native children of school age attended school in 1961 [5]. Respondent points out, furthermore, that enrolment figures as at 30 June 1964 were substantially higher than on the corresponding date in 1963. In the Police Zone the increase was more than 6 per cent.[6] and in the northern territories it was no less than 15 per cent.[7] It is estimated that about 52 per cent. of the Native school-age population now attend school [8]. Respondent refers, finally, to proposals which have been made by the Odendaal Commission for the extension of educational facilities during the next few years, and to Respondent's acceptance of the said proposals [9].

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[1] III, p. 392.
[2] IV, pp. 392-393.
[3] III, p. 391.
[4] *Ibid.*, p. 444.
[5] *Ibid.*, p. 445.
[6] From 16,764 (*vide* III, pp. 434-435) to 17,912 (Departmental information).
[7] From 32,533 (*vide* III, pp. 441-442) to 37,622 (Departmental information).
[8] Calculated on an estimated total Native population of 463,000, which figure represents an annual increase of 2 per cent. on the 1962 population figure cited in the report of the Odendaal Commission (*R.P.* No. 12/1964, p. 245 (table LXXXXII)).
[9] *Vide* Chap. III, para. 50, *supra*.

D. Disparity in Expenditure

22. This section of the Reply is divided into three parts headed, respectively, "On Education in General", "On Teachers in Particular" and "Conclusion". These matters are dealt with hereunder in the same order.

23. In the Counter-Memorial Respondent, while admitting that "amounts spent on Native education have at all times been substantially less than the amounts spent on European education" [1], submitted that—

> ". . . in the light of the circumstances which have prevailed and still prevail in the Territory, a comparison between the two things—expenditure on European education and expenditure on Native education—cannot *per se* be indicative of unfair discrimination against the Native groups [1]",

and that—

> "[c]onditions which have governed, and still govern, European and Native education, have been, and are, vastly dissimilar, and all comparisons based on mere differences in expenditure must inevitably be invalid in the context of charges as made by the Applicants. The same considerations apply, though to a lesser extent, to Native education in the Police Zone as compared with Native education in the areas beyond it [1]."

Respondent submitted, furthermore, that—

> "[t]he question of expenditure on education of each of the population groups must, in the first place, be considered in the light of the social and economic status and levels of development of each of the groups, and their respective educational needs [1]",

and that—

> "[t]he various factors and conditions which inhibited the introduction and development of education in the case of the Native groups, *rendered it almost inevitable that expenditure on education in the Territory should have begun on a basis of substantial excess on the side of European education* over that of *Native* education [1]". (Italics added and footnote omitted.)

It was pointed out at the same time that—

> "[w]ith the progressive extension of education to the Native groups, increasingly larger sums have . . . been spent on Native education, and with the continued social and economic advancement of the Native peoples of the Territory, the difference in expenditure on Native and European education must, in the course of time, of necessity disappear [1]".

24. In the Reply Applicants do not deal with the various conditions and factors to which Respondent referred in the Counter-Memorial as having thus far rendered European education more expensive than Native education. Their treatment of the matter amounts to the following:

(a) Their answer to Respondent's submission as contained in the partly italicized passage above is a submission that "the very reverse of the foregoing proposition was true in 1920 and remains true today. The inhibiting factors referred to by Respondent

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[1] III, p. 534.

should have made 'inevitable' *proportionately higher expenditures on the 'Native' group* [1]. In this regard it may be pointed out that, at least in so far as the pre-Second World War period is concerned, Applicants' submission is in direct conflict with the view of a member of the Permanent Mandates Commission, Mlle Dannevig, who, as was pointed out in the Counter-Memorial, stated in 1939 that she "... fully appreciated... that schools for European children must cost considerably more in proportion" [2]. Applicants completely ignore this statement [3].

(b) Applicants point to the differences in expenditure on European and Native education as revealed in Respondent's Counter-Memorial, and, on the basis thereof, they submit that—

> "... so astonishing a discrepancy, viewed in the context of the affirmative obligations of the Mandate, is a *per se* indication that Respondent has, from the inception of the Mandate, neglected the 'Native' population, to the advantage of the 'European' population [4]".

They add:

> "Respondent has spent, and continues to spend, a great majority of its educational funds on a small minority of the inhabitants; this can only be interpreted as a promotion of the well-being and social progress of a minority of the inhabitants, to the disadvantage of the overwhelming majority thereof [4]."

In addition to referring to expenditure figures in the Counter-Memorial, as stated above, Applicants in the Reply make a calculation of expenditure by Respondent in 1962-1963 on, firstly, each European and Native child of school age and, secondly, on each such child actually at school [5]. In the Counter-Memorial Respondent gave *per capita* expenditures, calculated on attendances, in various years in the case of both European and Native children [6]. Applicants, in a footnote [7], allege that Respondent's calculations are "misleading" because they are based on the number of pupils attending school rather than on the number of school-age children. The allegation is without substance. There is no justification for calling figures "misleading" when they are expressly stated to reflect expenditure

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[1] IV, p. 388.

[2] *Vide* III, p. 536.

[3] In other mandated territories with European populations there seems to have been a pattern of expenditure similar to South West Africa. In Tanganyika in 1938, e.g., the amount spent on each European child at school was 251.65 shillings as against 43.48 shillings in the case of African children (taking into account amounts spent by Native administration). The amount spent per head of the total European population of 9,128 was 25.14 shillings as against 0.30 shillings in the case of the total African population of 5,182,515. *Vide Report by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland to the Council of the League of Nations on the Administration of the Tanganyika Territory for the year 1938*, p. 119.

[4] IV, p. 393.

[5] *Ibid.*, pp. 393-394. They use the population figures for 1962 as estimated in *R.P.* No. 12/1964 in footnote 5 on p. 394.

[6] III, pp. 457-458 (Native children in Police Zone and northern territories); pp. 506-507 (European children). The position in the Caprivi is easily determinable from pp. 460 and 465 (paras. 85 and 95).

[7] IV, p. 393, footnote 5.

on "pupils at school" [1]. They also make the suggestion, which Respondent rejects, that Respondent based its calculation on pupils actually at school in order to render the comparison between expenditures on European and Native education "less shocking", but they omit to acknowledge that Respondent gave the expenditure *per capita* of the total Native population in 1960 in the Counter-Memorial [2]—an amount obviously substantially less than in the case of the European population. Respondent points out that, in any event, all the particulars necessary to make *per capita* calculations on the basis suggested by Applicants are either expressly stated in, or easily determinable from, the Counter-Memorial. Respondent says, furthermore, that a comparison of *per capita* expenditures cannot be considered to "reflect the total efforts" [3] made on behalf of the European and Native populations. Such a comparison would, by reason of the various factors which have thus far operated to make the Native school attendance rate lower than that of the Europeans, be particularly unrealistic if *per capita* expenditures were to be calculated on the total European and Native school-age populations [4].

25. To sum up: the aforegoing shows that Applicants base their contention that "Respondent has, from the inception of the Mandate, neglected the 'Native' population, to the advantage of the 'European' population" purely on a comparison of expenditures on European and Native education. and that, apart from submitting that factors which have inhibited the development of Native education should have made inevitable "proportionately higher expenditures on the 'Native' group", they have not dealt with various factors which, as Respondent indicated in its Counter-Memorial, show that "all comparisons based on mere differences in expenditure must inevitably be invalid in the context of charges as made by the Applicants" [5].

26. In regard to expenditure on teachers, Respondent indicated in the Counter-Memorial that it was not clear whether Applicants' contention was that there should be no difference in the salaries paid to European and non-European teachers [6], and it dealt with various factors and considerations which apply in South West Africa in order to show that, if that were indeed Applicants' contention, it would not be a valid one [7]. In their Reply Applicants have still not indicated precisely what their contention is. They do not say outright that there should not be a difference in the salaries of European and Native teachers who have the same qualifications. What they do, is to describe the difference between the salaries of European and Native teachers holding the same qualifications as an "extraordinary disparity" [8], and to allege [8] that Respondent has

[1] **III**, pp. 457-458. As to European pupils and expenditure, *vide* pp. 500 and 506-507.

[2] *Ibid.*, p. 459. The year 1960 was chosen because a population census was taken in that year.

[3] **IV**, p. 394, in footnote 5, carried over from p. 393.

[4] Respondent points out that in 1963-1964 expenditure on Native education in the Police Zone was R461,915, and in the northern territories R499,588. (Departmental information.) In 1962-1963 the corresponding figures were R405,432 and R251,689 (*vide* **III**, p. 458).

[5] **III**, p. 534.

[6] *Ibid.*, p. 532.

[7] *Ibid.*, pp. 532-533.

[8] **IV**, p. 395.

attempted to justify this "extraordinary disparity", whereas it is quite clear from the Counter-Memorial that Respondent merely indicated why European and Native salaries were not the same, and that it in no way dealt with the extent of the differences in such salaries.

It would seem, in the circumstances, that Applicants' contention is not that there should be no difference in the salaries of European and Native teachers holding equal qualifications, but that differences existing at present are "extraordinary". Applicants make no attempt, however, to indicate what a reasonable, or "ordinary", difference would be when regard is had to all relevant circumstances in the Territory. As will appear from the Reply, their answer to Respondent's treatment of the question of teachers' salaries [1] amounts to the following:

(a) they allege that the shortage of Native teachers shows that salaries offered to Natives are insufficient to attract them to the teaching profession [2]; and

(b) they allege that Respondent "attempts to justify" the "extraordinary disparity" between European and Native salaries, and they then proceed to reply to what Respondent said in the Counter-Memorial in regard to various factors which play a part in the determination of salaries and allowances of teachers in the different population groups [3].

Respondent will deal with these matters in turn.

27. Applicants refer to the shortage of Native teachers in the Territory and to the fact that Respondent attributes this shortage, *inter alia*, to "the absence of a keen feeling for the need for such services [on the part of the 'Native' groups] at their present stage of social evolution" [4]. They point out that Respondent has stated that "the Herero, in particular, show very little interest in the teaching profession . . ." [5].

Then, apparently in an attempt to discredit Respondent's aforementioned statements and to show that there is a general interest in the teaching profession, Applicants proceed to say:

> "Yet Respondent cites the Report of the 1958 Commission as holding that 'it was remarkable to what extent the idea of serving on [school committees] . . . and exercising authority over their schools stirred the imagination of Native parents, tribal councils and chiefs, *without exception*' [6]",

and—

> "[a] reasonable conclusion is that Respondent has failed to render the teaching profession (as distinguished from part-time service on school committees) sufficiently attractive to the 'Native' population [7]".

This alleged "reasonable conclusion" is in fact unfounded. It is also not a reasonable inference from the statement referred to by Applicants.

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[1] *Vide* III, pp. 532-533.
[2] IV, pp. 394-395.
[3] *Ibid.*, pp. 395-396.
[4] *Ibid.*, p. 394.
[5] *Ibid.*, referring to III, p. 360.
[6] III, p. 501. The relevant paragraph in the Commission's report appears in III, p. 369.
[7] IV, p. 395.

The fact that all Native witnesses before the said Commission showed great interest in controlling their schools is no warrant for suggesting that there is general interest on the part of Natives in the teaching profession, or for saying that Respondent has failed to render the profession sufficiently attractive. Respondent does not propose going into any detail in regard to this issue. It merely points out in regard to the Herero, whom Applicants mention, that at present there are no Herero teacher trainees at the Augustineum, and only six at Doebra, i.e., six out of a total of 100 trainees at these two centres [1].

Applicants also refer, apparently in an effort to bolster their aforesaid "conclusion", to a statement made by Mlle Dannevig during the 36th Session of the Permanent Mandates Commission in 1939. As appears from the part of the Minutes quoted by Applicants [2], Mlle Dannevig expressed the view, as she had also done the year before, that "the offer of higher salaries would perhaps induce more young natives to be trained as teachers". In Respondent's submission this expression of opinion cannot be taken to show that the then existing salaries in fact had any significant effect on the supply of teacher trainees, or that Respondent in fact failed to render the teaching profession sufficiently attractive. Furthermore, as is pointed out in the Counter-Memorial [3], salaries are adjusted from time to time, with the result that an opinion expressed at any particular time must of necessity relate only to conditions as then existing.

28. Applicants also attempt to use the aforementioned quotation from the Minutes of the Permanent Mandates Commission, and the reply of Respondent's representative, Mr. Andrews, to Mlle Dannevig's view in regard to salaries [4], as a basis for suggesting that Respondent does not, otherwise than in the case of European education, recognize higher salaries as a means of inducing young Natives to become teachers. This suggestion has no basis in fact. Furthermore, Mr. Andrews' reply does not support the suggestion. His view was obviously not that higher salaries were inappropriate to attract Natives to the teaching profession. His point was that, in circumstances as they prevailed at the time, there were "arguments against the idea of teachers who were such *from lucrative motives only*" [5]. In other words, whilst higher salaries might attract more teachers, those who were attracted only by the remuneration offered might well prove unsuitable for the task they had to perform. That is why he referred to Dr. Vedder who, by reason of his position and experience of conditions in South West Africa [6], was eminently qualified to say what qualities were most needed in Native teachers at that time.

29. Applicants say that "higher salaries are openly recognized as incentives by Respondent" [2] in the case of European teachers, and they quote a passage from the Counter-Memorial in which it is stated that "a considerable increase in the number of teacher trainees" since the war is "probably to be ascribed largely to increased salary scales for teachers,

[1] Departmental information.
[2] IV, p. 395.
[3] III, pp. 452-457 and 532-533.
[4] *Vide* IV, p. 395, footnote 2, for this reply.
[5] *Ibid.* (Italics added.)
[6] *Vide* III, p. 409.

and to the financial aid offered since 1950 by the Administration in the form of bursaries and loans" [1]. It is, of course, true that higher salaries are "openly recognized" as incentives by Respondent in the case of European education, but how this fact can, either by itself, or in combination with what was stated by the aforesaid 1958 Commission [2] or in the Permanent Mandates Commission, be used as a basis for suggesting that Respondent does not regard higher salaries as inducements in the case of Native education, is not clear.

Applicants' quotation from the Counter-Memorial, as referred to above, is followed by the following words:

> "Yet 'Native' teachers are offered salaries and allowances far lower than those available for 'European' teachers in the Territory. The commencing salary of a married male 'European' teacher in the lowest category, including a special allowance, is R1,406. The commencing salary of a married male 'Native' teacher with comparable qualifications, together with his cost of living allowance, is R696 [3]." (Footnotes omitted.)

The suggestion seems to be that the mere fact of a substantial difference in the salaries of European and Native teachers shows that Respondent has not rendered the teaching profession "sufficiently attractive" to the Native population, or that Respondent does not regard higher salaries as incentives in the case of Native teachers. Respondent rejects this suggestion and, refers to what is stated in the Counter-Memorial in regard to the various factors which operate to make the salaries of European teachers higher than those of Native teachers, and in regard to Native teachers' salaries and their increase from time to time [4].

In the latter regard Respondent mentioned in the Counter-Memorial that "[n]ew salary scales for Native teachers, to operate with retrospective effect as from a date in 1963, are at present under consideration" [5]. The new scales were fixed at the end of 1963 and came into operation with retrospective effect as from 1 April 1963. These scales are as follows:

Grade	*Qualifications*		*Scale*
1	Lower Primary Teachers Certificate	Men:	R384x36–600x48–936
		Women:	R294x18–312x24–384x36–492
2	Higher Primary Teachers Certificate	Men:	R456x36–600x48–1032
		Women:	R336x24–384x36–600x48–648
3	Matriculation plus professional Certificate	Men:	R564x36–600x48–1080x60–1440
		Women:	R456x36–600x48–840

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[1] IV, p. 395, and *vide* III, p. 508, where Respondent points out that, despite higher salaries and the other aids mentioned, "there has been, and still is, a considerable shortage of properly qualified teachers". On Applicants' argument this shortage of European teachers must be taken to indicate that European teachers' salaries are too low.

[2] *Vide* para. 27, *supra*.

[3] IV, p. 395. The final figure of R696 should be R776 for teachers in the Police Zone. Applicants have omitted to take into account a regional allowance of R80; *vide* III, p. 457.

[4] III, pp. 452-465 and pp. 532-533.

[5] *Ibid.*, p. 455, footnote 1.

Grade	Qualifications	Scale
4	Four Degree courses plus professional Certificate	Men: R600x48–1080x60–1500 Women: R492x36–600x48–888
5	Eight Degree Courses plus professional Certificate	Men: R648x48–1080x60–1560 Women: R528x36–600x48–936
6	Degree plus professional Certificate	Men: R744x48–1080x60–1680 Women: R600x48–1032

The aforementioned scales apply in the Police Zone and in the northern territories, save that teachers in the northern territories teaching in lower primary schools are remunerated according to the following scales, which are the same for men and women:

(i) Lower Primary Teachers Certificate:
R294x18–312x24–384x36–492.

(ii) Higher Primary Teachers Certificate:
R336x24–384x36–600x48–648.

In fixing the said new scales the cost-of-living allowance previously paid to teachers in addition to their salaries [1] was consolidated in the new salaries.

A comparison of these scales with those in operation prior to 1 April 1963 [2] will show that the increases are fairly substantial. In all cases it exceeds the total of salary and cost-of-living allowance paid prior to 1 April 1963, save in the case of married men, who commence at a lower salary but receive higher increments and rise to a higher maximum than was the case under the previous scales. This result followed from the fact, as already stated, that the cost-of-living allowance previously paid was consolidated in the new salaries, but a revision of the position in this regard is now under consideration.

Persons already in service when the new salary scales came into operation started on a notch in the scale which exceeded their previous salary plus cost-of-living allowance.

30. In the Counter-Memorial [3] Respondent submitted, in answer to a paragraph in Applicants' Memorials [4], that if Applicants' contention was that "all teachers should be paid the same salaries, it would not be a valid contention", and Respondent then dealt with various "circumstances and factors relating to the determination of salaries and allowances of teachers in the different groups" [3].

Respondent stated, firstly, that—

> "... the qualifications demanded in the case of European teachers are generally higher than in the case of non-European teachers, and it stands to reason that teachers with higher qualifications should command better salaries [3]". (Footnote omitted.)

As Applicants point out, and as also appears from the Counter-Memorial itself [5], it is possible to have European and Native teachers who have the same qualifications. Respondent's aforequoted statement was not in-

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[1] *Vide* III, p. 456.
[2] III, p. 455 and cost-of-living allowances at p. 456.
[3] *Ibid.*, p. 532.
[4] I, p. 158 (para. 183).
[5] III, pp. 455, 462, 463, 503 and 504.

tended to create the impression that Native teachers necessarily have lower qualifications and therefore receive smaller salaries than European teachers, but to point out why the vast majority of Native teachers (having passed only Std. VI and a teacher training course) receive smaller salaries than European teachers with the lowest recognized qualifications [1]. Respondent points out, furthermore, that the statement was made in a paragraph which deals with an allegation in the Memorials [2] in which Applicants referred merely to differences in salaries without having any regard to differences in qualifications.

31. Because of the incomplete and misleading way in which Applicants in the Reply state the further facts and arguments advanced by Respondent in regard to the matter in issue, Respondent considers it necessary to repeat in some detail what was said in the Counter-Memorial. Respondent pointed out that the range of economic alternatives open to prospective teachers was also an important factor in the determination of salaries. In regard to European teachers Respondent said, *inter alia,* that—

> "[f]or persons with the qualifications of the European teachers there are many alternative employment opportunities, not only in the Territory itself, but also in South Africa. The salaries of these teachers must, therefore, always bear a reasonable relationship to salaries paid in the other spheres of employment which are open to them [3]",

and that it had been found necessary to pay a special allowance to European teachers to attract them from South Africa to the Territory [3]. In regard to Native teachers Respondent said, *inter alia*:

> "The aforementioned considerations do not apply to nearly the same extent in the case of Native teachers in the Territory . . . The problem is rather one of inducing a sufficient number in the Territory to obtain even the lowest qualifications necessary for teaching purposes. There has in the past been little competition for the services of such persons on comparable salary bases . . . [3]"

Respondent then made the further point that, in its view,

> "A teacher's salary should . . . bear a relationship to the normal income of other members of his group, otherwise he might become separated or estranged from them as a result of an artificial financial barrier [3]."

It was also stated that—

> "The Native groups are in general still much less developed in the economic sphere than Europeans, and their whole structure of income and of cost of living is generally lower [3]",

and that such factors resulted in a situation that ". . . salaries paid to Native teachers are lower than those paid to European teachers, even where qualifications may be comparable" [3].

Respondent indicated that social and economic considerations of the kind mentioned by it also accounted for differences in the salaries of European and Native teachers in other African territories [3], and referred to the findings and recommendations of the Commission on The Civil

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[1] *Vide* III, pp. 388, 503-504 and 535.

[2] I, p. 158 (para. 182).

[3] III, p. 532.

Services of Kenya, Tanganyika, Uganda and Zanzibar, 1947-1948 [1].

Respondent now turns to Applicants' answers to the various points made in the Counter-Memorial, as restated above.

32. In regard to what Respondent stated in connection with economic alternatives open to prospective teachers, Applicants say:

> "... the argument by economic alternative is the creation of yet another endless circularity—it has been Respondent's duty for more than forty years to create meaningful economic alternatives for 'Natives', and its failure so to do cannot be adduced as a justification for a failure of a different sort [2]".

In Respondent's submission, this answer is given to avoid dealing with realities as they exist not only in South West Africa, but also in other underdeveloped countries where different population groups find themselves at substantially different levels of social and economic development. It is, Respondent submits, without substance, being based on the wholly unrealistic supposition that Respondent could, and should, in the brief span of some 40 years have developed the indigenous peoples of the Territory to a social and economic level equal to that of the European population or, in any event, to a level so near thereto as makes no real difference.

Applicants do not (save for a remark in a footnote, to which Respondent refers below) deal with the merits of Respondent's point that similar circumstances in other African territories have affected European and Native salaries in the same way as in South West Africa. They evade the issue by saying that "... such comparisons are meaningless and serve no useful purpose, since there are no other African territories subject to Mandate" [2]. This is, of course, no answer. The economic considerations here in issue do not apply only in mandated territories, and do not depend for their validity on the status of a country.

In regard to the same point, Applicants add in a footnote:

> "In any event, most other African territories, in recruiting European teachers, do so *from Europe*; salary differences become understandable in this light, since the motivation and effect is wholly different than is the case with respect to the 'Europeans' of South West Africa [3]."

As appears clearly from what is stated in the Counter-Memorial [4], the question of higher salaries for teachers imported from another country is only one of several considerations which are in issue. It is, furthermore, quite incorrect to suggest that the question of higher salaries (or special allowances) for imported teachers properly arises only when teachers are imported from Europe, and not when teachers for the Territory are imported from South Africa. The question in each case is whether a teacher leaves his home country to teach in another country, although the distance between the two countries may play an important part in determining salaries and other benefits. South West Africa is almost completely dependent on South Africa for its European teachers, and experience has shown that to induce such teachers to come to (or, in the case of teachers

[1] III, p. 533, footnote 3.
[2] IV, p. 396.
[3] *Ibid.*, footnote 3.
[4] III, pp. 388-389 and 532-533.

born in the Territory, to stay in) the Territory, they have to be offered a special allowance in addition to such salaries as are paid in South Africa [1].

33. In their answer to Respondent's submission that "[a] teacher's salary should ... bear a relationship to the normal income of other members of his group, otherwise he might become separated or estranged from them as a result of an artificial financial barrier", Applicants commence by misrepresenting what Respondent said. According to them Respondent stated that, "to pay higher salaries to 'Native' teachers would 'separate' and 'estrange' them" [2] from other members of their group. This is obviously not what Respondent stated. They then proceed to say that Respondent's "statement" is—

> "... yet another circularity, since if no members of the 'Native group' are rewarded above others, the 'group' progress will at all times be limited to the rate of advance of its slowest member [2]".

This "circularity" argument suffers from the fatal defect that Respondent never stated, or in any way suggested, that there are no members of the Native group who are rewarded above others, or that no members of the Native group should be rewarded above others. Respondent's point was that there should be a relationship, i.e., a reasonable relationship, between a teacher's salary and the income of other members of his group. Furthermore, Applicants' argument has no factual basis, since it is in no way true to say that no members of the Native group are rewarded above others.

34. Having stated their "circularity" argument, Applicants quote a part [3] of the paragraph with which Respondent concluded its treatment of the question of differential salary scales for European and Native teachers, and which reads as follows:

> "The situation is naturally not a static one, and is subject to continual adaptation and change, as will appear from the account already given of increases and alterations from time to time in salary scales and allowances. The opening up of a number of competing avenues of higher employment through progress made in the policy of separate development, as recounted in other portions of this Counter-Memorial, coupled with the teacher shortage in regard to Native education, must naturally tend to increase the basis of remuneration of Native teachers. With continued social and economic progress on the part of the Native population groups, the gap between salaries for Native and European teachers must in the ordinary course be narrowed and, eventually, disappear. It could, however, do incalculable harm to anticipate this process by singling out Native teachers for payment to them of salaries which would produce a complete economic imbalance between them and virtually all other members of their communities [4]."

They then say, apparently on the strength of the passage quoted by them, that "Respondent has thus stated that it will harm a man to pay him more" [2], and they ask "Where does this 'incalculable harm' arise? [2]"

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[1] III, p. 505.
[2] IV, p. 396.
[3] *Ibid.* (quotation at footnote 4).
[4] III, p. 533.

Respondent never stated, or suggested, that it "will harm a man to pay him more", but made the point that a teacher could become estranged from the members of his group as a result of an artificial financial barrier, and that such estrangement has the harmful result that "the teacher ceases to be able to exercise the required influence over his own people, and accordingly fails to be an effective instrument in advancing their spiritual and material progress" [1]. Respondent pointed out, furthermore, that a premature raising of salaries in the case of Native teachers [2] could cause harm in the following respect, viz., by causing "a complete economic imbalance between them and virtually all other members of their communities" [3].

Applicants, in asking "[w]here does this 'incalculable harm' arise?", say that "Respondent's answer to this question is to be found in a statement of Dr. Verwoerd in the South African Senate" [4], and they then quote a passage with which Respondent has already dealt in another connection [5]. Respondent indicated that the answer to Applicants' question is to be found in a proper reading of what is stated on the issue in the Counter-Memorial. As has been shown, Respondent's point was that a Native teacher's estrangement from his own community means a loss to that community. A possible desire on the part of such a teacher to join the European community (which is what Dr. Verwoerd spoke about, although not in connection with salaries), or any other community, is irrelevant

E. Conclusion

35. Applicants' "Conclusion" begins with the submission that—

> ". . . this last-mentioned discrimination [i.e., in regard to expenditure on teachers] is but another example of implementation of Respondent's basic policy of educational *apartheid* [6]".

Respondent has already dealt with the question of educational expenditures and teachers' salaries, and with various social and economic factors which have thus far operated to make such expenditures and salaries substantially larger in the case of European education than in the case of Native education. Respondent says that there is no substance in Applicants' submission that such differences constitute part of the implementation of any particular policy, let alone a "policy of educational *apartheid*" as Applicants picture it in the Reply.

Applicants further allege that—

> "[i]t [i.e., presumably, the alleged discrimination in teachers'

[1] **III**, p. 388.

[2] *Vide* the words "singling out", para. 34, footnote 3, *supra*.

[3] *Vide* the passage quoted above. Respondent points out that the Commission on The Civil Services of Kenya, Tanganyika, Uganda and Zanzibar (*vide* **III**, p. 389) recommended that account should be taken of ruling income levels in those classes of the community from which the civil servant comes. It stated, *inter alia*: "The disadvantages of so remunerating any class of Africans as to create a Mandarin caste, divorced in income and interests from their fellows, would not be confined to the economic field." (*Report of the Commission on The Civil Services of Kenya, Tanganyika, Uganda and Zanzibar 1947-1948*, Colonial No. 223 (1948), p. 27, para. 92.)

[4] **IV**, p. 396.

[5] Chap. II, paras. 5-20, *supra*, and particularly para. 10.

[6] **IV**, p. 397.

salaries] is a product and symptom of the policy which has prolonged and aggravated the very conditions which Respondent relies upon as justification for its policy [1]".

Respondent is not sure that it understands the meaning of this passage. It is not clear what the terms "the policy" and "its policy" are intended to signify. Perhaps the suggestion is that Respondent is itself responsible for the various factors which have, according to Respondent, thus far operated to make expenditures on European education, and European teachers' salaries, substantially larger than expenditures on Native education, and Native teachers' salaries. If so, the suggestion is denied. Perhaps, however, the allegation is intended to relate to the elaborate "circularity" argument which follows it. This argument, which Respondent does not propose to quote in full [1], has little relation to realities, and is without substance. It has, as its starting-point, the allegation that " 'Natives' remain uneducated because there are not enough 'Native' teachers". This allegation is an incomplete and misleading statement of a complex issue, as will appear from what is said in the Counter-Memorial in regard to the various factors which have served to retard the development of Native education [2], and must inevitably lead to wrong conclusions unless it is so qualified as to make clear that problems are gradually being solved and that the percentage of children receiving an education is increasing every year [3]. Basic to Applicants' argument is the further allegation that the shortage of teachers is due to low salaries. The allegation has in no way been proved by Applicants, and is denied. Respondent does not propose analysing Applicants' argument any further. Suffice it to say that, in Respondent's submission, neither its assumptions nor its conclusions are justified.

36. Applicants purport to see "[s]imilar circularities . . . in every aspect of the education of 'Natives' in the Territory" [1], and it is alleged that "[s]uch patterns rest upon the same assumptions, and move toward a common objective" [1]. It is not stated what these "circularities" are, and presumably the reference is to those "circularities" which are mentioned in earlier parts of the Reply and with which Respondent has already dealt.

Finally, Applicants refer to various matters previously raised by them in the Reply and then allege that "all of these aspects relate to, and are informed by, the essential design and assumptions of *apartheid*". Respondent has already dealt specifically with the various aspects referred to by Applicants, and with the allegations made by Applicants in regard thereto. Respondent has also demonstrated that Applicants' allegations regarding what they term "the essential design and assumptions of *apartheid*" [1] are without substance.

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[1] IV, p. 397.

[2] III, pp. 407-421.

[3] Similar considerations apply in regard to M. van Asbeck's view—*vide* IV, p. 397, footnote 2—that there was a "vicious circle" in that "there was no primary education because there were no teachers and no teachers because there was no primary education". Furthermore, and in any event, if there was such a frustrating "vicious circle" at the time when M. van Asbeck spoke, it has since been successfully broken, as is evidenced by the number of teachers and pupils at the present time

CHAPTER V

SEPARATE EDUCATION AS VIEWED BY UNITED NATIONS POLITICAL ORGANS

A. Introductory

1. This Chapter deals with Annex 5 to the Reply [1], in which Applicants advance evidence in support of the following statement made by them in an earlier part of the Reply, viz.:

> "Segregation on racial grounds has been condemned in all civilized nations . . . It is excluded, for example, from the educational policies of Territories subject to Trusteeship Agreement under Chapter XII of the United Nations Charter, or subject to reporting as Non-Self-Governing Territories under Chapter XI [2]."

The Annex begins with a paragraph in which it is alleged that—

> "[t]he appropriate *political organs* of the United Nations have determined that racial separation in education is incompatible with the purposes and principles of administration of dependent territories [3]" (italics added),

and that the United Nations, "[s]peaking through such organs", has—

> ". . . determined that separation is incompatible with *(a)* the broad goals of education; *(b)* the basic meaning of education; *(c)* the principle of equal opportunity; *(d)* the principle of racial equality; and *(e)* the goal of unification of the territory [3]".

Then follow five paragraphs, lettered *(a)* to *(e)* [4], in which Applicants, apparently in order to substantiate the five propositions mentioned in the quotation immediately above, refer to views of and resolutions by "political organs" of the United Nations. These views and resolutions are also described by Applicants as "standards" [5]. It is alleged, furthermore, that these "organs", in asserting the said "standards", had due regard to the "practical difficulties involved in implementing them" [5], and that the "determination by the United Nations that separate development in education is incompatible with the purposes and principles of administration of dependent territories has been fully, or almost fully, complied with in every Non-Self-Governing Territory with the exception of South West Africa" [6]. The Annex concludes with what is intended to be an illustration that "[t]he promotion of the moral well-being and the social progress of all the inhabitants of a territory by implementing non-discrimination in education is evidenced by the development in Somaliland under Italian Administration" [7], and a comparison is made between this territory and South West Africa.

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[1] IV, pp. 398-403.
[2] *Ibid.*, p. 372.
[3] *Ibid.*, p. 398.
[4] *Ibid.*, pp. 398-399.
[5] *Ibid.*, p. 399.
[6] *Ibid.*, p. 401.
[7] *Ibid.*, p. 402.

Respondent deals hereafter with the above-mentioned five propositions and the other allegations made in regard thereto, but before doing so it makes a few general observations as set out in the next paragraph.

2. It is a matter of great significance that, as noted above, the "standards" in regard to education on which Applicants place reliance in their Annex 5, have allegedly emanated from pronouncements of *political* organs of the United Nations. The extent to which Applicants' statements are in truth not supported by the pronouncements of the organs in question, will be indicated hereafter. For the present Respondent is concerned with the situation in so far as the pronouncements may well be said to accord with Applicants' expositions. It is in this respect that fundamental importance attaches to the political nature of the organs, and to the fact that their pronouncements on education obviously emanated from, or were geared to, their vision of the socio-political future of the trust territories concerned. This last factor also explains why Applicants discuss the pronouncements on education with reference to matters such as "the goal of unification of the territory", "the principle of racial equality", and "the principle of equal opportunity" [1].

It seems clear to Respondent that no discussion of the question of separation or integration in education—even in the light of the "broad goals" or the "basic meaning" of education [1]—can be divorced from the socio-political context of the particular situation in which the question arises. Respondent has already pointed out that in the United States of America, where the question concerns Negroes and White persons who differ in racial origin but speak the same language, share the same culture and participate in the same political institutions, and where there is no policy to bring about an alteration in the last-mentioned respect, the answer may well with justification be different from that to be given in South West Africa—where the groups concerned have, *inter alia*, different cultures, languages, political institutions, largely different areas separate ly occupied by them, where they are concerned to retain their separate identities and where the policy is one of development towards separate nationhoods. For similar reasons the answer in South West Africa, in the socio-political context just indicated, may for very good reasons have to be different from that decided upon in the trust territories in question *consequent upon* a decision (rightly or wrongly taken) to attempt to integrate the various ethnic groups into a socio-political unit. For this reason alone there can be no question of abstracting, from pronouncements of the United Nations organs regarding such trust territories, any "standards" capable of rule-of-thumb application to education in South West Africa.

As is indicated in various instances below, White populations constituted a very small percentage of the total numbers of inhabitants of the various trust territories—and they were almost invariably further reduced after decisions on the part of the Administering Authorities, in the second half of the 1950s, to accept a policy of accelerated development towards independence, on a basis of attempted integration of the inhabitants into a single unit. As regards attempted integration even amongst the diverse non-White groups, Respondent has indicated above[2] that the results have in some instances been disastrous and in others not much better. This

[1] *Vide* para. 1, *supra*.

[2] *Vide* sec. E, *supra*.

is a further reason why the Court will not, in Respondent's submission, attach any weight to "standards" sought to be abstracted from the pronouncements of the political organs concerned.

B. The Proposition that Separation Is Incompatible with the "Broad Goals of Education"

3. It is alleged that "[s]eparation on account of race is incompatible with the broad goals of education" [1]. Neither of the resolutions referred to by Applicants [2] in this connection was concerned with "the broad goals of education", nor do Applicants say what "the broad goals of education" are. The resolutions were concerned with what were termed "objectives in education" in Non-Self-Governing Territories as defined by the Committee on Information from Non-Self-Governing Territories. It appears from these "objectives of education" that they are of much wider scope than is normally associated with a school education. For example, one such "objective" is stated to be "[t]o raise the standards of living of the peoples by helping them to improve their economic productivity and standards of health" [3].

There is, in Respondent's submission, nothing in the first resolution referred to by Applicants which says that separation is not compatible with education, or even with the "objectives of education" as stated in the resolution. In the second resolution mentioned by Applicants, the General Assembly considered that, for the attainment of the aforesaid objectives, "it is necessary to establish systems of primary, secondary and higher education which will meet the needs of all, regardless of sex, *race*, religion, social or economic status, and provide adequate preparation for citizenship" [4].

It is clear, in Respondent's submission, that the General Assembly was here concerned with the provision of educational facilities at various levels, to "meet the needs of all", and that it held that no one should be deprived of education because of his sex, race, religion, etc. The resolution does not mean that all children must have the same education, or that all must attend the same schools.

C. The Proposition that Separation Is Incompatible with "the Basic Meaning of Education" [4]

4. Separation in education is alleged by Applicants to be incompatible with the "basic meaning" of education, or with "the meaning of education iself" [4]. Applicants do not say what the "basic meaning" of education is, nor what "the meaning of education itself" is supposed to be, and in Respondent's submission these expressions are not self-explanatory. It would seem, furthermore, that the Committee on Information, whose

[1] IV, p. 398 (para. *(a)*).

[2] *Ibid.*, footnotes 1 and 2.

[3] *G.A. Resolution* 743 (VIII), 27 Nov. 1953, *G.A., O.R., Eighth Sess., Suppl.* No. 17 (A/2630), p. 24. From a later United Nations document it appears that the above-mentioned Committee regarded it as its function "to seek to contribute to the promotion of education in the ... broadest sense of the work [sic] 'education' ...": *G.A., O.R., Eleventh Sess., Suppl.* No. 15 (A/3127), p. 14 (para. 12).

[4] IV, p. 398. The word "race" is not italicized in the original, as Applicants' quotation would indicate.

view that "the principle of non-discrimination is essential to and is an essential part of education" is quoted by Applicants, was not concerned with philosophical concepts about the "basic meaning" of education, but with the need for non-discrimination as a means of ensuring equality of opportunity. That this is so, appears from the words which follow immediately upon those quoted by Applicants, viz.:

> "It [i.e., the principle of non-discrimination] should be encouraged by all means and every effort made to overcome the technical difficulties of linguistics and finance that may limit equality of opportunity [1]."

It follows, therefore, that the proposition here in issue is, in essence, the same as the proposition mentioned in the paragraph immediately below.

D. The Proposition that Separation is Incompatible with "the Principle of Equal Opportunity" [2]

5. Applicants allege that "[s]eparation in education is incompatible with the principle of equality of opportunity", and that "[i]n order to assure equal opportunity, there must be equal treatment, not separate treatment, of the population" [2].

In support of the latter allegation Applicants quote from a resolution of the General Assembly in the year 1949 when Administering Members were invited "to take steps where necessary to establish equal treatment in matters relating to education between inhabitants of the Non-Self-Governing Territories under their administration, whether they are indigenous or not" [3]. The Special Committee on Information gave the following interpretation of the above resolution, as appears from the report of the Sub-Committee on Education for 1950:

> "The Special Committee considers the resolution to stress equality of opportunity for different ethnic and religious groups of the school population, in order that every child, regardless of race, religion, language or social status, may acquire both a knowledge of his own culture and a sympathetic understanding of the cultures of others. *It does not necessarily mean that a common educational programme should in all cases be provided for all groups in a community of different racial or religious composition* [4]." (Italics added.)

According to the above-mentioned report, the Special Committee expressed the view, which is quoted by Applicants, that "[i]n the field of education no principle is more important than that of equality of opportunity for all racial, religious and cultural groups of the population" [5], and it also held that "it should be accepted as a general principle that no school should exclude pupils on grounds of race, religion, or social status" [6]. At the same time it held, as the italicized words in the above-quoted passage indicate, that "a common educational programme . . . for all groups in a community of different racial composition" was not neces-

[1] *G.A., O.R., Eleventh Sess., Suppl.* No. 15 (A/3127), p. 23.
[2] IV, p. 398.
[3] *Ibid.*, p. 399, footnote 1.
[4] *U.N. Doc.* A/1303/Add. 1, p. 16 (para. 43).
[5] *Ibid.*, p. 17 (para. 50 *(a)*).
[6] *Ibid.*, p. 18 (para. 50 *(c)*).

sarily required, but that "programmes and organization of different types of school may properly be designed to meet the needs of different groups of pupils" [1]. The Committee felt that regard should be had to local conditions in every country, and to *the wishes of any group "desirous of separate school activities for the maintenance of its cultural heritage"* [2]. (Italics added.) It is recorded that—

> "[t]here was . . . a strong belief that the principle of equal treatment in education has so many ramifications that its consideration can be adequate only within a picture of the whole cultural organization and the complete social context of any territory [2]",

and that the Special Committee held the view that—

> "[r]espect should be paid to the wishes of any group desiring to establish particular educational facilities for its members, but this should be subject to the overriding consideration that the general welfare of the whole community is not thereby prejudiced and that the practical operation of any system of differentiation does not lead to discrimination against any group [3]".

The aforegoing shows, in Respondent's submission, that in 1950 both the General Assembly and the Committee on Information, whilst holding that no person should be excluded from any school merely on account of his race, and that there should be protection against discrimination against any group, thought that regard should be had to the wishes of any group desiring to establish particular educational facilities for its members, and that there could properly be differentiation in school facilities and programmes [4].

6. In the years that followed, however, as Respondent will now indicate, there came a change in attitudes. Thus, in 1955 the Committee expressed the following view in regard to separate systems at the secondary level:

> "Practical difficulties, particularly those of language are held by some Members to justify school systems adapted to the special needs of groups of the population. But the Committee holds that, at the secondary level, this justification can only be accepted in very exceptional circumstances and as a temporary expedient . . . [5]",

and in 1956 it stated, in regard to secondary education, that "every effort should be made to develop a unified school system open to children of all races" [6]. In primary education, however, it was thought that different considerations applied. In the same year the Committee recognized that "special schools to meet the special needs, particularly linguistic, of young children may be justified so long as the system established has relation to these needs and not to race barriers" [7].

Respondent points out in this connection that in a "Study of Dis-

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[1] *U.N. Doc.* A/1303/Add. 1, p. 18 (para. 50 *(c)*).

[2] *Ibid.*, p. 17 (para. 47).

[3] *Ibid.*, para. 50 *(b)*.

[4] This submission also covers *G.A. Resolution* 324 (IV) of 15 Nov. 1949. *U.N. Doc.* (A/1251), pp. 39-40. (*Vide* **IV**, p. 400, footnote 6. The resolution was passed before *G.A. Resolution* 328 (IV) of 2 Dec. 1949. *Vide* **IV**, p. 399, footnote 1.)

[5] *G.A., O.R., Tenth Sess., Suppl.* No. 16 (A/2908), p. 30 (para. 92).

[6] *Ibid., Eleventh Sess., Suppl.* No. 15 (A/3127), p. 22 (para. 78).

[7] *Ibid.*, para. 77.

crimination in Education", issued by the United Nations Economic and Social Council at about this time, it is stated that whilst the term "discrimination in education" should be interpreted as broadly as possible so as to cover all "inequalities ... based on race, colour, sex, language, religion ..." [1], the term "discrimination measures" cannot be applied—

> "... both to unjust discriminatory measures and to certain legitimate distinctions calculated to restore rather than to prevent equality in enjoyment of the right of education. This is, for instance, true of special education provided for a separate population group in its own language or in accordance with its own cultural traditions ... [2]"

It is pointed out in the abovementioned "Study" that the United Kingdom Government observed in regard to the Trust Territory of Tanganyika, for which it was the Administering Authority, that—

> "... the suggestion that there should be racial unification in primary schools runs counter to the opinion of the majority educationalists who, throughout the world, emphasize the necessity, in the case of primary education, for schools to be related to social and home environments and the advisability of teaching the very young in their mother tongue or in the language they use in their home environment. It is only at later stages that persons from different environments can and should be mixed ... [3]"

And in regard to Kenya, according to the aforementioned "Study", the United Kingdom Government stated, *inter alia*, in a memorandum:

> "This idea of the multi-racial school is very attractive. It suggests a solution of the political problem of the plural society: children, it is said, have no race feeling, and if you educate them side by side on the same benches they will remain free of it when they grow up. Such schools exist in the United States, and in cosmopolitan cities like Cardiff or Liverpool; why should they not exist in Africa?
>
> We admit the attractiveness of the idea, and we hope to show that some educationists in Kenya are working towards it. But the case of the United States or of the cosmopolitan city in Britain is not a parallel. There, you have a country with a well-established civilization and language of its own, and the problem is to assimilate the alien immigrant ... This is not the problem in Kenya. Nobody suggests that the aim of education there should be to make the European child or the Asian child into a good African, to teach him to forget his parents' mother-tongue and ancestral traditions ...
>
> It is true that some countries, in which the problems of a plural society have proved intolerable, have accepted the multi-racial school as the only way out. Malaya is a case in point: there, the Malay, Chinese and Indian communities are coming together in so-called national schools in which the medium of instruction is none of the three main languages, but English. The price which each community in Malaya pays which joins in the national schools is that its own language and traditional civilization are inevitably subordinated to the need for giving its children a common inheritance."

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[1] *Vide U.N. Doc.* E/CN. 4/Sub. 2/181, 7 Nov. 1956 (para. 50), p. 24.

[2] *Ibid.*, para. 51.

[3] *Ibid.*, p. 56 (para. 159).

Having dealt with some language difficulties with which an integrated school system in Kenya would have to cope, the memorandum continued:

> "Which ever language is chosen as the medium of instruction, some of the class are going to be taught through the medium of a foreign language. And since language is the vehicle of culture, and since the cultures of a Kikuyu, a Gujerati, and an English child are so different, we believe that at the present stage, co-racial education is not possible at the primary stage. If it is admitted in theory that something might be done by a system of parallel classes on a language basis in the same school, this still will be very expensive in staff; and the differences between the pupils lie much deeper than merely linguistic differences . . .[1]"

In 1959 the Committee on Information from Non-Self-Governing Territories stated that it had decided to go a step further than it had in 1956, and recommended the development of a common system of education also at the primary school stage [2]. The Committee now expressed the view that "on no ground whatsoever can education on a racial basis be justified" [3], and that separate school systems should disappear [4].

At about the same time the aforementioned Committee stated, *inter alia*, that "whether or not it had been feasible to provide equally advantageous facilities for each of the racial groups, it was liable to entail a multiplication of staff, effort and resources which no territory appeared able to afford" [5].

7. Three resolutions, later than those referred to above, are cited by Applicants, dated respectively 19 December 1961, 19 December 1962 and 20 November 1963 [6]. These resolutions must be read, at least in part, against the background of, firstly, movements for independence in the case of some non-self-governing territories and, secondly, the General Assembly's support for such movements, as expressed, *inter alia*, in its "Declaration on the granting of independence to colonial countries and peoples" [7] and in its condemnation of what it terms "colonialism and all practices of segregation and discrimination associated therewith" [8]. In the said "Declaration on the granting of independence to colonial countries and peoples", which is expressly referred to in the first two of the above-mentioned three resolutions, it is stated, *inter alia*, that "the peoples of the world ardently desire the end of colonialism in all its manifestations"; that "an end must be put to colonialism and all practices of segregation and discrimination therewith"; and that "the increasingly powerful trends towards freedom in such territories which have not yet attained independence" are "recogniz[ed]". In both the said resolutions the General Assembly expressed the view that "racial discrimination and

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[1] *U.N. Doc.* E/CN. 4/Sub. 2/181, pp. 58-59 (para. 163).

[2] *G.A., O.R., Fourteenth Sess., Suppl.* No. 15 (A/4111), p. 16 (para. 33).

[3] *Ibid.* (para. 37).

[4] *Ibid. Vide* quotation at footnote 2, IV, p. 400.

[5] *G.A., O.R., Fifteenth Sess., Suppl.* No. 15 (A/4371), p. 51 (para. 239).

[6] *Vide* IV, p. 400, footnotes 7 and 8, and p. 401, footnote 1.

[7] *G.A. Resolution* 1514 (XV), 14 Dec. 1960, *G.A., O.R., Fifteenth Sess., Suppl.* No. 16 (A/4684), p. 66.

[8] *G.A. Resolution* 1904 (XVIII), 20 Nov. 1963, *G.A., O.R., Eighteenth Sess., Suppl.* No. 15 (A/5515), p. 36. The same phrase occurs in the "Declaration", being the resolution referred to in the footnote immediately above.

segregation in Non-Self-Governing Territories can be eradicated fully and with the greatest speed by the faithful implementation of the Declaration on the granting of independence to colonial countries and peoples" [1].

None of the above-mentioned three resolutions deals specifically with the subject of education and the organization thereof in any particular country, but it is nevertheless clear from what has been said above that the political organs here in issue moved, within the short space of about a decade, from the position where they recognized that the educational and social development of different cultural groups in a country might require separate educational facilities and programmes, to the point where such recognition is no longer given, and where all facilities and programmes are required to be joint, and where consideration of the particular needs of different cultural groups has been pushed into the background.

E. The Proposition that Separation is Incompatible with "the Principle of Racial Equality" [2]

8. In the first paragraph of the Annex the proposition is stated that "separation ... is incompatible with ... *(d)* the principle of racial equality". In the paragraph containing material in support of this proposition it is alleged that "[s]eparation . . . inevitably leads to the development or encouragement of racial prejudice" [3].

In Respondent's submission, it needs no profound analysis of these two allegations to observe that they are not the same. The difference is, however, of no consequence, for in Respondent's submission neither allegation can validly be made as holding true for all contact situations in all countries. Whether separation in education in any country does, or will, in fact have the consequences referred to by Applicants must, in Respondent's submission, obviously depend on all relevant factors within such country. It is accordingly denied that separation "inevitably" leads to racial prejudice.

In support of their allegation, Applicants cite two passages from reports of the Committee on Information from Non-Self-Governing Territories [4]. Neither of these expressions of opinion by the Committee can, in Respondent's submission, validly be advanced as propositions which have general application. They are, it is submitted, contradicted by recent events in the United States of America, where it has been illustrated that a joint system of education, if not desired by all the groups concerned, can increase and exacerbate "racial attitudes" and "interracial suspicion" [5]. In South West Africa, as has been stated elsewhere [6], any attempted policy of integration is bound to cause prejudices and strife.

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[1] *G.A. Resolution* 1698 (XVI), 19 Dec. 1961, *G.A., O.R., Sixteenth Sess., Suppl.* No. 17 (A/5100), p. 37, and *G.A. Resolution* 1850 (XVII), 19 Dec. 1962, *G.A., O.R., Seventeenth Sess., Suppl.* No. 17 (A/5217), p. 43.

[2] **IV**, p. 398.

[3] *Ibid.*, pp. 398-399.

[4] *Ibid.*, p. 399.

[5] *Vide* sec. E, Chap. XI, *supra.*

[6] *Vide* **II**, pp. 457 *et seq.*, and **IV**, p. 382 (para. 62); *vide* also sec. E, *supra.*

F. The Proposition that Separation is Incompatible with "the Goal of Unification of the Territory" [1]

9. It is alleged that separation in education is "incompatible with the goal of a unified territory capable of striving toward self-government and social progress" [2]. To illustrate that "political organs" [1] of the United Nations have so "determined" [1], Applicants quote a passage from a report of the Trusteeship Council [3] from which it appears that the Council, in dealing with Tanganyika, stated that it had on a previous occasion "expressed the opinion that the system of separate schools was an obstacle to the evolution of a unified and integrated society, and that it was important to bring together children of different races as soon as the language barrier between them disappeared" [4].

In Respondent's submission the words used by the Council do not support Applicants' broad and general allegation that separate education is not compatible with the goal of "a unified territory capable of striving toward self-government and social progress". The Council did not speak of a "unified territory", nor of a "striving toward self-government and social progress". It merely expressed the opinion that a system of separate schools was an obstacle to the evolution of a unified and integrated *society*.

Respondent has no serious quarrel with the logic of the Council's opinion in so far as it concerns a country where the aim is—and such an aim had been set in the case of Tanganyika [5]—to establish a "unified and integrated" society [6]. The opinion has no relevance, however, in the case of a country where the aim is not to establish such a society but, on the contrary, to preserve the separate identity of the various constituent population groups.

10. Applicants say, further, that "[o]ne of the most important questions concerning the relation of education to social unification has been the

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[1] **IV**, p. 398.

[2] *Ibid.* In the first paragraph at **IV**, p. 398, separation is said to be incompatible with the "goal of unification of *the territory*". This "territory" is not identified, and "the" should probably read "a", as in the first sentence of paragraph *(e)*.

[3] *Ibid.*, p. 399 at footnote 4.

[4] *G.A.*, *O.R.*, *Eleventh Sess.*, *Suppl.* No. 4 (A/3170), p. 61.

[5] *Ibid.*, p. 33. In 1956 (the date of the report) Africans constituted 98.6 per cent. of the total population (8,084,000 out of 8,195,700). The remainder were Asians, Arabs and Europeans. Europeans (an estimated 22,500) constituted about 0.27 per cent. of the total population. *Vide* figures *ibid.* In 1958 the European population was estimated at 20,619 (or 0.23 per cent. of the total), of whom only about 3,000 were considered to be permanently settled in the country: *G.A.*, *O.R.*, *Thirteenth Sess.*, *Suppl.* No. 4 (A/3822), p. 1. In regard to the Council's opinion it may be pointed out that in 1950 the Committee on Information expressed the view that "[d]ifferentiation in school facilities and programmes should not militate against the development of mutual sympathy and a feeling of common citizenship among the inhabitants of a territory"—thereby implying that differentiation need not militate against such feelings of sympathy and common citizenship. *Vide G.A.*, *O.R.*, *Fifth Sess.*, *Suppl.* No. 17 (A/1303/Add. 1). Report approved by *G.A. Resolution* 445 (v), 12 Dec. 1950, *G.A.*, *O.R.*, *Fifth Sess.*, *Suppl.* No. 20 (A/1775), p. 54.

[6] Whether such aim has proved to be in the best interests of the inhabitants, is a different matter. *Vide* para. 2, *supra*, and sec. E, Chap. III, *supra*.

problem of a suitable language of instruction" [1]. They say that "[l]anguage barriers have often been cited as an excuse for postponing inter-racial schools" [2], and cite a statement made by the Committee on Information in its 1950 report to the effect that "[t]he problem of the choice of language in instruction, important and difficult as it is, loses many of its elements of conflict where there is a general conviction that the educational system does not favour any section of the population at the expense of others" [2].

Respondent points out that the Committee on Information did not make the above-quoted statement in relation to what Applicants call "social unification". The passage quoted is the first paragraph in a section headed "Equal treatment" [3], and the Commission wished to indicate, in Respondent's submission, that whilst there would be no "equal treatment" if the language of one group were used as medium of instruction in schools where there were also children of other language groups, "elements of conflict" would be reduced if there was a general conviction that facilities were otherwise "equal". In this same report, as has been shown before [4], the Committee expressed the view that equality of opportunity did not necessarily entail "a common educational programme", and that, subject to certain requirements, respect should be paid to the wishes of any group which was "desirous of separate school facilities for the maintenance of its cultural heritage".

It is clear, in Respondent's submission, that the Committee on Information did not, as Applicants suggest, deal with languages of instruction in relation to "social unification".

It may be noted that Applicants' approach involves the admission that "social unification" in a heterogeneous situation will require the members of one or more groups to sacrifice the advantages of being taught in their own language. Respondent would point out that it may involve a great deal more, viz., the loss of a group's cultural heritage.

In regard to Applicants' reference to the Trusteeship Council's statement concerning education in Tanganyika [5], Respondent points out that *completely separate systems were apparently still maintained at that* time (i.e., 1957). It appears from the report of the Council that it reminded the Administering Authority of previous recommendations to unify the educational system, and that the Administering Authority stated that one of the main obstacles to their implementation was "the accepted view . . . that primary education should be given in the children's mother-tongue" [6]. The Administering Authority, as pointed out in the passage quoted by Applicants, agreed that it was desirable that English should be taught in the primary schools at the lowest possible levels, but its view apparently was that sound educational principles required that instruction in primary schools should be in the pupils' mother tongue.

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[1] IV, p. 399.
[2] *Ibid.*, and *vide U.N. Doc.* A/1303/Add. 1, p. 16.
[3] *U.N. Doc.* A/1303/Add. 1, p. 16.
[4] *Vide* para. 5, *supra.*
[5] IV, p. 399, footnote 7.
[6] *G.A., O.R., Twelfth Sess., Suppl.* No. 4 (A/3595), p. 50 (para. 198).

G. Alleged Consideration of Practical Difficulties [1]

11. Having dealt with views expressed by the "political organs" of the United Nations in connection with the above-mentioned propositions, Applicants make the following allegation:

> "In asserting the preceding standards required by the duty to promote education in dependent territories, the various organs of the United Nations have been entirely aware of the practical difficulties involved in implementing them [2]."

It may be assumed that the "various organs" of the United Nations have been aware of the practical difficulties involved in implementing their requirements. Respondent would respectfully point out, however, that the establishment of joint systems of education as at present required by these organs involves much more than a mere question of practical difficulties and the solution of such difficulties. It involves that children who belong to a language group whose language is not chosen as the common medium of instruction are deprived of all the generally admitted educational, sociological and psychological advantages of mother-tongue instruction [3]. It involves, furthermore, that cultural groups may ultimately suffer the loss of nothing less than their cultural heritage. Respondent has shown in this regard that these same "political organs" recognized, not so many years ago, that respect should be paid to the wishes of every group "desirous of separate school facilities for the maintenance of its cultural heritage", but that this view has since changed into one which demands joint education in all circumstances [4]. In stating this view, these organs say that "on no ground whatsoever can education on a racial basis be justified" [5], but it is clear that they do not condemn only such separation as can properly be said to be based on race. In Respondent's submission they unreasonably and unrealistically identify all separation in education, even where based on the linguistic and cultural differences which characterize racial groups in a country, with "education on a racial basis". In this regard Respondent says, furthermore, that it seems most unlikely that they would have taken this line of consciously attempting to minimize the difficulties and problems involved in mixed education if they had not been imbued with the overriding philosophy and policy that there should be integration in the socio-political structure of the various territories [6].

It may be pointed out in this connection that Administering Authorities from time to time informed the Trusteeship Council that separate educational systems in the territories administered by them were not based on race. Respondent cites two examples:

(i) In 1959 the following was reported in regard to Ruanda-Urundi:

> "So far as discrimination in schools is concerned there are, at the primary level, schools with an African syllabus, a school for

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[1] **IV**, pp. 399-400 and *vide* para. 1, *supra*.
[2] *Ibid.*, p. 399.
[3] *Vide* **III**, p. 377 and *vide* Chap. III, paras. 15 *(a)* and 21 *(b)*, *supra*.
[4] *Vide* paras. 5-7, *supra*.
[5] *Vide* para. 6, *supra*.
[6] *Vide* para. 2, *supra*.

Asians at Usumbura and schools run on Belgian lines. The Administering Authority explains that these distinctions are prompted not by racial discrimination but by practical requirements arising from the location of the establishments and from profound differences in customs, education and, particularly, language, which make a single common system of education impossible [1]."

(ii) The following appears in the 1962 Trusteeship report in regard to New Guinea:

"The great majority of both mission and Administration primary schools are classified as Primary 'T', and have a curriculum specially designed for indigenous pupils. The others, classified as Primary 'A', follow the primary school curriculum of the State of New South Wales. The Administering Authority states that the difference in schools is necessary because of the wide variations in the respective cultural and educational backgrounds of the students attending them [2]."

12. In dealing with the aforesaid political organs' alleged awareness of the practical difficulties involved in complying with their requirements, Applicants refer, somewhat incongruously, to a statement by the Committee on Information to the effect that there should be no separate school systems [3]. They say in this regard that "[i]t is clear that the operative part of the Committee's statement is its insistence upon the principle of equal opportunity" [4]. It does not appear from the passage quoted by Applicants that this is so, but it seems clear from other paragraphs in the report that the Committee thought that joint systems of education were necessary to ensure equality in practice. It referred, e.g., to the poor quality of indigenous primary schools in some territories [5]. As has been shown [6], the Committee held the view that "whether or not it had been feasible to provide equally advantageous facilities for each of the racial groups, it was liable to entail a multiplication of staff, effort and resources which no Territory appeared able to afford".

With respect to the question of "practical difficulties", Applicants quote a conclusion of the Trusteeship Council in regard to mixed schools in the Cameroons under French Administration [7]. On the strength of this conclusion, for which no supporting evidence is mentioned in the Council's report, Applicants say that it is a "fact" that "primarily separate schools may quickly become completely inter-racial without increasing the quantum of practical difficulties" [4]. Respondent submits that the said conclusion establishes no such "fact", and, furthermore, that a conclusion drawn from conditions in one territory is not necessarily valid elsewhere.

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[1] *G.A., O.R., Fourteenth Sess., Suppl.* No. 4 (A/4100), p. 58.
[2] *Ibid., Seventeenth Sess., Suppl.* No. 4 (A/5204), p. 27 (para. 141).
[3] IV, p. 400, quotation at footnote 2.
[4] IV, p. 400.
[5] *G.A., O.R., Fourteenth Sess., Suppl.* No. 15 (A/4111), p. 16 (para. 35).
[6] *Vide* para. 6, *supra*.
[7] IV, p. 400, quotation in footnote 4.

H. Alleged Compliance with United Nations Requirements

13. Applicants state that "[t]he determination by the United Nations that separate development in education is incompatible with the purposes and principles of administration of dependent territories has been fully or almost fully complied with in every Non-Self-Governing Territory with the exception of South West Africa" [1], and they then proceed to show how there has been compliance with "the requirements laid down by the appropriate organs of the United Nations" in respect of various types of education [2].

Respondent submits that it is in no way obliged to comply with the said "requirements" in the case of South West Africa. It says, furthermore, that no real purpose can be served by an inquiry on its part into the degree of school integration in the various territories mentioned by Applicants [3]. It seems to Respondent, with respect, that the relevance—not to mention the propriety—of an 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 [4].

In the circumstances Respondent will deal but briefly with what is stated by Applicants in support of their above-quoted allegation.

14. Respondent submits, generally, that the evidence advanced by Applicants does not seem, save in the case of university institutions [5], to support the allegation that there has, in practice, been "full", or "almost full" compliance with the said "requirements". The allegation would seem to be an over-statement in the case of secondary education, and it is certainly such in the case of primary education. This appears not only from what is said in the relevant paragraphs in the Reply [6], but also from the following passage in Part Two of the 1960 report of the Committee on Information from Non-Self-Governing Territories:

> "From an early date in the period, . . . efforts were made in a number of Territories—of which those under French administration provided a notable example—to abolish all such [i.e., racial] distinctions in the public school systems. In others, the principle of integration in educational facilities was proclaimed then or later, although in most of these cases a policy of gradual application of the principle, working downwards through the system from the university level, was applied. In the majority of these cases, the process of integration had not, at the end of the period, penetrated far into the secondary level, and the primary schools remained almost wholly separated. There also remained cases, as the Committee

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[1] **IV**, p. 401.

[2] *Ibid.*, pp. 401-402.

[3] *Ibid.*, pp. 401-402 in paragraphs *(a)* to *(e)*.

[4] It may be pointed out, also, that of the "dependent" territories mentioned or referred to in footnotes by Applicants at **IV**, pp. 401-402, all save two (New Guinea and Nauru—the latter being referred to in footnote 9 at p. 401) were independent territories at the date of the Reply.

[5] **IV**, p. 401 (para. *(a)*).

[6] *Ibid.*, pp. 401-402 (paras. *(b)* and *(c)*).

pointed out in 1959, where separate systems were still maintained as a matter of policy [1]."

In regard to primary schools [2], Applicants say that "[a]part from South Africa, no Administering Authority has contested the principle of inter-racial schools on the primary level" [2]. Respondent has already referred to cases where administering authorities pointed out that joint education at the primary stage was in conflict with the principle of mother-tongue instruction for young children, or that linguistic and cultural differences made it impossible to have joint systems of education [3], and says that Applicants' allegation is unfounded. To support their allegation, Applicants refer, firstly, to Ruanda-Urundi, but what they say in regard to this Territory, whether correct or not, is in no way supported by the report cited by them [4]. They refer, secondly, to the Cameroons under French administration, and say that "by 1957 all schools were open to students of all races" [5]. From the report referred to by Applicants it appears that the Trusteeship Council commended the policy of the Administering Authority "which has led to the establishment of schools open to students of all races" [6]. This, it is submitted, does not support Applicants' sweeping allegation as to "all schools".

In regard to vocational schools Applicants say that "[v]ocational schools are increasingly established upon an inter-racial basis"[7], and they refer to Tanganyika and the Cameroons under French Administration—territories which have been independent for some time.

Two statements are made in regard to Tanganyika. The first, relating to the establishment of an inter-racial Technical Institute at Dar es Salaam, is correct [8]. The second, viz., that "[f]rom 1958 on, there was no distinction as to race in any aspect of vocational training in Tanganyika", is not supported by the authority quoted [9].

In regard to the Cameroons under French Administration, the allegation is that inter-racial vocational schools were (or were about to be) established at Yaoundé, Douala and Garua. The allegation is not supported by the authority referred to [10].

15. Applicants say, furthermore, that "[i]n all dependent territories other than South West Africa, the general practice has been to narrow the gap between European and indigenous teachers in all aspects of their employment" [11]. In proof of this sweeping statement as to the "general" practice, Applicants refer to Togoland under French Administration, and to New Guinea. In regard to Togoland they say that "[a]s early as 1949, European and indigenous teachers ... were placed on a completely

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[1] *G.A., O.R., Fifteenth Sess., Suppl.* No. 15 (A/4371), p. 51 (para. 239).

[2] IV, p. 402 (para. *(c)*).

[3] *Vide* para. 6, *supra*.

[4] *Vide* IV, p. 402, footnote 4. The page of the report cited by them deals with Tanganyika.

[5] *Ibid.*, footnote 5.

[6] *G.A., O.R., Twelfth Sess., Suppl.* No. 4 (A/3595), p. 144 (para. 286).

[7] IV, p. 402 (para. *(d)*).

[8] *Ibid.*, footnote 6.

[9] *Ibid.*, text at footnote 8 and report cited in footnote 8.

[10] *Ibid.*, footnote 7. The report mentioned by Applicants merely notes that "vocational schools have been or will be set up" at the three places mentioned. No mention is made of their racial character.

[11] *Ibid.*, p. 402 (para. *(e)*).

equal footing", and refer to a Trusteeship Council report in which it is stated that "[a]s regards teacher-training, the annual reports stated that under the *arrêté* of 18 December 1949, the staff had been reorganized and European and indigenous teachers placed on completely equal footing, the only distinctions made being on the basis of diplomas" [1]. It is not clear, in Respondent's submission, whether the report refers to all teachers (as Applicants say), or only to teachers connected with teacher-training establishments.

In regard to New Guinea, there is nothing in either of the two reports cited by Applicants [2] to support their above-quoted allegation. The first report in no way deals with conditions of employment of European and indigenous teachers [3]. From the second report cited it appears that there were 236 non-indigenous and 565 indigenous teachers at Administration schools in the territory. Nothing is said of conditions of employment.

It is clear, in Respondent's submission, that Applicants have in no way established any "general practice . . . to narrow the gap between European and indigenous teachers in all aspects of their employment". It is, furthermore, not correct to say that there has been no narrowing of the gap between conditions of employment of European and Native teachers in South West Africa [4].

I. Somaliland under Italian Administration [5]

16. Applicants conclude their Annex 5 by citing "the development in Somaliland under Italian Administration" 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" [6]. Their reasons for choosing this territory as an example are stated to be the following:

> "Somaliland is chosen because Italy was faced with natural obstacles exceeding those of South West Africa when Somaliland was made a Trust Territory on 2 December 1950. The Somalis were nomadic people to a degree far greater than that of the indigenous inhabitants of South West Africa. The population density was extremely low (two persons per square kilometer). Finally, unlike South West Africa, Somaliland was very poorly endowed with natural resources, and as a result the Territory could ill afford high expenditures on education [5]."

Particulars of this nature would no doubt have been relevant if they had been followed by evidence of increased educational facilities or

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[1] *G.A., O.R., Sixth Sess., Suppl.* No. 4 (A/1856), p. 199. It may be pointed out that in 1947 there was a European population of 1,082 in the Territory as against 943,364 Africans. Two years later the respective figures were Europeans 841, Africans 970,983 (*vide G.A., O.R., Fifth Sess., Suppl.* No. 4 (A/1306), p. 80).

[2] **IV**, p. 402, footnote 10.

[3] Applicants, reference may be to *G.A., O.R., Fifteenth Sess., Suppl.* No. 4 (A/4404), p. 145, where it appears that 11 non-indigenous teachers took up employment at indigenous schools. But nothing is said of conditions of employment.

[4] *Vide* **III**, pp. 456 and 505, in regard to salary increases in the case of European and Native teachers; *vide* also pp. 532-533.

[5] **IV**, pp. 402-403.

[6] *Ibid.*, p. 402.

increasing school attendance figures, but their relevance to the only kind of "development" mentioned by Applicants, viz., the presence of a few hundred Somali children in Italian, Indian and Pakistani schools [1], is not apparent, and is not explained by Applicants.

Applicants say that "[a]t the outset of the Trusteeship period, petitions filed before the Trusteeship Council claimed that Somali and Italian pupils in elementary schools were completely segregated" [1], but their allegation is not supported by the report they cite [2]. It appears from this report that Somali students were admitted to Italian schools "following an entrance examination" [3], and that the Administering Authority stated that "pupils were admitted without discrimination to all schools in Somaliland" [3].

The figures of Somali pupils attending non-Somali schools, as cited by Applicants [4], are correct. It appears from the relevant reports, however, that what Applicants call "Italian" schools were, in fact, Italian, Indian and Pakistani schools [5]. Respondent points out, furthermore, that the distinction between Italian and Somali schools was maintained throughout the period of trusteeship, and that the former, which were attended principally by Italian children, offered the metropolitan curriculum, whereas the latter were "adapted to the particular requirements of the population of the Territory" [6]. The Italian population, always a small part of the total population of the Territory [7], fell from 4,858 in about 1955 [8] to 2,331 in about 1958 [9].

17. Reports of the Trusteeship Council reveal the following particulars in regard to school enrolments in Somaliland during the trusteeship period:

In 1950-1951 there was a total enrolment of 7,479 in all schools [10] i.e., about 1.5 per cent. of the school-age population [11]. In 1954-1955, when the total number of school children stood at 11,219 [12], the representative of one country remarked at a meeting of the Trusteeship Council on the considerable increase in elementary school enrolment [13], while the representative of another country noted that "only some 4 per cent. of the school-

[1] IV, p. 403, and *vide infra*.

[2] *Ibid.*, footnote 5. The page of the report cited deals with another territory. If Applicants' reference was intended to be to p. 97 of the report, this page also does not support their allegation.

[3] *G.A.O.R., Sixth Sess., Suppl.* No. 4 (A/1856), p. 97.

[4] IV, p. 403.

[5] *G.A., O.R., Tenth Sess., Suppl.* No. 4 (A/2933), at p. 140; and *G.A., O.R., Twelfth Sess. Suppl.* No. 4 (A/3595), p. 97.

[6] *Vide ibid., Sixth Sess., Suppl.* No. 4 (A/1856), p. 97; *G.A., O.R., Tenth Sess., Suppl.* No. 4 (A/2933), p. 140; *G.A., O.R., Fourteenth Sess., Suppl.* No. 4 (A/4100) p. 86.

[7] About 0.3 per cent. in 1950. *Vide* figures in *G.A., O.R., Sixth Sess., Suppl.* No. 4 (A/1856), p. 81.

[8] *G.A., O.R., Tenth Sess., Suppl.* No. 4 (A/2933), p. 107.

[9] *Ibid., Fifteenth Sess., Suppl.* No. 4 (A/4404), p. 86.

[10] *Ibid., Sixth Sess., Suppl.* No. 4 (A/1856), p. 97. The report states that attendance was "noticeably lower than the enrolment figures". *(Ibid.)*

[11] *Ibid.*, p. 81, for population figures. The percentage calculation is on the assumption that school-age children constitute 23 per cent. of the total population. (*Vide* III, p. 444.)

[12] *G.A., O.R., Tenth Sess., Suppl.* No. 4 (A/2933), at p. 140.

[13] *Ibid.*, p. 142.

age children attended school" [1]. In 1956 it was noted by a member of the Council that "[e]ven from the city population only 17 per cent. of children of school age attended school" [2]. 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" [3]. In 1958-1959 total enrolment in all schools in the country increased to about 18,600 [4].

18. As appears from all the aforegoing, Applicants have in no way demonstrated how "implementing non-discrimination in education" promoted "the moral well-being and the social progress of all the inhabitants" of Somaliland under Italian Administration. Beyond showing that a few hundred Somali students attended Italian, Indian and Pakistani schools, Applicants have failed to show how the implementation of "non-discrimination" played any part at all in the development of education in that country.

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[1] *G.A., O.R., Tenth Sess., Suppl.* No. 4 (A/2933), p. 142.

[2] *G.A., O.R., Eleventh Sess., Suppl.* No. 4 (A/3170), at p. 115. In this year, also, the Council, remarking on the continued use of languages other than the children's mother tongue, viz., Somali, as the medium of instruction, drew the attention of the Somali Government to the view expressed by Unesco that "many experiments in this field conducted in various countries . . . have shown that the use of languages other than the mother tongue in primary education reduces the effectiveness of the instruction given and tends to discourage pupils from pursuing their studies". (*Ibid.*, p. 112.)

[3] *G.A., O.R., Fourteenth Sess., Suppl.* No. 4 (A/4100), at p. 86 (para. 227). The school age-population in 1957 was estimated by Unesco at 225,000 children between 5 and 12 years old. *(Ibid.)*

[4] *Ibid.*, para. 228.

SECTION H

The Economic Aspect

CHAPTER I

INTRODUCTION

1. In the Memorials Applicants dealt with the economic situation in South West Africa in two separate parts headed, respectively, "Well-Being, Social Progress and Development in Agriculture" and "Well-Being, Social Progress and Development in Industry". At the end of each of the said parts Applicants formulated a concluding charge [1].

In essence each of these charges was one of a "deliberate, systematic and consistent course of conduct" which not only failed to promote to the utmost the well-being of the Native population of South West Africa but, on the contrary, had the very opposite effect, namely that it "inhibit[ed] [their] well-being", "prevent[ed] [their] social progress and ... development", and "reverse[d] possibilities of social progress [for them] into a steady regression" [1].

In other words, Respondent here also stood indicted of improper motives, i.e., of exercising its powers of administration with the unauthorized object of preventing progress on the part of the Native population, and even of reversing possibilities of progress for them.

Upon this understanding of Applicants' case [2], Respondent in the Counter-Memorial [3] dealt in detail with the aspects of well-being, social progress and development relating to the economic position of the inhabitants of the Territory, and particularly of the Native inhabitants.

2. In keeping with their reaction generally [4] to the manner in which Respondent met their case in the Counter-Memorial, Applicants in the Reply attempt to widen their charge also in respect of economic conditions in the Territory by reliance on an alleged "norm of non-discrimination or non-separation", although not expressly mentioning it by that name.

Thus, in the introduction to their treatment of the economic aspect in the Reply, Applicants first inform the Court that "Respondent's purported explanations of the particular measures by which it effectuates the policy of *apartheid evade Applicants' central point* ...", and that Respondent's *"characterization"* of Applicants' case *"misses the central point at issue"* [5]. The Court is then told that Applicants' "central point" is that "... the policy of *apartheid* itself violates Respondent's obligation to promote the well-being and progress of the inhabitants of the Terri-

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[1] I, pp. 117 and 130.

[2] *Vide* II, pp. 392-395.

[3] III, pp. 2-103.

[4] *Vide* Part III, sec. A, paras. 2-10, *supra*.

[5] IV, p. 404. (Italics added save for the word "*apartheid*".)

tory" [1]. And the reason advanced by Applicants for this contention is that—

> "... the inherent evil of *[apartheid]* lies in the allotment of status, rights, duties, opportunities and burdens on the basis of membership in a 'group' or tribe [1]".

This proposition is later repeated with reference to the following statement in the Counter-Memorial, which, according to Applicants, reflects the "premise underlying" Respondent's "apartheid policies", viz.,

> "In the history of the Territory there has at all times been social separation between these groups, and experience has shown that members of each group prefer to associate with members of their own group, and that certain kinds of contact between members of these groups tend to create friction [2]."

Applicants say that "such a premise and policy is (sic) wholly repugnant to Respondent's obligation to promote the well-being and social progress of the inhabitants of the Territory" [3].

Admittedly the policy of separate development applied in South West Africa basically involves differentiation between the various population groups in the Territory; but it is denied that the said policy can, by reason merely of such differentiation, be regarded as repugnant to Respondent's obligation to promote the well-being and progress of the inhabitants of the Territory. In this regard Respondent refers to what has been stated in section C of this part of the Rejoinder with regard to Applicants' alleged legal norm of "non-discrimination or non-separation".

3. It is apparently on the basis of their reliance upon the said norm that Applicants seek to exclude from consideration much of the information submitted by Respondent in the Counter-Memorial. Thus they state that—

> "[s]pecific measures of implementation of the general policy of *apartheid*, or separate development, merely illuminate and confirm the nature and consequences of that policy ... [1]",

and that such measures are "highly relevant" but, apparently, only in so far as they "give dimension and effect to that policy" [1]. Whatever all this might mean, it seems to be intended to provide the basis for Applicants' further averments that "the bulk of the Counter-Memorial, including Book V [which deals, *inter alia*, with the economic aspect] is concerned with largely irrelevant *minutiae*" [1], and that "little if any purpose is served by Respondent's lengthy examination of the details of restrictive laws and regulations designed to effectuate that policy" [3].

In so far as Applicants rely on the aforementioned norm, it would indeed be unnecessary for them to go into details of measures which admittedly involve differentiation as between ethnic groups and their members. But in so far as Applicants persist in the charges of improper motives advanced in the Memorials, it is hard to see how any information, however detailed, which can throw light on Respondent's real motives, can be regarded as irrelevant.

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[1] **IV**, p. 404.
[2] **III**, p. 55 and **IV**, p. 405.
[3] **IV**, p. 405.

4. Applicants indeed proceed, as in regard to other aspects of their case concerning their Submissions 3 and 4, to advance factual allegations that would be unnecessary and irrelevant in the event of reliance solely upon the alleged norm of "non-discrimination or non-separation". They rely here also on so-called "current norms" [1] and "recognized standards" [2], against which, it is contended, Respondent's policies and practices should be measured. In this regard Respondent refers to what has already been stated in general regarding the relevance of such vague and undefined norms and standards to the matters in issue [3]. Respondent deals later with the specific allegations made by Applicants when seeking to apply these so-called "norms" or "standards" to certain aspects of Respondent's economic policy [4].

5. Applicants further persist in the Reply with a charge that Respondent's legislative measures and administrative acts relative to the economic aspect are purposely directed at preventing the progress and development of the Native inhabitants of the Territory.

In this respect Applicants state in the Reply:

> "Furthermore, as in the case of restrictions upon rights of residence and movement, Respondent's major premise concerning the role and place of the 'Native' in the Police Zone *infects specific measures of economic apartheid with an unacceptable design* [1]." (Italics added and footnote omitted.)

In support of this contention the following is advanced:

> "Thus, Respondent explains its policy of dealing with 'idle persons' in the Police Zone on the basis that—
>
> '. . . it involves removal from an area in which their *presence serves no purpose in the absence of willingness to work*, to a place which is their *real home*. These considerations do not apply to White or Coloured persons whose only *real home* may be *in urban and proclaimed areas* [5].'
>
> Respondent thus by *fiat* and by policy denies to the vast majority of the inhabitants of the Territory, including those spending a large part of their working lives in the Police Zone, any possibility of a 'real home' in 70 per cent. of the Territory (whatever the quoted phrase signifies)[6]." (Footnote omitted.)

It is to be noted that this charge, although concerned with measures implementing Respondent's policy, is advanced by Applicants in outlining their case in the "Introduction" to their treatment of "The Economic Aspect". In the circumstances Respondent feels constrained to deal with it at once, and to point out that the charge, and the conclusion of "unacceptable design" derived therefrom, rest on nothing more than a rendering out of context, distortion and unwarranted general application of an explanation given by Respondent in the Counter-Memorial with regard to a particular legislative measure.

The explanation in question was concerned with a provision in the

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[1] IV, p. 413.
[2] *Ibid.*, pp. 417-418.
[3] *Vide* sec. C, paras. 32-39, *supra*.
[4] *Vide* Chap. II, paras. 95-103, and Chap. IV, paras. 1-7, *infra*.
[5] Quoted from III, p. 218. Italics added by Applicants.
[6] IV, p. 405.

Native (Urban Areas) Proclamation of 1951 [1], which empowers a Native Commissioner or Magistrate, who has upon due enquiry declared a Native within an *urban or a proclaimed area* to be an idle person [2], *inter alia*, to order that such Native be removed from the urban or proclaimed area and sent to his home [3].

As will be shown hereinafter, this provision is applicable, in so far as it concerns persons who could be affected thereby, to only a small number, namely idle Natives in urban or proclaimed areas who have homes elsewhere, and it is operative only in respect of a very small part of the Territory, namely the urban and proclaimed areas.

6. There are at present in South West Africa 30 "urban areas", 21 of which have been declared "proclaimed areas" in terms and for the purposes of the said legislation [4]. The total extent of land in respect of which the provision in question is operative is 394,688 hectares [5], representing 0.69 per cent. of the Police Zone, or 0.48 per cent. of the whole Territory. The total Native population of the said areas at present is 70,459 [5]. It is, of course, impossible to determine how many Natives within the said areas are potentially idle persons who, having their homes elsewhere, are liable in terms of the provision in question to possible removal from such areas to their homes. In fact, however, *only 5 Natives have*, in terms of the said provision, *actually been removed from urban or proclaimed areas as idle persons over the last five years* [5].

In the light of the above, it is clear that Applicants have misused Respondent's explanation, which they quote in the Reply. Whereas the provision in question is operative only in respect of a very limited part of the Territory, i.e., the total extent of urban and proclaimed areas, representing 0.48 per cent. of the whole Territory, Applicants for the purpose of their argument simply extend its operative effect to "70 per cent. of the Territory" [6]. And, whereas the provision potentially affects only a very limited number of persons, i.e., idle Natives in the urban and proclaimed areas who have homes elsewhere, Applicants for the purpose of their argument simply render it applicable to "the vast majority of the inhabitants of the Territory, including those spending a large part of their working lives in the Police Zone" [7].

In the premises, it is clear that Applicants' allegation that—

> "Respondent thus by *fiat* and by policy denies to the *vast majority of the inhabitants* of the Territory ... any possibility of a 'real home' in *70 per cent. of the Territory* [8]" (italics added),

rests upon a distorted version of Respondent's explanation, and that the

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[1] *Proc.* No. 56 of 1951, sec. 26 in *The Laws of South West Africa 1951*, Vol. XXX, pp. 144-146, as amended by *Ord.* No. 25 of 1954 in *The Laws of South West Africa 1954*, Vol. XXXIII (II), pp. 736-752.

[2] For the definition of an "idle person" in the said legislation, *vide* **III**, p. 215.

[3] *Ibid.*, p. 215.

[4] All the proclaimed areas are in fact urban areas; there are no other proclaimed areas.

[5] Departmental information.

[6] **IV**, p. 405. No indication is given as to the manner in which Applicants have calculated this percentage.

[7] *Ibid.* In a footnote Applicants aver that the latter admittedly number more than 170,000 and they refer to **II**, p. 402. The figure of 170,720 there given was the total Native population of the whole of the Police Zone according to the 1960 Census.

[8] **IV**, p. 405.

allegation is false. It is hardly necessary to add that Respondent denies Applicants' further contention that—

> "... Respondent's major premise concerning the role and place of the 'Native' in the Police Zone infects specific measures of economic *apartheid* with an unacceptable design [1]",

a contention in support of which Applicants, in the present context, advance nothing other than the false allegation aforementioned.

In so far as Applicants' contention regarding improper motives on the part of Respondent is repeated later in the Reply relative to particular policies or measures in the economic sphere, Respondent will deal therewith in answer to Applicants' specific allegations.

7. The rest of Chapter IV B.3.*c*.2 of the Reply is devoted to an attack by Applicants on Respondent's economic policies, and to criticism of particular economic measures and conditions. Applicants divide their treatment thereof under the following heads:

General considerations [2].
The reserves [3].
The Police Zone [4].
Conclusion [5].

In reply to Applicants' allegations under the above heads, Respondent will in the succeeding chapters follow the order in which the said allegations appear, save where a particular matter is raised by Applicants under more than one of the aforementioned heads, in which case it will be convenient to deal therewith comprehensively under one of the said heads only [6].

8. Before proceeding to deal with Applicants' specific charges, Respondent makes the following general observations:

(*a*) In their treatment of the economic aspect, as in their treatment of other aspects of government, Applicants in the Reply also criticize policies and conditions in South Africa. Respondent has already explained its attitude in this regard, and the approach which will be followed in answering Applicants' averments [7]. The economic sphere, in particular, is one in which the conditions prevailing in South Africa differ in many respects from those in South West Africa, and in which the policies applied in South Africa cannot be properly evaluated without a complete picture of the economic conditions prevailing in the Republic, and without a systematic and detailed explanation of such policies and their application—a task which, for reasons already stated [7], will not be undertaken by Respondent. Respondent will, however, in keeping with the approach which has been indicated, deal with Applicants' specific allegations relative to economic policies and conditions in South Africa in order to meet Applicants' criticisms in as brief a manner as

[1] IV, p. 405.
[2] IV, pp. 405-414 and also Annex 6 (1), pp. 426-430.
[3] *Ibid.*, pp. 414-417.
[4] *Ibid.*, pp. 417-424 and also Annex 6 (2), pp. 431-438.
[5] *Ibid.*, pp. 424-425.
[6] The parts of the Annex referred to in footnotes 2 and 4, *supra*, will be dealt with under the heads to which their contents relate.
[7] *Vide* sec. A, para. 24, *supra*, and sec. D, *supra*.

possible, without entering into a systematic or detailed discussion of such policies or conditions.

(*b*) Also in the part of the Reply now under consideration Applicants have raised new complaints [1]. In this respect the remarks contained in section D, *supra*, apply, viz., that although in its submission not obliged thereto, Respondent will for the sake of completeness answer such complaints in this Rejoinder, but that in the nature of things its treatment thereof cannot be as complete as it would have been had these complaints been raised properly and timeously.

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[1] E.g., complaints relative to alleged "cheap" or "low-cost" labour (IV, pp. 406 and 408) and complaints relative to legislative measures such as the Workmen's Compensation Act, No. 30 of 1941 (*ibid.*, p. 416), the Social Pensions Amendment Ordinance No. 2 of 1962 (*ibid.*, p. 417), and the Motor Carrier Transportation Act, No. 39 of 1930 (*ibid.*, p. 420).

CHAPTER II

GENERAL CONSIDERATIONS

A. Introductory

1. In this Chapter Respondent deals with the various matters discussed by Applicants in Chapter IV B.3.*c*.2.(B) of the Reply under the heading "General Considerations" [1], which matters can for convenience be grouped under the following heads:

(a) Applicants' allegations regarding the "structural foundation" and "premise underlying" Respondent's policy of apartheid.
(b) Migratory labour in South West Africa and the implications thereof.
(c) Applicants' allegations regarding low wages in the Territory.
(d) The rights of Natives in respect of the acquisition and occupation of land.
(e) The position of Natives in the mining industry.
(f) The opportunities of employment for Natives in the Railways and Harbours Administration.
(g) Applicants' allegations regarding a policy of "*laissez-faire* with respect to tribalism".
(h) Applicants' allegations regarding economic conditions in dependent territories [2].

Respondent will, in dealing with Applicants' allegations, follow the order indicated above.

B. Applicants' Allegations regarding the "Structural Foundation" and "Premise Underlying" Respondent's Policy of Apartheid

2. This topic is introduced as follows in the section of the Reply under consideration:

> "Respondent's policy of *apartheid*, as applied to the economic life of the inhabitants of the Territory, rests, as has been shown, upon the same structural foundation, and reasoning as does Respondent's policy of *apartheid* in education [3]."

Later in the same section of the Reply this allegation is repeated in the following terms: "Economic *apartheid* is necessarily based upon the same major premises as is educational *apartheid*" [4]. And the "premise underlying [Respondent's] educational and other *apartheid* policies" is described by Applicants with reference to the following statement made by Respondent in the Counter-Memorial:

> "In the history of the Territory there has at all times been social separation between these groups [the European and Native popula-

[1] IV, pp. 405-414.
[2] *Ibid.*, Annex 6 (1), pp. 426-430.
[3] *Ibid.*, p. 405.
[4] *Ibid.*, p. 407.

tion groups], and experience has shown that members of each group prefer to associate with members of their own group, and that certain kinds of contact between members of these groups tend to create friction [1]."

This statement was made by Respondent in explaining the reasons underlying certain provisions in the mining regulations of the Territory, in accordance with which there is separation between the European and Native population groups employed in certain posts in the mining industry. The statement is correct as far as it goes, but is not, and was not intended to be, a full exposition of the circumstances and considerations which influence and shape Respondent's policies generally in regard to the administration of the Territory. Such an exposition was given in another part of the Counter-Memorial [2], where Respondent dealt fully with the particular circumstances of the Territory; with the ethnic, linguistic and cultural differences between the various population groups; with the differences in stages of advancement attained by them; and with their development, against the background of history, on the basis of separation between the groups. It is in the light of all these circumstances and considerations that Respondent's policies and practices in South West Africa are to be seen and evaluated.

Such policies, for the reasons stated by Respondent, do involve the adoption of measures which recognize, and as far as is practicable give effect to, the principle of separate development of the different groups, and to their wishes in that regard. This applies in all spheres of administration—educational, economic and other. In this sense it is correct to say that a general or common premise underlies Respondent's "education and other *apartheid* policies" in South West Africa, and that "Respondent's policy of *apartheid*, as applied to the economic life of the inhabitants of the Territory, rests . . . upon the same structural foundation and reasoning as does Respondent's policy of *apartheid* in education" [3].

3. However, Applicants' conclusions as to the effect of, and the intention underlying, the application by Respondent of its policy to the economic life of the inhabitants of the Territory, are as unwarranted as are their conclusions relative to Respondent's educational policy.

In this regard Applicants say—without any justification, in Respondent's submission—that—

"[t]he education received by the 'Native' child prepares the 'Native' adult for his distinctive role in the economic life of the Territory, that of agricultural or industrial labourer . . . Denial of equality in the educational sphere leads to a denial of equality in all other spheres, not only as a conscious continuation of *'the deliberate design that pervades the several parts' of the life of the Territory*, but also as an inevitable consequence of the lack of educational training. Education and economic status are inseparable, as are economic status and political rights and opportunities [4]." (Italics added and footnotes omitted.)

Respondent of course accepts the proposition that there is a necessary

[1] **IV**, p. 405 as quoted in **III**, p. 55.
[2] **III**, pp. 399-488.
[3] **IV**, p. 405.
[4] *Ibid.*, pp. 405-406.

and close relationship between education and economic status, and that denial of opportunities in the educational sphere must lead to a denial of opportunities in the economic sphere. The question, however, is whether the application of Respondent's policies is intended to have, and in fact have, the alleged effect. Indeed, Applicants' complaint is not only that Respondent's educational policy as applied in the Territory has the effect of denying opportunities in education, and therefore economic opportunities, to the Natives, but that Respondent's policy is designed to have that effect. Thus they speak of the "*distinctive role* [of the Native] in the economic life of the Territory, that of agricultural or industrial labourer", for which the "education received by the 'Native' child prepares the 'Native' adult", and of a "*deliberate design*" to that end [1]. (Italics added.)

4. In support of the aforementioned charge Applicants quote the Committee on South West Africa to the effect that—

"... beyond some minor teaching and menial positions at the lowest levels, their training and education seems (sic) *directed* merely to preparing the 'Natives' as a source of cheap labour for the benefit of the 'Europeans' [2]". (Italics added.)

This statement appears in the 1960 report of the said Committee, which, although dealing, *inter alia*, with educational conditions in South West Africa, contains no factual averments which could justify this conclusion. In fact, the Committee had before it the report of the 1958 Commission of Inquiry into Non-European Education in South West Africa [3], which described in detail the then existing conditions relative to the education of the Native and Coloured groups in the Territory, and which contained proposals for extending and improving facilities for the said groups. The report of the Commission in itself belies the charge that opportunities in education are denied to the Natives, and that Respondent's educational policies and practices are directed to that end. Respondent can only conclude that the Committee on South West Africa must, in making the aforementioned charge, have been influenced by false and preposterous allegations contained in petitions submitted to the United Nations by organizations and individuals, or made in oral statements by petitioners who appeared before the Committee. Thus, in its report the Committee cited from petitions to the effect that the object of the system of "Bantu Education" was to "teach African children from childhood that they are inferior to 'Europeans' " [4], and that the said system had been "introduced by the Union Government in order to prevent the people from reading books and newspapers through which they might be informed about the world situation" [5].

5. Although both these accusations are so preposterous and palpably

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[1] IV, pp. 405-406.

[2] *Ibid.*, p. 406, as quoted by Applicants from *G.A., O.R., Fifteenth Sess., Suppl.* No. 12 (A/4464), p. 56.

[3] *Report of the Commission of Inquiry into Non-European Education in South West Africa* (1958), unpublished.

[4] *G.A., O.R., Fifteenth Sess., Suppl.* No. 12 (A/4464), p. 54. This statement in the petition of Senior Headman (also referred to as chief) Hosea Kutako was also referred to by Applicants in I, p. 158, and was dealt with by Respondent in III, pp. 531-532.

[5] *G.A., O.R., Fifteenth Sess., Suppl.* No. 12 (A/4464), p. 54.

false as to merit no discussion, the Committee on South West Africa attached sufficient importance thereto to record them in its report. In this regard Respondent draws attention to similar false or exaggerated statements made by petitioners to the United Nations, *inter alia*, with regard to educational and economic conditions in South West Africa, which statements were relied upon by Applicants in Chapter VI of the Memorials, headed "Supplemental Material in regard to the alleged violation by the Union of Article 2 of the Mandate". Respondent dealt in the Counter-Memorial [1] with the extracts from the petitions cited by Applicants, and demonstrated not only that the accusations made were for the most part false, exaggerated or misleading, but also that such petitions emanated largely from what may be called a group of "professional petitioners", united by a common purpose to end Respondent's administration of South West Africa by all means [2].

In this regard it is significant that the petitions which, in the words of the Committee on South West Africa, were "taken into account by [it] during its examination of conditions in South West Africa" [3], appear on the whole to emanate from the same sources [4] as the petitions upon which Applicants sought to rely in their Memorials [5].

It is therefore strange that Applicants in the Reply should place reliance upon the conclusions of the Committee on South West Africa, which appear to be based, at least to some extent, on the allegations of the said petitioners, whereas Applicants have not even attempted to refute or even to deal with the submissions made by Respondent in the Counter-Memorial relative to such petitioners and to their accusations.

The conditions in the Territory relative to the education of Natives, and the facilities and educational opportunities provided for them, have been dealt with fully in the Counter-Memorial [6], and have again been treated of in section G of this Rejoinder.

In the light of what has been stated, Respondent emphatically denies the unwarranted conclusion of the Committee on South West Africa that "their training and education seems directed merely to preparing the 'Natives' as a source of cheap labour for the benefit of the 'Europeans' ", [7] and points out that Applicants themselves offer no evidence in support of the conclusion.

6. Respondent likewise denies the charge made by Applicants that the education received by the Native in South West Africa prepares him for a "distinctive role in the economic life of the Territory, that of agricultural or industrial labourer" [8].

Not only is this accusation contradicted by evidence furnished regarding the educational facilities and opportunities actually provided for

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[1] IV, pp. 1-46.
[2] *Ibid.*, p. 46.
[3] *G.A.*, *O.R.*, *Fifteenth Sess.*, *Suppl.* No. 12 (A/4464), p. 7.
[4] *Ibid.*, pp. 7-8.
[5] I, pp. 167-180.
[6] Book VII (III).
[7] With regard to the Committee's allegation of "cheap labour", *vide* paras. 43 *et seq.*, *infra*.
[8] IV, p. 406. *Vide* also in this connection the allegation made by the Special Committee on South West Africa, as quoted by Applicants at IV, p. 408, viz., "... except for a few minor activities in [the] townships or locations [the Natives] have no economic possibilities other than wage labour".

the Native groups of South West Africa, both in the Territory itself and in South Africa, but it is also contradicted by the stage of advancement in fact attained by many Natives of South West Africa in the economic field.

There is not, as Applicants allege, a "distinctive role" intended for the Native "in the economic life of the Territory". It is true that the majority of the Natives who are wage-earners are employed as semi-skilled and unskilled workers in enterprises established by European initiative, but this is not so by reason of a denial of educational or economic opportunities to them. It is due to the fact that the Natives generally are still on a path of transition from a traditional economic and social system to a modern one.

Respondent has already demonstrated the progress made by many Natives in advancing from the limited role generally played by Natives in the economy of the Territory at the inception of the Mandate [1] to increased participation at progressively higher levels in agriculture [2], industry [3], commerce [4], and the general administration of the Territory [5].

In further elucidation thereof, the following list has been compiled of occupations held by Natives in the Territory not employed as labourers or engaged in farming activities [6]:

	No.
1. Professional, technical and related worker	1,348
2. Administrative, executive, managerial worker	140
3. Clerical worker	212
4. Sales worker	606
5. Miner, quarryman and related worker	64
6. Worker in transport and communication	1,038
7. Craftsman, production worker	2,040
8. Service, sports and recreation worker	14,597
9. Fisherman, lumberman, hunter, etc.	1,185
	21,230

It will be observed that the number of Natives in the aforementioned occupations totalled 21,230, which figure represented 4.95 per cent. of the total Native population of 428,575 in 1960, and 12.69 per cent. of all Natives economically active in that year (167,344) [6].

That Respondent's policy has been directed not only at creating increased economic opportunities for the Natives, but also at protecting the Natives in their own areas against competition by Europeans, is clearly evidenced, not only by the general exclusion of Europeans from the Native reserves, but also by the protective measures adopted for the benefit of the Natives in the townships occupied by them in the urban areas of the Territory [7].

Extension of Respondent's policy of separate development through a system of homelands for the different population groups, as proposed by

[1] II, pp. 404-414.
[2] III, pp. 1-39.
[3] *Ibid.*, pp. 40-100.
[4] *Ibid.*, pp. 101-103.
[5] *Ibid.*, pp. 139-166.
[6] Departmental information.
[7] *Vide* III, pp. 102-103.

the Odendaal Commission [1], would, in Respondent's submission, lead to ever-increasing opportunities for the Native at all levels, as much in the economic sphere as in others.

In the Reply Applicants have, save for repeating criticism of certain particular measures or conditions relative to the economic aspect—which criticism will be dealt with hereinafter—not thought fit to traverse the factual ground covered by Respondent in Book V of the Counter-Memorial. They simply brush it aside as being "concerned with largely irrelevant *minutiae*" [2]. In the result nothing has been advanced by Applicants in the Reply to support their charge that there is a "deliberate design" on the part of Respondent to relegate the Native in South West Africa, in so far as the economic life of the Territory is concerned, to the "distinctive role" of "agricultural or industrial labourer" [3], save the view expressed by the Committee on South West Africa, which, for the reasons aforestated [4], must be rejected.

7. Although their intention is not clear, Applicants seem to suggest [5], with reference to an extract from the report of the Commission on Native Education 1949-1951 (the Eiselen Commission), that there is a lack of educational training in the Territory. In the first place, the said Commission dealt with Native education in South Africa, and not with conditions in South West Africa.

Secondly, the quotation from the Commission's report, which can be misleading if read in isolation, does not, when read in its context, in any way support a view that there is a lack of educational training of the Natives. In the part of the report referred to by Applicants, the Commission mentioned the desire on the part of the Bantu in South Africa to have the same curricula and examinations as are found in European schools, with the object of obtaining the same educational certificates as the Europeans. The Commission explained that the desire for the same certificates by the Bantu had an economic motivation, based upon a reasoning that without equal certificates the Bantu would not have a claim to equal pay.

The Commission fully realized the relationship between education and economic opportunities, but said in this regard:

> "The enunciation of an economic policy lies beyond the scope of the work of this Commission. Attention, however, must be drawn to the fact that much of what is taught and learnt in Bantu schools is never applied in practice, because the economic incentives which should operate when children leave school are either absent or of such a nature as to undo the work of the schools. The reform of these economic conditions cannot be the function of an Education Department, but the success of the work of the schools is dependent upon the existence of social and economic opportunities for absorbing the products of the schools [6]."

Contrary, therefore, to what Applicants suggest the Commission did not find that there was a "lack of educational training". It felt that

[1] *Vide* IV, pp. 475-483, *R.P.* No. 12/1964, pp. 81-107 and 213.
[2] IV, p. 404.
[3] *Ibid.*, p. 406.
[4] *Vide* paras. 4-5, *supra*.
[5] IV, p. 406, footnote 3.
[6] *U.G.* 53—1951, p. 104.

economic opportunities should be created to absorb the educated products of the schools.

It was in the course of considering economic factors relative to education, that the Commission referred to the desire of the Natives for the same certificates, which, *inter alia*, elicited the following comments from the Commission:

> "From the evidence presented to the Commission it seems quite clear that teachers, parents and children alike are far more concerned with the obtaining of certificates than they are with the deeper values of education [1]",
>
> and—
>
> "The attitude of the Bantu towards their schools, their culture, and their languages, are highly coloured by existing economic conditions which are such as to emphasize out of true proportion certificates and skills marketable among the European population or in State employment [2]."

Since the Commission issued its report in 1951, there has not only been a substantial increase in the educational facilities and opportunities offered to the Bantu in South Africa, but, as will be demonstrated hereinafter [3], progressively more and more economic opportunities have been created for "absorbing the products of the schools".

8. In stating the proposition that "[e]ducation and economic status are inseparable, as are economic status and political rights and opportunities" [4], Applicants refer to adverse allegations and comments regarding policies and practices in South Africa, which they then seek to apply to South West Africa because, as they allege, "precisely the same considerations and circumstances apply in the Territory" [5].

Respondent firstly wishes to point out that the last allegation is unfounded. Although it may be correct to say that basically the problem is the same—because of the fact that in South West Africa, as in South Africa, there are different population groups at different stages of development, a situation which gives rise to differences in participation by the groups in the economic sphere—the economic conditions and circumstances differ widely in many respects as between the two countries.

It would, however, be out of place to enter into a systematic comparison of conditions and circumstances as they exist in South Africa and in South West Africa; and, indeed, such a task would be unnecessary as, in Respondent's submission, the criticism of South African policies relied upon by Applicants is devoid of substance, as will be shown immediately below.

9. Thus Applicants cite the following comments by Professor de Kiewiet in a lecture delivered in January 1956 and published under the title *The Anatomy of South African Misery*, viz.:

> "A special theory is developed in which the economic life of society is subordinated to its political objectives, so that non-

[1] *U.G.* 53—1951, p. 43.
[2] *Ibid.*, p. 104.
[3] *Vide* paras. 11-13, *infra*.
[4] IV, p. 406.
[5] *Ibid.*, footnote 5.

European workers are not free to improve their standard of living *if thereby they seek also to gain added political opportunity or social advancement* [1]."

The theory suggested by Professor de Kiewiet as underlying Respondent's policy in South Africa is that the Bantu should not develop politically, and that, in order to prevent his advancement in the political sphere, he is denied opportunities of economic advancement.

That there is no such theory underlying Respondent's policy is clear, not only from what has been specifically stated by Respondent to be the objectives of its policy, but also from what has in fact been accomplished by Respondent in the implementation of that policy.

Professor de Kiewiet's condemnation of Respondent's policy rests on a complete misconception of the basic principles of that policy. This is clear from the following statement made by him in the very lecture to which Applicants refer, viz.:

> "In the concrete language of economics and politics *apartheid* is actually a system in which the power of the state is used to maintain the economic and political supremacy of the white community over a population of approximately ten million Africans, Indians and coloured men [2]."

That the objective of Respondent's policy is not to maintain supremacy of the White community over the other population groups, politically or economically, has been repeatedly stated at the highest government levels, and has been evidenced by the advancement achieved by the said groups. With regard to their political achievements, Respondent refers to what has already been stated in the Counter-Memorial [3] and elsewhere in this Rejoinder [4]. These considerations in themselves disprove the theory propounded by Professor de Kiewiet, namely that because Respondent wishes to withhold political rights from the Bantu, it curbs their economic advancement.

10. Professor de Kiewiet's allegation is also disproved by what has in fact been done by Respondent in improving economic conditions for the Bantu in South Africa.

Respondent does not in this regard propose to present a survey of the economic position of the Bantu in South Africa, but will cite a few authorities who have studied the position and have expressed themselves thereanent; and, in so doing, perhaps a natural starting point will be to quote Dr. W. W. M. Eiselen, the Chairman of the Commission on Native Education 1949-1951, who is also relied upon by Applicants.

Before doing so, it is necessary to point out that the excerpt from Dr. Eiselen's article in *Optima,* which appears in the Reply [1], may, if taken out of its proper context, create a wrong impression. What Dr. Eiselen said in this article, which was written in 1959, was the following:

> "So it seems to the writer and to most members of the European electorate, as well as to many enlightened representatives of the Bantu and other groups, that the maintenance of White political

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[1] **IV**, p. 406, footnote 5.
[2] De Kiewiet, C. W., *The Anatomy of South African Misery* (1956), p. 49.
[3] **II**, pp. 477-483.
[4] *Vide* secs. E and F, *supra.*

supremacy over the country as a whole is a *sine qua non* for racial peace and economic prosperity in South Africa [1]."

Indeed, as Applicants say, this is the converse of the position taken by Professor de Kiewiet, namely that in order to keep the non-Europeans in South Africa from gaining added political opportunity, they are restrained in economic development.

What is clear is that Dr. Eiselen was not so much concerned with describing declared government policy, as with possible future developments. In the same context he cited Sir Percivale Liesching, then High Commissioner for the United Kingdom in South Africa, to the following effect:

"The High Commission Territories are advancing into a constitutional sphere, into more representative forms of government, but it is not to be foreseen that their progress along these lines, which is the policy of Her Majesty's Government, would ever mean that they would advance to the status of independence comparable with Ghana, that is, complete independence within the Commonwealth [2]."

11. Since Sir Percivale Liesching and Dr. Eiselen expressed the aforementioned views in 1958 and 1959, respectively, much water has flown under the bridge of political development of the Bantu both in the High Commission Territories and in the Bantu homelands in South Africa [3], and problems regarding the eventual political rights of the Bantu, which Dr. Eiselen described as "problems for the future" [1], have been resolved much sooner than he could ever have foreseen. However, whatever doubt Dr. Eiselen might have had as to the political future of the Bantu peoples, he had no doubt as to the path of economic progress planned for them in South Africa. In the very article from which Applicants have taken the excerpt quoted in the Reply, Dr. Eiselen outlined the plans of the Department of Bantu Administration and Development, of which Department he was then the Secretary, for the economic development of the Bantu in South Africa. He said in that regard that—

"[t]hose Bantu who remain behind on the land will, as full-time progressive farmers, be taught to make the maximum productive use of their ground and livestock in their own interest and that of their community. For the others, many of whom still migrate to our urban and mining areas in search of work at present, other outlets are being created. That is why, in the second place, we are busy building a series of rural townships in the Bantu areas, many of them on sites recommended by the Tomlinson Commission. Since 1954, 18 of these places have been laid out and proclaimed, and a further 47 are at various stages of development and 31 sites are being examined from this point of view. The purpose of these townships is to provide a source of livelihood for those inhabitants of the Reserves who have had to leave the land, by opening opportunities for them in trade, the professions and administration, while it is also anticipated that the increased production of raw materials to be expected from the Bantu areas under the new agricultural policy will gradually

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[1] *Optima*, Mar. 1959, p. 8.
[2] *The Cape Argus*, 12 Sep. 1958.
[3] II, pp. 477-483.

lead to the establishment of Bantu industries and factories in such centres to supplement the others being created or encouraged on the borders of the Bantu areas but near enough to allow workers to return home either daily or at least for week-ends. Briefly, therefore, our purpose is to promote in the Bantu areas that transition from primitive pastoralism and mono-culture of maize to a diversified modern economy, which is essential for the support of any large population above the mere subsistence level."

And he stated that, in order to give a more direct stimulus to this process of development,

"... we have established a Bantu Investment Corporation with the South African Native Trust as sole shareholder, specially to promote and encourage the economic development of the Bantu areas, by *inter alia*, 'the provision of capital or means, technical and other assistance and guidance, the furnishing of expert and specialized advice, information and enlightment ... the encouragement, extension and establishment of existing or new industrial and financial undertakings in Bantu areas ... the encouragement of thrift and the planning and promotion of capital accumulation by Bantu ... and the promotion of Bantu self-help in the economic sphere'.

To prove the increasing interest that the Bantu themselves are showing in commerce, I may mention that over the last seven years, from 1951 to 1958, the number of Bantu traders in their own territories has almost doubled itself, rising from 3,871 to 6,032 [1]."

12. As further evidence of the advancement of the South African Bantu in the economic sphere, Respondent quotes the following authoritative statements:

(a) *Professor Wilhelm Röpke*—Professor at the graduate School of International Studies, Geneva:

"Exhaustive figures would be superfluous here, because it is a matter of record that South Africa, along with Western Europe, North America, Japan, Australia and New Zealand, belongs to the definitely well-to-do nations. Its Bantu population participates to such a great extent in this prosperity that its standard of living far exceeds that of the inhabitants of all the other African countries [2]." (Translation.)

"All statistics prove, in addition, that nowhere in Africa is the Negro so well paid, provided with such good living quarters, so well fed and so well dressed as he is in South Africa [3]." (Translation.)

(b) *Allen J. Ellender*—Member of the Senate of the United States of America:

"South Africa is exceedingly prosperous, and the peoples of all races are in varying measures sharing in that prosperity. Consequently, the great majority of them are happy and contented. The natives are earning better wages and enjoying

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[1] *Optima*, Mar. 1959, p. 10.

[2] Röpke, W., "Südafrika. Versuch einer Würdigung", *Schweizer Monatshefte*, No. 2, 44th Year (May 1964), pp. 97-112, at p. 101.

[3] *Ibid.*, p. 108.

greater benefits in respect to education, health, and housing than the black man in any other country of Africa[1]."

(c) *Démians d'Archimbaud*—in an article published in *La Revue Française*:

"One can say in conclusion that it is undeniable that the [South African] Bantu is by far the best nourished African people, the best dressed, the best homed and the best educated in Africa. In ten years time, it is probable that this country so maligned today will have become the incontestable leader and, I am persuaded thereof, uncontested in Africa south of the Sahara[2]." (Free translation.)

(d) *Professor Henry Hofstetter*—Professor of the Indiana University, United States of America:

"I would be very much surprised to find another country governed by Whites where the Non-Whites are given such a square deal in the economic field as in South Africa[3]."

(e) *Marcus D. Banghart*—Vice-President of the Newmont Mining Corporation, United States of America:

"The Bantu races of South Africa have experienced great changes in purchasing habits and living standards and are now spending some R 700 million ($1 billion) per year on domestic purchases. They own four times as many automobiles per capita as the people of Russia. The market opportunities offered by the development and advancement of the Bantu are enormous[4]."

(f) *Clarence B. Randall*—retired board Chairman of Inland Steel Co., United States of America, and adviser to Presidents Kennedy and Eisenhower of the United States:

"How has the Bantu fared under this policy of separation? First of all, he has today, beyond question, the highest *per capita* income of all the black races in Africa—an income that exceeds that of the citizens of Ghana or of Nigeria, for example. His opportunity to earn makes him the envy of all his neighbours to the north, as witness the fact that 20,000 of them endeavour each year to enter South Africa illegally[5]."

(g) *M. R. M. Dale*—Canadian Trade Commissioner in South Africa, is quoted to the effect that:

"South Africa was doing more for its indigenous population than any other country . . . South Africa provided in such a way for the non-White population that they dispose of considerable purchasing power[6]." (Free translation.)

(h) *Mr. Garfield Weston*—Canadian businessman, is reported to have said that—

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[1] United States of America: 88th Congress, 1st Session—Senate—*A Report on United States Foreign Operations in Africa* by Honorable Allen J. Ellender, United States Senator from the State of Louisiana (1963), p. 121.

[2] *La Revue Française*, No. 139 (Apr. 1962), p. 19.

[3] *baNtu*, Aug. 1960, p. 482.

[4] *Ibid.*, Apr. 1962, p. 227.

[5] *The Reader's Digest*, Vol. 83 (Oct. 1963), p. 47.

[6] *Die Transvaler*, 28 Aug. 1961, p. 2.

"... the Government was raising the living standards of Africans by five per cent. a year ...[1]".

The above serve as examples of statements which have been made by persons who have observed the economic conditions of the Bantu in South Africa. These examples can be multiplied many times.

13. The following table, which reflects the occupational distribution of all economically active Bantu in South Africa as on 7 September 1960, other than labourers or Bantu engaged in farming activities, further illustrates the degree of economic advancement reached by the Bantu in South Africa:

TABLE [2]

Occupations	*Number of Natives employed*
1. Professional, technical and related worker	48,714
2. Administrative, executive, managerial worker	4,796
3. Clerical worker	19,472
4. Sales worker	28,473
5. Miner, quarryman and related worker	3,136
6. Worker in transport and communication	64,402
7. Craftsman, production worker	76,487
8. Service, sports and recreation worker	720,593
9. Fisherman, lumberman, hunter, etc.	29,165
Total	995,238

14. Applicants, after stating that economic apartheid, being "based upon the same major premises as is educational *apartheid* ... produces identical results with respect to the inhabitants affected" [3], say:

"The 'Coloured' inhabitants fall between the 'Native' and the 'European' groups, and reflect yet another application of the *apartheid* policy, inasmuch as the rights, opportunities and burdens of the 'Coloureds' are likewise wholly allotted on the basis of membership in a group [4]."

It is correct to say that the Coloured people of South West Africa constitute a separate population group, and that in the application of Respondent's policies they are treated as such. It is also true, in a sense, that they fall between the Native and European groups, in that, *inter alia*, in the economic sphere they generally stand on a level higher than the Native groups but somewhat below the Europeans. But this is so not by any decree of Respondent. It flows naturally from the fact that they have generally reached a stage of development exceeding that attained by the Native inhabitants of the Territory, but still below that of the European inhabitants.

Respondent, moreover, denies the accusation of the Committee on South West Africa that Respondent aims at "keeping the coloureds as a group apart, superior to the Natives but inferior to the Europeans",

[1] *Sunday Express*, 15 Nov. 1964.

[2] Population Census, 1960: *Sample Tabulation, No. 5—Industry Divisions, Age Groups, Major Occupational Groups—Bantu* (Mar. 1963), table 3.1, pp. 52-55 and table 3.2, p. 56.

[3] As to this proposition *vide* para. 2, *supra*.

[4] IV, p. 407.

which accusation Applicants quote in the section of the Reply dealing with education [1], and also incorporate by reference [2] in their treatment of the economic aspect.

There is no question of a forcible keeping apart of the Coloured group against its wishes. It is the desire of the Coloured people to be treated as a separate group, and Respondent acts in observance of that desire; but not, as the Committee suggests, by placing them in a position "superior to the Natives but inferior to the Europeans". Respondent has already stated [3], and here repeats, that its policy of separate development, which involves, *inter alia*, the treatment of the Coloured people as a separate group, is not based on a concept of superiority or inferiority, but solely on the fact that the people of the various groups are different. Indeed, there is nothing in Respondent's policy to prevent the Coloured people generally, or individuals from amongst them, from developing to a stage of civilization and prosperity equalling or surpassing that of the Europeans.

C. Migratory Labour in South West Africa, and the Implications thereof

I. Introductory

15. Although Applicants in the Memorials mentioned the fact that Natives recruited from the northern areas have to return to their homes after completion of their contract periods, which may in no case exceed two-and-a-half years [4], they did not make a substantive complaint regarding employment of migratory labour in the Territory. Such a complaint is now newly introduced in the Reply, and it is accordingly necessary to devote more space to a treatment thereof in this Rejoinder than would otherwise have been the case.

In the succeeding paragraphs this subject will be dealt with under the following heads:

(a) the role of migratory labour in the economy of South West Africa;
(b) migratory labour in other countries;
(c) the extent to which the labour force in the Territory is in fact migratory;
(d) future developments regarding the system;
(e) Applicants' criticisms of the system.

II. The Role of Migratory Labour in the Economy of South West Africa

16. That the labour employed in the Territory is partly migratory is a natural consequence of the social and economic conditions prevailing in the Territory, a full exposition of which was given in the Counter-Memorial [5].

From the information there furnished it is clear that the situation in South West Africa resembles that found throughout Africa and elsewhere

[1] IV, p. 362.
[2] *Ibid.*, p. 407, footnote 1.
[3] II, p. 471.
[4] *Vide* I, p. 124.
[5] II, pp. 409-414 and III, pp. 4-103.

in underdeveloped countries of the world, in that there are two sectors constituting the total of the Territory's economy. This situation is briefly described as follows in the report of the Odendaal Commission:

"The economy of South West Africa may be described as a dual economy, consisting of a predominantly modern money or exchange sector and a traditional subsistence sector [1]."

The modern sector of the Territory's economy comprises farming, mining, fishing and other productive enterprises conducted in accordance with modern commercial principles. These enterprises create labour requirements, and offer opportunities of gainful employment not only to the inhabitants of the said sector, but also to persons whose homes are elsewhere. From this sector there can be distinguished the traditional, or indigenous sector, populated by the majority of the Natives of the Territory, who still largely adhere to the traditional pattern of a subsistence economy, but many of whom are at the same time desirous of earning a monetary reward for services in the modern economy.

Respondent has already explained [2] that, in the circumstances aforestated, the best course that could be adopted was to concentrate upon and encourage a rapid development of economic enterprises in the modern sector as growth points for further development of the economy of the Territory as a whole. It was economically the most rational and practical method of employing the available resources of the Territory. The modern sector would in this process not only produce income which could be applied towards development of the Territory as a whole, but would also provide increased and more diversified opportunities of gainful employment to the inhabitants of the Territory.

The only contributory role which the traditional sector could play in the course of such economic development would, at least in the earlier stages, be the provision of labour for reward. However, with progress in the education of the indigenous population and their understanding of modern economic systems and methods, development could in the course of time and as capital became available gradually be extended from the modern to the traditional sector.

17. In this pattern of economic growth it was only natural that, for some time at least, the modern sector would continue to be better developed than the traditional sector. Such a result is the natural consequence of economic development being fostered in a backward economy, and its very existence is regarded as a sign of progress. In the words of Albert O. Hirschman, Professor of International Economic Relations at Columbia University, U.S.A.,

"... we may take it for granted that economic progress does not appear everywhere at the same time and that once it has appeared powerful forces make for spatial concentration of economic growth around the initial starting points [3]".

The same authority goes so far as to advocate the creation of imbalances in order to stimulate economic growth. Thus he says:

"Whatever the reason, there can be little doubt that an economy, to lift itself to higher income levels, must and will first develop

[1] *R.P.* No. 12/1964, p. 315.

[2] II, pp. 409-414.

[3] Hirschman, A. O., *The Strategy of Economic Development* (1960), p. 183.

within itself one or several regional centres of economic strength. This need for the emergence of 'growing points' or 'growth poles' in the course of the development process means that international and interregional inequality of growth is an inevitable concomitant and condition of growth itself [1]."

In South West Africa, as well as in many African countries, the growth points referred to by the said author have been created and maintained by European entrepreneurs who have established themselves as producers of mineral, fishing and agricultural products.

The situation described by Applicants, namely that "[a]reas of the Territory occupied by 'Europeans' are in all respects economically well-developed in comparison with the areas occupied by approximately 75 per cent. of the 'Natives' " [2], is a situation normally encountered where a modern economy has been introduced to countries with an indigenous population practising a traditional subsistence economy. Indeed, as stated by two other economists:

> "The Creator has not divided the world into two sectors, developed and under-developed, the former being more richly blessed with natural resources than the latter. All developed countries began by being underdeveloped by modern standards, which are the operative ones; indeed they remained in this state until quite recently [3]."

The resultant effect mentioned by Applicants, namely that " 'Native' labour will, to a significant degree, be drawn from the reserves to service the more advanced 'European' economy" [2], is likewise a normal and inevitable concomitant. In this regard it has been stated in a United Nations study that—

> ". . . where immigrant settlers from advanced economic backgrounds establish themselves as producers for export in the midst of a traditional economy . . . it draws away part of the labour resources of the traditional economy into wage-earning employment [4]".

In such a pattern of development migratory labour is a normal, and very often inevitable condition, brought about by social as well as economic considerations.

18. Despite its known disadvantages, to which reference is made below [5], the migratory labour system has positive advantages both for the migrant worker and for the economy in which his services are employed. Although it is an inevitable feature of the system that the worker is temporarily separated from his family during the periods of his employment, the system enables him to obtain a cash income without severing his traditional ties and tribal relationships. These ties and relationships are often so strong that many Native workers would not be willing to settle permanently in the modern economy sector if that entailed a sacrifice of their accustomed agricultural and social ways of life. As

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[1] Hirschman, *op. cit.*, pp. 183-184.

[2] IV, p. 407.

[3] Bauer, P. T. and Yamey, B. S., *The Economics of Under-developed Countries* (1960), p. 46.

[4] *U.N. Doc.* E/3137, ST/ECA/57, *Structure and Growth of Selected African Economies* (1958), p. 2.

[5] *Vide* paras. 20-21, *infra*.

stated by William Watson of the University of Manchester, an authority on migrant labour:

> "As long as Africans have secure rights to the use of tribal land they will cling to the land, to the subsistence it provides, and to their tribalism, for this offers a security they understand [1]."

A United Nations publication concerning the Federation of Rhodesia and Nyasaland contains the following:

> "As yet, there seems to be a rather strong resistance among the African labourers to settle their families in town. Quite apart from the need for suitable housing, rupture with the traditional tribal and village surroundings, and facing a new life on an individual family basis among people from other villages and tribes—perhaps with other languages—free from the traditional checks and restrictions, and subject to unfamiliar western laws and law enforcement, cause the African to hesitate [2]."

And, in a survey of African labour, the International Labour Office observed that the Native worker—

> ". . . while prepared to adopt work for wages as a more or less permanent means of subsistence . . . is not prepared, at least under the conditions now prevailing, to give up contact with the village from which he has come, since he considers that there alone lies security for him in old age and in periods of sickness or unemployment [3]".

To these people migratory labour, which offers an opportunity of satisfying specific needs demanding cash means, obviously represents a practical solution. While the worker is employed away from his home, the members of his family continue in the ordinary way with their farming operations in the traditional sector. And, not only are they in this manner provided with sustenance during the absence of the workman, but their presence and activities on the land ensure that the workman retains his land rights, which would, in accordance with Native law and custom, be lost to him if he and his family were to remove therefrom and leave it unoccupied.

In so retaining his rights to tribal land the worker remains assured of a living in times of industrial recession and economic depression, when his services cannot be utilized in the modern economy and unemployment results, or when for shorter or longer periods he prefers to live in the tribal area rather than work in the modern sector, and also when, as a result of ill health or old age, he can no longer hold employment. This aspect is dealt with by another authority, W. Elkan, as follows:

> "A permanent move to town would . . . involve giving up a part of income and also of course, a potent form of insurance against hazards of industrial life. This remains true whether the wage in town is low or high, whether or not family houses are available and irrespective of what social insurance may exist for wage earners. Unless a

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[1] Watson, W., "Migrant Labour in Africa South of the Sahara—2. Migrant Labour and Detribalisation", *Inter-African Labour Institute Bulletin*, Vol. VI, No. 2 (Mar. 1959), pp. 8-33, at p. 30.

[2] *U.N. Doc.* E/3137, ST/ECA/57, *Structure and Growth of Selected African Economies* (1958), pp. 73-74.

[3] International Labour Office, *African Labour Survey* (1958), p. 138.

> permanent withdrawal from the countryside is actually made a *condition* of employment in the town, workers will tend to hold on to their land and the income and security which it affords [1]."

Another economist who has noted this tendency, William J. Barber, states:

> "In taking up the options which are open to him as the money economy expands, the African has appeared to demonstrate a rationality in his economic behavior. It is, however, a rationality which can only be understood within the context of the dualistic economic structure within which he lives. If he is a wage-earner, he is well advised—as long as the real wage obtainable from employment in the money economy remains at its traditional level—to keep a 'foot in two camps' by moving between the money and the indigenous economies. He dare not risk a sacrifice in the output of the subsistence agricultural community which would follow from his continuous absence. This situation recommends perpetuation of the migratory system—an arrangement which is both rational and economic, even though it may not appear so to the European employer or to an outside observer who expects rational economic behavior to take the same form in both the underdeveloped and Western economies [2]."

The system of migratory labour does not, however, offer advantages only to the individual worker. It is beneficial also to the general economy of the traditional sector, in that the worker brings back to the said sector cash emoluments, which raise local levels of living and assist in the economic developments of the area, as well as experience, which can be applied in the process of development of that sector. Another advantage of the system is that it ensures that employment, and opportunities of earning cash wages and gaining experience, are not confined to a fortunate few employed on a permanent basis, but that these are spread out and extended to a much larger labour force on a temporary basis.

19. From the viewpoint of the modern economy, the system also has decided advantages. While the economic enterprises in the modern sector, which serve as growth points for the economy of the Territory as a whole, can, in making use of the services of the migrant worker, pay him for such services and provide him with sustenance and accommodation, it would for the larger part be economically impossible to absorb him and his family permanently into the modern economy.

The economy of the modern sector would not be able to bear the financial burden of accommodating and providing a large number of people, consisting of workers and their families, with housing and other social amenities and facilities such as schools, hospitals, etc. The Territory's economy, being based upon the exploitation of primary resources, agriculture, mining and fishing, and being geared to exports of pastoral, mineral and fishing products, is subject to world market conditions. It has therefore not only a limited income potential, but is also subject to

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[1] Elkan, W., "Migrant Labour in Africa South of the Sahara—6. The Persistence of Migrant Labour", *Inter-African Labour Institute Bulletin*, Vol. VI, No. 5 (Sep. 1959), pp. 36-43, at p. 42.

[2] Barber, W. J., "Economic Rationality and Behaviour Patterns in an Underdeveloped Area: A Case Study of African Economic Behaviour in the Rhodesias", *Economic Development and Cultural Change*, Vol. VIII, No. 3 (Apr. 1960), pp. 237-251, at p. 251.

large and erratic fluctuations in world market prices and demand [1].

In the words of the Odendaal Commission,

> "[t]he basis of its economic activities is however still very limited and sensitive to foreign price fluctuations, while disappointments and setbacks in the past have led to a cautious policy of capital investment [2]."

In view of past experience it would be unrealistic to assume that fluctuations and setbacks will not occur in the future, and that unimpeded growth is assured. A closer look at the facts makes it clear that it will require a long time (if it is not altogether impossible) to lessen significantly the Territory's dependence on primary production with its attendant instability. However, short of far-reaching changes in the structure of production, it would be irresponsible, from an economic point of view, to permit a large-scale settlement of people within the modern economy sector on this uncertain basis. Droughts, industrial recession and economic depressions would bring about unemployment and make it impossible for the modern economy sector to maintain its labour force. In this regard, Lord Hailey, referring to Africa in general, states:

> "It is true, on the one hand, that the fluidity of the boundaries between the subsistence and the money economies contributes to the long-term stability of the economy as a whole. A people that continues to produce its own food is less vulnerable to a world depression than a people that is largely dependent on the market for its livelihood [3]."

And a United Nations *Study on Processes and Problems of Industrialization in Under-developed Countries* has found that the difficulty in stabilizing the industrial worker—

> "... is in many cases intensified by the instability of employment in industries that are directly dependent upon foreign trade or seriously affected by it and are sensitive to the fluctuations of the world market [4]".

Industrial workers displaced by the adverse effects of fluctuations in world trade, tend to flock back to the rural areas. As the aforementioned study points out, this reverse flow into agriculture has adverse consequences for living conditions there [4]; but on the other hand it should be obvious that failing such return to rural areas the alternative would be starvation in the towns.

20. Admittedly the system of migratory labour has certain adverse effects, socially and economically. These result mainly from the fact that the worker is separated from his family during his period of employment, and the fact that temporary employment often makes for inefficiency and waste.

When giving consideration to these adverse effects, sight must, however, not be lost of the extremely difficult process of adaptation which bearers of a traditional culture inevitably have to face when coming into

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[1] *Vide* also paras. 36-39, *infra*, in regard to special circumstances affecting labour in the Territory.

[2] *R.P.* No. 12/1964, p. 333 (para. 1312 (v) *d*).

[3] Lord Hailey, *An African Survey:* Revised 1956 (1957), p. 1314.

[4] *U.N. Doc.* E/2670, ST/ECA/29, *Processes and Problems of Industrialization in Under-developed Countries* (1955), p. 22.

contact with the conditions of modern civilization. Thus a United Nations publication observes that—

> "... the gulf between the traditional culture of Africans in their own surroundings and the culture of modern cities remains wider and deeper than the rural-urban gulf in any other major region of the world. The problem of transition, as a social and psychological problem, is thus encountered in Africa in an extreme form [1]."

And in a publication from the same source it is stated that the transition from rural peasant to urban industrial worker—

> "... requires, at the point of departure, emancipation from the dictates of custom and tradition, and at the place of employment, adjustment to an unfamiliar kind of work and labour discipline, and assimilation to a new type of social environment. Peasant patterns of work and leisure are generally incompatible with the demands of machine work and factory discipline [2]."

It is also observed in this publication that—

> "[i]n many instances, therefore, the undesirable social consequences of industrial development reflect incongruities between the demands of industrialization and the established ways of pre-industrial societies [3]".

Elsewhere in the Reply [4] Applicants, in dealing with Respondent's influx control measures, aver that the "true cause" of social evils, such as prostitution, venereal disease, alcoholism, crime and the like,

> "... is not to be found in the fact that 'Natives' congregate in urban and proclaimed areas; it is in fact found in the discriminatory system of migratory labour itself. Splitting of families, an evil attribute of the system Respondent nowhere seeks to justify, generates many of the evils the influx control policy is designed to meet [4]."

And in support of this allegation Applicants refer to a report of the United Nations Economic Commission for Africa, in which it is stated that the disruption of family life by a system of migratory labour creates situations which "breed the problems of venereal disease, prostitution, crime and delinquency" [4].

It is, however, a fact that the social evils in question are found in many cities and towns of developing countries where there is no migratory labour, but where people from traditional societies come into contact with modern civilization.

Thus it has been stated in a recent United Nations *Report on the World Social Situation*:

> "... in the process of transition, of breakdown of old social forms and creations of new ones, there is a particularly dangerous phase when attitudes and behaviour may be without anchors, controlled

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[1] *U.N. Doc.* E/CN.5/324/Rev. 1, ST/SOA/33, *Report on the World Social Situation* (1957), p. 147.

[2] *U.N. Doc.* E/2670, ST/ECA/29, *Processes and Problems of Industrialization in Under-developed Countries* (1955), p. 21.

[3] *Ibid.*, p. 119.

[4] IV, p. 467.

more by passing winds of demagogy, faddism or mob spirit than by established values of home and community [1]".

Respondent must, however, not be understood to underestimate the adverse effects of the migratory labour system. What Respondent wishes to emphasize, is that at least part of the cause of the undesirable phenomena often attributed to a system of migratory labour is to be sought in the difficulties which are experienced independently thereof by members of traditional societies in adapting themselves to the conditions of modern economies and the ways of modern civilization.

21. That the system of migratory labour inevitably entails social sacrifices, stands beyond doubt. But, it is Respondent's contention that, on objective appraisal, the adverse effects of the system are far outweighed by its advantages in the process of developing a modern economy in an under-developed territory such as South West Africa. Indeed, in the present circumstances of the Territory, as is also the position in many other territories in Africa having as yet under-developed economies and largely backward population groups, a system of migratory labour appears to be the most practical method of utilizing the available economic resources and fostering economic development.

Thus Lord Hailey, though drawing attention to the unfortunate social consequences of the system [2], remarked as follows:

> "It seems inevitable that in the existing circumstances of Africa, the labour market should be in a large measure dependent on floating or migrant labour. It is, as the East African Royal Commission of 1953-5 has observed, the only system through which a considerable section of the African population can now meet its needs. For many Africans it is not possible to gain a higher income level for the support of their families without wage-earning, and *the migrant labour system appears as the most economic choice which they can make, however socially undesirable it may be* [2]." (Italics added.)

The Inter-African Labour Institute, while drawing attention to, and emphasizing, the adverse effects of the system of migrant labour, has stated:

> "There are other more general considerations which should not be left unnoticed. In the conditions of African industrial development migrant labour *is no doubt a necessary phase*: some bridge has to be thrown across the gulf separating tribal and modern economies [3]." (Italics added.)

And the United Nations *Committee on Information from Non-Self-Governing Territories*, though stating that in a system of migratory labour—

> "[t]he disadvantages of excessive movement and instability are many. There is loss of time and energy, wage levels are low, possibilities for training are few and continuity in employment is lacking. The separation of the worker from his family leads to the perpetua-

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[1] *U.N. Doc.* E/CN.5/346/Rev. 1, ST/SOA/42, *Report on the World Social Situation* (1961), p. 25.

[2] Lord Hailey, *An African Survey:* Revised 1956 (1957), p. 1387.

[3] "The Human Factors of Productivity in Africa: A Preliminary Survey", *Inter-African Labour Institute*, 2nd Ed. (1960), p. 93.

tion of low levels of rural productivity and sometimes to social disorganization [1]",

nevertheless concluded that—

"[h]owever undesirable extensive labour migration may be, *it can be viewed as an unavoidable stage of the economic development in these [the Non-Self-Governing] Territories* [1]". (Italics added.)

22. Respondent, recognizing the economic advantages of the system, and permitting it to operate in the Territory to an extent which will be explained hereinafter [2], has, at the same time, sought to curb and counteract the social evils attendant in the system by adopting appropriate control measures, and by providing housing, social amenities and health facilities.

III. Migratory Labour in Other Countries

23. The dualistic economic pattern in South West Africa—i.e., a total economy comprised of a modern as well as a traditional economy—is largely characteristic of African economies as a whole. Thus, in the words of a United Nations publication regarding African economies,

"... at the present stage of their development the economies of African countries are heterogeneous economies; therefore, in analysing their significant structures and relations it would be misleading to deal with them as if they were homogeneous modern money economies [3]".

It follows as a natural corollary that the system of migratory labour is a common phenomenon in most African territories. Prof. D. Hobart Houghton of Rhodes University states that the system—

"... has arisen throughout the continent [of Africa] wherever foreign enterprise and investment and new contact with world markets have drawn Africans out of their primitive subsistence economies [4]".

And a United Nations publication, in which economic conditions in Africa are reviewed, describes the labour position as follows:

"A considerable part of the African labour supply consists of migrant workers seeking employment, in some cases in areas far distant from their country of origin. In certain regions—for example, in the Gold Coast, and in the plantation areas of eastern Africa—there is a seasonal migration which follows a pattern common to many other parts of the world at harvest time. The most important migrant labour in Africa, however, is of a non-seasonal type, in mining, industrial and commercial areas. The migrants are almost exclusively males in their most productive years, most of whom return after a period to their tribal homes, though many leave again after a short stay. There is therefore an almost continuous movement back and forth [5]."

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[1] *G.A., O.R., Sixteenth Sess., Suppl.* No. 15 (A/4785), p. 53 (para. 75).

[2] *Vide* paras. 27-28, *infra.*

[3] *U.N. Doc.* E/3137, ST/ECA/57, *Structure and Growth of Selected African Economies* (1958), p. 3.

[4] Smith, P. (Ed.), *Africa in Transition* (1958), p. 39.

[5] *U.N. Doc.* E/1910/Add. 1/Rev. 1, ST/ECA/9/Add. 1 (1951), *Review of Economic Conditions in Africa*, p. 74.

With regard to the extent to which migrant labour is employed in African territories, Guy Hunter quotes the *Report of the Director-General to the First African Regional Labour Conference* of the International Labour Organisation to the effect that—

> "[o]f the 12 to 13 million adult males in Southern, East and Central Africa, it is estimated that 5 million are absent from their tribal homes, engaged on wage labour [1]".

24. As an indication of the extent to which the system operates in certain African territories, Respondent gives the following available particulars, in some cases by suitable quotations from authoritative sources, and in others by a brief statement of the facts culled from such sources:

(a) *The British High Commission Territories*

(i) *Basutoland*

"It would seem, therefore, that the Territory is deprived every year of a proportion—generally estimated to be between 50 and 60 per cent.—of its able-bodied men [2]."

(ii) *Bechuanaland*

Estimates of the absence from the Territory of male workers vary from 27.5 per cent. in 1938-1940, to 50 per cent. in later years [3].

(iii) *Swaziland*

Absence of male workers from the Territory is estimated at 25 to 30 per cent. [3]

(b) *Moçambique*

It is recorded that in 1958, 112,450 workers proceeded from Moçambique to South Africa, and 47,345 to Southern Rhodesia [4].

"According to Portuguese sources, there were at the end of 1953 155,000 workers from Moçambique in Southern Rhodesia [5]."

(c) *Southern Rhodesia*

According to the 1951 census, the immigrant labour force totalled nearly 247,000 as compared with 271,000 indigenous labourers employed at that time. The distribution of migrants by origin was roughly 86,000 from Nyasaland, 48,500 from Northern Rhodesia, nearly 102,000 from Moçambique, and the balance from elsewhere [6].

"... in 1957-1958, Southern Rhodesia recruited in Nyasaland more than 15,000 workers who were added to some 40,000 who had al-

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[1] Hunter, G., *The New Societies of Tropical Africa* (1962), p. 201.

[2] Lord Hailey, *An African Survey*: Revised 1956 (1957), p. 1379.

[3] *Ibid.*, p. 1380.

[4] *Migrant Labour in Africa South of the Sahara* (C.C.T.A. Publication, No. 79, 1961), p. 132.

[5] Oblath, A., "International Migrations in Africa South of the Sahara", *Migration News*, 12th Year, No. 6 (Nov./Dec. 1963), pp. 5-10, at p. 8.

[6] Lord Hailey, *An African Survey*: Revised 1956 (1957), p. 1380.

ready been in Southern Rhodesia a long time. At that time 20,000 workers from Northern Rhodesia were in this territory [1]."

(d) *Zambia (formerly Northern Rhodesia)*

"It has been estimated that taking the territory as a whole at least one-third to a half of the able-bodied men are normally away from their villages, the actual proportion varying from as little as 3 per cent. in certain areas near the railway to 70 per cent. or more in certain outlying areas [2]."

"Northern Rhodesia had at the end of 1957 about 20,000 immigrants who came principally from Nyasaland and Tanganyika and who were employed in industry [1]."

(e) *Malawi (formerly Nyasaland)*

"The number of adult males in the Protectorate suited for employment has been put at about 380,000. It was estimated that in 1954 there were about 160,000 Nyasaland workers employed outside the Protectorate . . . [2]"

(f) *East African Territories*

(i) *Uganda*

". . . considerable internal movements take place in the last-named territory, originating mainly in certain districts in the northern and western provinces, where between 40 and 50 per cent. of adult *tax-paying* males are normally absent from their homes [3]". (Italics added.)

"In so far as the supply is concerned, the question arises—where does the labour come from? In Kampala [the largest town in Uganda], we find it comes from all parts of Uganda and is very largely migrant [4]."

(ii) *Tanganyika*

In 1954 altogether 21,350 migrant labourers proceeded from the Territory to mines in Northern Rhodesia, Southern Rhodesia and South Africa [5],

". . . the number of workers from neighbouring territories, principally Ruanda-Urundi and Moçambique, was estimated in 1957 at some 55,000. In 1958, the number of workers recruited in Nyasaland, in pursuance of arrangements was estimated at about 30,000; the workers recruited in Ruanda-Urundi, in pursuance of arrangements also, was evaluated at 2,550 in 1959. The number of workers recruited from Moçambique in employment on July 31, 1959 was 22,751 [1]".

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[1] Oblath, A., "International Migrations in Africa South of the Sahara", *Migration News*, 12th Year, No. 6 (Nov./Dec. 1963), pp. 5-10, at p. 8.

[2] Lord Hailey, *An African Survey:* Revised 1956 (1957), p. 1381.

[3] International Labour Office, *African Labour Survey* (1958), pp. 130-131.

[4] "Migrant Labour in Africa South of the Sahara—XIII. Migrants and Proletarians", *Inter-African Labour Institute Bulletin*, Vol. IX, No. 1 (Feb. 1962), p. 58.

[5] International Labour Office, *African Labour Survey* (1958), p. 131.

(g) *West African Territories*

(i) *Ghana*

"Most inter-territorial migrations in this area are directed to Ghana, ... whose mining enterprise and native agriculture are largely dependent on extra-territorial labour. The 1948 census recorded 53,000 persons from other British territories and 122,000 of other foreign origin in the Gold Coast. The total number of persons to enter the territory increased from 108,000 in 1938 to 392,000 in 1953 ... Extra-territorial workers originate mainly in the neighbouring French territories of Upper Volta, Ivory Coast and Togo, but a considerable immigration also comes from Nigeria [1]." (Footnotes omitted.)

"... during the period 1953-1954, 253,610 persons entered Ghana from French territories while 273,897 left the country [2]".

(ii) *Nigeria*

"... no less than 250,000 migrants have been checked leaving the Sokoto province of North Nigeria, of whom three-quarters originated in the province [3]".

(iii) *Ivory Coast*

"For the Ivory Coast, which also receives a large number of Soudanese, the Abidjan census of 1955 showed that out of 127,600 inhabitants, almost 22,000 were Voltaics, and more than 18,000 Soudanese; according to an investigation made in 1953-1954 in the Abidjan region, 50% of the employed workers were foreigners, of whom 30% were of Voltaic origin, and, in the south-east, almost 80% of the workers employed were foreigners, of whom 70% were Voltaics [4]."

(iv) *Liberia*

It appears that a significant proportion of labour employed on some of the plantations is obtained through a traditional system of recruitment with the assistance of tribal chiefs [5].

"... the tribal chief [in Liberia] functions in much the same manner as the 'labor contractor' in the Orient. To ensure that the men will return to perform work for the chief, it is common practice to deny families permission to accompany the men [6]."

25. From the aforegoing it is clear that migratory labour is common to many African countries, in the sense of migrations not only within the boundaries of a particular territory, but also beyond the boundaries of certain territories to neighbouring, and even distant territories, to

[1] "Inter-Territorial Migrations of Africans South of the Sahara", *International Labour Review*, Vol. LXXVI, No. 3 (Sep. 1957), pp. 292-310, at p. 306.

[2] International Labour Office, *African Labour Survey* (1958), p. 133.

[3] Hunter, G., *The New Societies of Tropical Africa* (1962), p. 202.

[4] Oblath, A., "International Migrations in Africa South of the Sahara", *Migration News*, 12th Year, No. 6 (Nov./Dec. 1963), p. 9.

[5] International Monetary Fund, *The Economy of Liberia* (Prepared by the African Department and Exchange Restrictions Department, Feb. 1963), p. 10; Taylor, W. C., *The Firestone Operations in Liberia* (1959), p. 67; Anderson, R. E., *Liberia: America's African Friend* (1952), p. 136 and *vide* also **III**, p. 76.

[6] United States Department of Labor, *Labor in Liberia* (May 1960), p. 9.

which workers are attracted by more opportunities and better wages.

This phenomenon is particularly evident in the Republic of South Africa, where agricultural, industrial and mining enterprises attract workers not only from the traditional Bantu areas in the Republic itself, but also from neighbouring and other territories, for temporary work in mines, industries and agriculture. Instructive in this regard is the following table, which reflects the distribution of foreign Bantu mine workers in the Republic on 30 June 1961:

TABLE [1]

Country of Origin	*Employees*
Basutoland	68,311
Swaziland	9,231
Bechuanaland	21,200
Southern Rhodesia, Northern Rhodesia, Nyasaland [2]	47,562
Moçambique	115,728
Other countries	50,312
Total	312,344

In addition there were 53,281 foreign Bantu employed in *urban areas* on 30 June 1961, of whom 35,353 came from the three High Commission Territories, 4,120 from Moçambique and 13,808 from other countries [3]. And the number of foreign Bantu workers in *agricultural employment* in the Republic on that date was estimated as 270,000 [4]. In total, therefore, approximately 635,000 foreign male Bantu workers were in employment in the Republic on 30 June 1961.

26. Migratory labour is, of course, not peculiar to the African Continent; it is also noticeable in many countries outside Africa where expanding industries and mining enterprises offer employment to workers, including foreigners, who are prepared to migrate temporarily in search of higher wages. An International Labour Office publication describes the position as follows:

> "Alternating movement is now a feature of the employment market in many countries, but at present little detailed information is available concerning it [5]."

Although this particular publication deals largely with labour conditions in African territories, it mentions the system as operating also in non-African territories. Thus the following is stated with regard to Turkey:

> "Migration from subsistence farming into temporary urban employment or seasonal work in commercial agriculture is a permanent feature of the Turkish employment market [6]."

And it also records that in Yugoslavia—

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[1] Van der Merwe, P. J., "Die Bantoe-Arbeidsmag in die Republiek van Suid-Afrika" (The Bantu Labour Force in the Republic of South Africa), *baNtu*, Vol. IX, No. 4 (Apr. 1962), pp. 210-218, at pp. 215-216.

[2] Separate particulars for these three countries are not available.

[3] *Report of the Committee re Foreign Bantu* (Apr. 1962), p. 164.

[4] *Ibid.*, p. 142.

[5] International Labour Office, *Why Labour leaves the Land* (1960), p. 165.

[6] *Ibid.*, p. 170.

"About half the industrial labour force (some 600,000 in mining and manufacturing in 1953) are estimated to be 'peasant-industrial workers' of one kind or another. A large proportion of peasant income is derived from industrial and other non-agricultural work: a sample survey covering all regions of the Republic in 1953 showed that on private farms only 61 per cent. of the total cash income was derived from work on the holding, while 39 per cent. was derived from off-farm activities [1]." (Footnotes omitted.)

In the following sub-paragraphs a brief illustration is given of the operation of a system of migratory labour also in other countries of the world. In some cases the illustration is by way of quotations from authoritative sources, in others by a brief statement of facts obtained from such sources.

(a) *Switzerland*

"Over half a million foreign workers are now being employed in Switzerland in the course of each year [2]."

"In August, the peak period for seasonal work, there were 550,000 in 1961 and 645,000 in 1962, which is equivalent to about a quarter of all persons in remunerated activity in Switzerland [2]."

"As the figures show, the great majority of foreign wage-earners currently employed in Switzerland are non-seasonal workers subject to control. A foreign worker in this category is not permitted to change his employer, his occupation or his branch of the economy. What is more, he is forbidden to bring his family, either wife or children [3]."

(b) *Federal Republic of Germany* (*West Germany*)

Mr. Anton Sabel, the President of the Labour Exchange and Labour Insurance, said that—

"[a]ccording to his statistics there will be only 970,000 foreign workers in the Federal Republic by the end of September [1964]. Most of the Foreigners working in the Federal Republic, about 31 pc. come from Italy, 15 pc. each come from Spain and Greece. Recruiting of labour in Portugal has only started recently. Until today there were only 3,500 Portuguese working in the Federal Republic [4]."

(c) *France*

According to the International Labour Review there were 78,879 foreign workers in France in 1961, mostly from Italy, Portugal and Spain. The figure in 1962 was 113,019 [5].

(d) *United States of America*

According to statistics furnished by the Organization for European Economic Co-operation, there were in 1957 more than 450,000 immigrant

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[1] International Labour Office, *Why Labour leaves the Land* (1960), p. 179.

[2] "Foreign Workers in Switzerland", *International Labour Review*, Vol. LXXXVII, No. 2 (Feb. 1963), pp. 133-155, at p. 133.

[3] Schneiter, E., "Foreign Labour in Switzerland", *EFTA Bulletin* (Dec. 1963), pp. 8-12, at p. 8.

[4] *The German Tribune*, 3 Oct. 1964.

[5] *International Labour Review*, Vol. LXXXVIII, No. 2 (Aug. 1963), p. 183.

farm workers employed in the United States, mainly from Canada, the West Indies and Mexico [1].

"The United States have, since 1946, attracted a considerable number of seasonal immigrants, mainly from Mexico. Not all of these enter the country legally, so that only partial records are available [2]."

"The domestic migrant labor force is augmented by a foreign migrant labor force of equal number. A half a million foreign nationals annually come to America to harvest our crops. They come singly, leaving their families behind, and work for short periods of time under contracts with our large farm-factories [3]."

(e) *Mexico*

"The number of agricultural workers involved in annual internal migratory movements was estimated at about 200,000 in 1940. In 1945, according to the census, there were 593,970 workers in Mexican manufacturing industries."

". . . 70,000 migrant workers were admitted to the United States in 1950 under a formal agreement to remedy manpower shortages, in particular in the south western part of the United States. The immigration of such workers is complicated by the abnormally large number of clandestine entrants to the United States from Mexico; in 1950, for instance, some 565,000 illegal immigrants were identified and returned to Mexico [4]."

(f) *Peru*

"Another result of the poverty of the peasants is the emergence of a floating indigenous rural population which is obliged to migrate periodically to the coast in search of employment on the big cotton, sugar and rice plantations.

Only a small proportion of Indian labour is full-time, however. Normally the Indian alternates between mining work in the high tablelands and agricultural work in the valley [5]."

(g) *Argentine*

"In the north of Argentine several thousand Indians periodically leave their tribal homes to work in the sugar plantations in Salta and Jujuy. It was estimated in 1940 that 25,000 Toba and Mataco emigrate each year for this purpose. Thousands of Indians also come from Bolivia to work in the plantations or in the mining area of Jujuy [6]."

(h) *Puerto Rico*

"Recently the demand for farm labour in the United States has given rise to a seasonal type of migration. American farm interests contract the labourers in Puerto Rico, pay their transportation to the

[1] International Labour Office, *International Migration 1945-1957* (1959), p. 154.

[2] *Ibid.*, p. 153.

[3] United States Senate Committee on Labor and Public Welfare, Sub-Committee on Migratory Labor, *The Migrant Farm Worker in America* (1961), p. 10.

[4] International Labour Office—International Labour Conference, Thirty-Seventh Session, 1954, Fifth Item on the Agenda: *Migrant Workers (Underdeveloped Countries)*, Report V (1) (1953), pp. 44-45.

[5] International Labour Office, *op. cit.*, p. 51.

[6] *Ibid.*, p. 55.

mainland, and return them to the island after the harvest. As long as there is full employment and high labour wages in the United States, this type of seasonal movement will probably continue [1]."

IV. The Extent to which the Labour Force in South West Africa Is in Fact Migratory

27. For an appreciation of the extent to which migratory labour is in fact employed in the economy of South West Africa, it is necessary to deal with certain calculations made by Applicants in regard thereto, and with statements in the Reply which misrepresent the position.

In the Counter-Memorial [2] Respondent indicated that of the 65,998 adult male natives employed in the Police Zone in 1960, 27,771 came from Ovamboland and 850 from the Okavango.

Applicants say that these 28,621 workers represent approximately 10 per cent. of the population of the northern sector, and, calculating on a life expectancy of 60 years as a base, they compute that "10 per cent. of the population of the northern sector is the equivalent of approximately one-half of the adult male 'Natives' *between the ages of eighteen and forty-two*" [3]. However, when this calculation is applied by them in argument, Applicants simply aver that there is a "prolonged absence of approximately *one-half of the adult male population* [from the northern reserves]" [4]. (Italics added.)

This statement is, of course, false. It departs from Applicants' own calculation, in which the number of workers in question was expressed not as one-half of all the adult male Natives of the northern sector, but as one-half of the adult male Natives of a certain age group only.

28. Also in another respect Applicants misrepresent the labour position in the Territory. They say that the balance of the Native labour force in the Police Zone (i.e., not hailing from the northern sector), which is "recruited from among the inhabitants of the 'Native' reserves within the Police Zone, or is obtained from 'Natives' resident on 'European' farms or in urban areas", also provides labour which is "temporary in its essence" [5]. This they say is so because of "the sweeping powers of the Administration with respect to 'Native' rights of residence anywhere in the Territory", and because "[*d*]*e jure* and *de facto* the entire 'Native' population of the Territory is so controlled and powerless with respect to rights of residence and freedom of movement" [5].

Respondent denies that the measures effected in order to control the residence of Natives in urban areas, or the movement of Natives within the Police Zone, which measures have been dealt with fully in the Counter-Memorial [6], have the effect that labour in the Police Zone is "temporary in its essence". On the contrary, the said measures have a stabilizing effect in preventing Natives from roaming over the Police Zone without employment or other means of livelihood.

That there is some measure of migratory, or shifting, labour among

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[1] International Labour Office, *op. cit.* pp. 57-58.
[2] **III**, p. 74 (para. 17).
[3] **IV**, p. 407, footnote 4.
[4] *Ibid.*, p. 408.
[5] *Ibid.*, pp. 407-408.
[6] **III**, Book VI **(III)**, *passim*.

Natives who are ordinarily resident within the Police Zone, is not denied. Natives do move from the reserves within the Police Zone to take up employment in the rural and urban areas. There are, however, no statistics available as to the incidence of such movements. In most cases such movements would hardly be of a migratory nature in the sense in which that word is generally used relative to labour conditions, inasmuch as the majority of such Natives have their families with them at the places where they are employed, i.e., either on farms or in Native townships in the urban areas.

The following statement relative to migratory labour in the Territory is contained in the report of the Odendaal Commission:

> "The only migratory part of the population is the 27,771 workers from Ovamboland and 850 from the Okavango who work temporarily in the Southern Sector for periods ranging from one to two years for married persons and from one to two and a half years for single persons [1]."

The figure of 28,621 [27,771 plus 850] given by the Commission for the year 1960 did not include a further 4,528 Native workers who entered the Police Zone from beyond the borders of South West Africa, mostly from Angola [1]. Here too, as in many rapidly developing countries, it is found that foreign workers are attracted to the Territory for gainful employment.

The number of territorial Native workers in the Police Zone in the year 1960 who can properly be called migratory (28,621), represented approximately 43 per cent. of the total labour force employed in that Zone during the said year.

V. Future Developments regarding the System in South West Africa

29. The present dualistic pattern of the economy of South West Africa—i.e., an economy divided into a modern and a traditional sector—must in Respondent's view be seen as a transitional phenomenon, bound to disappear in time as the traditional sector is gradually brought to the same level of productivity as that of the present modern economy sector. By "exporting" its labour services, the traditional sector is ensuring the continued growth of the modern economy, a process which, in conjunction with appropriate measures aimed at the development of the non-White areas, will gradually but steadily bring about a transformation of the traditional economy of the Native groups into a modern one.

This implies that migrant labour in the Territory is not to be viewed as a permanent institution, but rather as a temporary expedient in the economic development of the Territory—albeit an essential one. As the traditional economy of the non-White areas is being transformed and developed, it will offer ever increasing opportunities of employment to the inhabitants of such areas, and thus the need to leave these areas in search of gainful employment elsewhere as migratory workers will consequently diminish, and may eventually disappear altogether.

30. This process of transformation must, however, of necessity be one that will take some time. Economic dualism is inextricably bound up with

[1] *R.P.* No. 12/1964, p. 39.

traditional and deep-seated socio-cultural attitudes which cannot be altered by radical steps, but require considerable time and patience to change. To quote an authoritative United Nations publication in this respect:

> "If it is to be a smooth and not unduly painful process, the transition from rural peasant to urban industrial worker is not one that can be greatly accelerated [1]."

The same publication contains also the following:

> "The social organization of the subsistence or near-subsistence sectors of under-developed countries invariably contains elements which are not conducive to the internal growth of new forms of industrial production and which generally constitute serious obstacles to the introduction of these new forms from without [2]."

In this regard an International Labour Organization Survey of African Labour states:

> "The deep social implications which land—and cattle in areas where they are raised—have for Africans mean that resistance to reforms, which is often stigmatised as conservatism, laziness or stupidity, in fact springs from complex social and cultural factors linked to existing customary systems of agriculture[3]."

And another authority, N. S. Carey Jones, has written:

> "One of the biggest problems in Africa, and which has hardly been tackled, is that social institutions and ways of living adapt themselves to a changed economic environment slowly [4]."

31. Where, for the reasons aforestated, transformation of the economy of the traditional sector must of necessity be a slow process, while at the same time economic development in the modern sector may proceed at a faster rate, the question may well arise whether in these circumstances a diminution of migratory labour can ever be expected—at least in the foreseeable future.

With regard to Africa generally, the International Labour Organisation has answered this question as follows:

> "However, a diminution of migrations is not likely to occur in the near future; it may be expected, on the contrary, that the slow progress of social measures as compared to the rapid industrial development of the continent will lead to a further increase in migratory movements [5]."

In South West Africa, however, future developments may, in view of the particular circumstances of the Territory, be different, and are, indeed, expected to be. In the first place, it is questionable whether, with its present known resources, much further development can be expected in the economic potential of the Police Zone. And, secondly, the developments which, pursuant to the report of the Odendaal Commission, are

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[1] *U.N. Doc.* E/2670, ST/ECA/29, *Processes and Problems of Industrialization in Under-developed Countries* (1955), p. 21.

[2] *Ibid.*, p. 18.

[3] International Labour Office, *African Labour Survey* (1958), p. 61.

[4] Carey Jones, N. S., *The Pattern of a Dependent Economy* (1953), p. 121, footnote 1.

[5] "Inter-Territorial Migrations of Africans South of the Sahara", *International Labour Review*, Vol. LXXVI, No. 3 (Sep. 1957), pp. 292-310, at p. 310.

being initiated or accelerated in the non-White areas [1], must create ever-increasing opportunities and avenues of employment within such areas, thus tending to diminish the need for migratory labour from such areas into the Police Zone. This would apply particularly to Ovamboland, whence the bulk of the present migratory labour force is drawn, and where large development projects are being initiated in implementing the recommendations of the Commission [2].

VI. APPLICANTS' CRITICISMS OF THE MIGRATORY LABOUR SYSTEM OPERATING IN THE TERRITORY

32. Applicants contend that, in permitting the operation of a system of migratory labour in the Territory, Respondent has violated its obligations towards the inhabitants, inasmuch as the "consequences of the policy are impossible to reconcile with the positive obligations of Article 2 of the Mandate" [3]. Arguing in support of this contention, they say:

> "A factor contributing to economic stagnation of the northern reserves is the prolonged absence of approximately one-half of the adult male population therefrom [4]."

Respondent has already indicated that this statement, in so far as it describes the proportion of the population which is usually absent from the northern reserves as a migrant labour force, is incorrect [5]. Much less than "one-half of the adult male population" is absent from the northern reserves at any one time.

33. As proposals for counteracting what they describe as the "economic stagnation" of the said reserves, Applicants put forward two suggestions. The first suggestion is that—

> "[w]ere the families of 'Native' labourers permitted to accompany them to their work, population pressure upon the land inevitably would decrease with the possibility of a correspondingly more prosperous agriculture for those remaining; similarly, the land in the northern reserves would tend to be farmed by persons who would devote themselves exclusively to farming, rather than on a 'part-time' basis by persons who migrate to and from the Police Zone at intervals [4]".

The suggestion that the families of migrant workers should accompany the workers "to their work", is apparently put forward on the basis of a suggested temporary sojourn in the Police Zone. This is, indeed, implied in another statement in the Reply, where Applicants speak of—

> ". . . the widely-criticized policy of preventing the families of 'Natives' from the northern reserves from accompanying them on their tours of employment . . . [6]".

It is, however, followed by a more far-reaching suggestion in the following terms, viz.:

> "If equality of opportunity were afforded to inhabitants without

[1] IV, pp. 202-211.
[2] *Ibid.*, pp. 203-204.
[3] *Ibid.*, p. 409.
[4] *Ibid.*, p. 408.
[5] *Vide* para. 27, *supra*.
[6] IV, p. 413.

> restriction based on 'group', tribe or colour, many families would remove from the reserves to the Police Zone; a surplus of production would result in the reserves, in place of the subsistence economy which now frustrates creation of capital or entrepreneurial skills from within [1]."

In making these suggestions, Applicants, in the first place, seem to have misled themselves as to the whole premise upon which their argument is based, and, secondly, to have given no thought to the implications involved.

34. Applicants' argument in respect of both the aforementioned suggestions is based on an assumed premise that there is a "population pressure upon the land" in the northern reserves, and that this situation compels the practice of a mere subsistence economy, or, to put it in their own words, "the inhabitants cannot generate capital owing to the subsistence economy which is fostered . . . by the large population" [1].

Applicants' basic premise is, of course, false: there is in fact no "population pressure upon the land".

As a reason for assuming that there is such a "pressure", Applicants refer to certain statistics furnished in the Counter-Memorial relative to population increases in the northern reserves, including Ovamboland, in respect of which Respondent commented as follows:

> "This rapid increase of population, particularly during the period of Respondent's administration of the Territory, points to the favourable conditions under which the Ovambo have been living [2]."

It does not, however, follow that, because there has been a rapid increase in population, there is also a "pressure upon the land". Far from that being the case, large portions of the northern reserves are not put to agricultural use at all. Nor is a form of subsistence economy practised because of any alleged limitations of land, or because of any increase in population figures. It is practised by the indigenous people of South West Africa, like the inhabitants of other countries in Africa, as an age-old tradition [3], which can be altered only by a very slow and gradual process of education and the introduction of modern economic methods [4]. Subsistence economy in the reserves is as little fostered by the size of the population today as it was "fostered" by the very much smaller population which existed at the inception of the Mandate [5], when the practice was even more tradition-bound than it is at present.

In this regard Applicants, when quoting from the report of the Odendaal Commission [6] to the effect that the inhabitants of the northern sector "consume what they produce and there is consequently little building up of permanent capital assets", and that "animal husbandry and crop production are practised mainly for self-maintenance", conveniently omit to state that the Commission did not find this situation to exist because of a "population pressure upon the land", but because, to use the words of the Commission, the ". . . economy [of the Natives] is

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[1] **IV**, p. 409.
[2] **III**, p. 8.
[3] *Vide* Chap. III, para. 5, *infra*.
[4] *Ibid.*, para. 6, *infra*.
[5] *Vide* **III**, p. 8.
[6] **IV**, pp. 408-409.

still rooted in the traditional subsistence economy, in both the physical and the psychological sense of the word . . .[1]".

Respondent deems it appropriate to draw attention, in so far as the future is concerned, to its acceptance in principle of the Commission's recommendations that provision be made for an appreciable extension of the areas of the existing Native reserves in South West Africa. Save in the case of the Kaokoveld, which is very sparsely populated, the recommendations of the Commission involve, *inter alia*, the addition of large areas of land to the proposed homelands in the northern sector [2].

35. Applicants' further arguments that a reduction of population in the northern reserves will bring about "more prosperous agriculture for those remaining" [3], that "the land in the northern reserves would tend to be farmed by persons who would devote themselves exclusively to farming" [3]; that "a surplus of production would result in the reserves" [4]; and that "[n]ot only would production be more efficient, but a natural modernization of agricultural methods would take place" [4], not only founder with the premise upon which these arguments are based, namely that there is a "population pressure upon the land", but also reflect a totally unrealistic view of the situation in the northern reserves and the traditional customs of its peoples.

The fact that the Native inhabitants of the northern territories generally practise a form of subsistence economy and do not produce a surplus over and above their immediate needs, cannot be ascribed to lack of opportunity for expansion in their farming activities, nor to a lack of encouragement to apply modern methods. It is, as already stated, due to an ingrown tradition which, as indicated elsewhere in this Rejoinder [5], will take a considerable time to change by educating the Natives, and leading them from a subsistence economy to a modern economy.

That much has already been achieved in this regard, is evidenced by the finding of the Odendaal Commission that—

> "[t]o a great extent . . . the modern exchange economy has already strongly influenced the subsistence economy of a large part of the population [6]".

But that further efforts in educating and encouraging the Natives to adopt improved methods, and to look beyond their immediate needs, will still entail a lengthy process, is equally clear from other findings of the Commission, viz., that the Natives in the northern areas—

> "[o]n the whole . . . have not sufficient skill and enterprise, either to triumph over local conditions and the limitations imposed by nature in their own areas [1]",

and that—

> "these traditional sectors are still a long way from capital formation by their own efforts for investment in projects which could promote their own economic development—still far from the stage where the

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[1] *R.P.* No. 12/1964, p. 315 (para. 1286).
[2] *Ibid.*, pp. 81-89 and Chap. III, paras. 27-28, *infra*.
[3] **IV**, p. 408.
[4] *Ibid.*, p. 409.
[5] *Vide* Chap. III, paras. 5-8.
[6] *R.P.* No. 12/1964, p. 315 (para. 1284).

indigenous population could advance themselves by their own drive and volition from a stationary economy to self-sustaining growth. They will still have to be given much aid and advice to encourage them on their way . . . [1]"

The aforementioned considerations apply equally to Applicants' further criticisms that the migratory labour system deprives the northern reserves "of the presence of a large percentage of the able-bodied men" and "[a]t the same time, the initiative for effecting changes devolves upon the women inhabitants in addition to their accustomed labour on the land" [2]. In this regard, too, custom and tradition play their part, inasmuch as the bulk of the work as far as agricultural activities are concerned was traditionally performed by the womenfolk [3]. And this is still the position today, even when the menfolk are not absent in the performance of migratory labour but are resident with their families in the reserves.

36. Not only would implementation of Applicants' suggestions fail to bring about the progress and prosperity which they predict for the northern areas if there were to be a mass exodus of workmen and their families to the Police Zone, whether on a temporary or a permanent basis, but their suggestions reflect a total lack of insight into, and appreciation of, the economic conditions of the Territory and the customs and traditions of the indigenous people.

In suggesting that the families of Native migrant workers should be permitted to accompany them "on their tours of employment" [4], Applicants seem to have given no consideration to the implications of such a policy, either in so far as the workmen themselves are concerned or as to the effect which it would have on the economy of the Territory.

Irrespective of the light in which the tribal authorities would view this proposal [5], it is doubted, for the reasons already stated [6], whether, if such permission were to be granted, and if the workmen were to appreciate the necessary consequences of taking their families with them, any appreciable number would in the long run avail themselves of the right. Those that would venture the step, would upon their return to their rural homes after expiration of their contracts of service, be sadly disillusioned, for not only would their farming activities have come to an end during their absence, but they would also, in the words of the authorities to which reference has been made [6], have lost the "only security" which they understand, viz., the "rights to the use of tribal land" [6]. And the question would then immediately arise as to their sustenance in the reserves while waiting for the next period of employment to commence. Applicants do not venture an answer to this problem. Nor, it would seem, have Applicants given thought to the other implications which would arise in the modern economy sector if their suggestion were to be implemented. There would be the cost of transport of the workmen and their families over many miles in a land in which transport is at all times a vexed problem;

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[1] *R.P.* No. 12/1964, p. 513 (para. 1551).

[2] **IV**, p. 409.

[3] **II**, p. 324 (para. 47).

[4] *Vide* para. 33, *supra*.

[5] *Vide* **II**, p. 325 and **III**, p. 73, regarding the opposition of the tribal authorities to such a step.

[6] *Vide* para. 18, *supra*.

the cost of accommodation of the workmen and their families and the provision of other facilities and conveniences at their places of employment, albeit only for the duration of their contract periods. These costs would have to be borne by the economic resources within the Police Zone, either by way of a very much increased wage to the workmen or by providing accommodation, conveniences and other facilities in kind, neither of which can, as will be shown hereinafter, be afforded by the economy of the Territory [1].

37. Similar, and even more serious, implications would be involved in the implementation of Applicants' other suggestion, viz., that—

> "[i]f equality of opportunity were afforded to inhabitants without restriction based on 'group', tribe or colour, many families would remove from the reserves to the Police Zone . . . [2]".

For the same reasons as have been mentioned relative to Applicants' suggestion that families should be allowed to accompany the workmen on their migratory visits [3], Respondent expresses grave doubt whether, if the consequences were realized, any appreciable number of Natives would choose to sever their ties with the traditional sector and settle permanently with their families in the strange surroundings of the modern economy sector, away from their traditional cultures and customs, and without retaining rights to the use of tribal land. That many Natives would be attracted by the novelty of living in urban areas, and would, if permitted, embark upon such a venture, can be foreseen. But it can equally be foreseen that the rigours of city life, and conditions in times of unemployment, sickness and old age, might well, after the experiment had been tried, cause many such settlers to return to the reserves.

In any event, implementation of Applicants' proposal is not economically feasible. Under present circumstances, implementation of their suggestion would require that the large number of people envisaged would have to be provided with employment, with housing and with other social amenities by the enterprises which at present attract the bulk of the labour force: the mining industry, the fishing industry and agriculture.

The suggestion implied in Applicants' proposal, viz., that these three sources of employment can create employment opportunities at will, rather than in accordance with market conditions, is so naive that it merits no further consideration.

38. With regard to the suggested permanent accommodation of a large number of workmen and their families in mining, industry and agriculture in the Police Zone, Respondent states as follows:

(a) *The Mining Industry*

Mining areas in the Territory are situated in parts which have no other economic activities on any scale, so that the mining companies concerned are compelled to accommodate all their employees themselves. Apart from accommodation, recreation and other social amenities must, of course, be provided. This means a heavy capital outlay for industries already affected by very long distances separating them from both sources of supply and from markets, and by the considerable extra

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[1] *Vide* para. 38, *infra*.
[2] IV, p. 409.
[3] *Vide* para. 36, *supra*.

awards they have to pay in order to attract both capital and skilled personnel.

It goes without saying, that this outlay would have to be very much greater if whole families were to be housed in individual dwellings and provided with schools, hospitals, and other necessary facilities, than when single workers are accommodated. Mining is based on the exploitation of a wasting asset, the exhaustion of which automatically renders obsolete not only the productive apparatus, but also the homes and other facilities which cannot be transferred to other occupants in an otherwise uninhabited area. In this regard mention may be made of the view expressed by the Odendaal Commission that the diamond fields and base metal mines in the Police Zone, which at present produce more than 90 per cent. of the mining output in the Territory, "will in all probability be largely worked out in 25 years' time" [1].

These are important considerations when thought is given to proposals to stabilize a labour force dependent on the mining industry. Thus, with regard to migrancy and urbanization of Native workmen in the Republic of South Africa, G. E. Stent has stated:

> "Were the anticipated life of the mines long, or were it a question of beginning new operations with new methods, it might be an economical proposition [i.e., to encourage a stabilized labour force]. As it is, however, the outlay would be spread over only a limited period of working, and as such its cost would prove prohibitive [2]."

In the circumstances it must be obvious that the mines would suffer heavily and could be forced to close down, if they were compelled to provide not only for the workers but also for their families—whether provision were to be made in cash, by way of increased wages, or in kind.

(b) *The Fishing Industry*

The fishing industry differs from the mining industry in that it operates on a more permanent basis or is, at least, expected to do so. The industry is, however, subject to significant seasonal fluctuations, with the result that it is active for only part of every year, and cannot afford to employ a permanent labour force. It would *a fortiori* be unable to provide permanent accommodation for workmen and their families. The migratory labour system is therefore the only practical *modus operandi* in this industry. The average number of extra-territorial and northern Natives employed in factories in the Police Zone every year is 2,588, their contracts generally being for eight months of the year [3]. A very large proportion of the said number are employed in the fishing industry.

(c) *Agriculture*

Although stock farming in the Police Zone is also a permanent activity, and is not marked by seasonal fluctuations, it offers very little scope for large-scale permanent settlement by non-White workers. Inasmuch as the Police Zone often suffers protracted droughts, stock diseases and epidemics, resulting in a substantial curtailment, albeit temporarily, of the agricultural labour force, settlement of a large number of workmen and their families on farms would be at best a precarious venture.

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[1] *R.P.* No. 12/1964, p. 333 (para. 1312 (v) *b*).

[2] Stent, G. E., "Migrancy and Urbanization in the Union of South Africa", *Africa*, Vol. XVIII, No. 3 (July 1948), pp. 161-183, at p. 183.

[3] Departmental information.

With regard to non-White persons employed in other branches of activity in the modern economy sector, it is true that many of them are in fact housed in urban townships together with their families. It may be expected that as employment opportunities in commerce, building and construction, administration and the services increase, their number will, for some time at least, also rise. The scope for such an increase is, however, limited, and will largely depend on the extent to which primary economic production—mining, fishing and agriculture—stimulates secondary and tertiary activities. And, as has already been stated [1], it is questionable whether any considerable further development can be expected in the economic potential of the Police Zone.

39. From the aforegoing it is clear that fundamental economic factors strictly limit the modern sector's capacity for absorbing, on a permanent basis, a large number of the population of the northern territories.

There are, however, additional and equally fundamental considerations bearing on the absorptive capacity of the said sector. A policy of encouraging stabilization of labour by way of settlement of a larger permanent labour force in the Police Zone, must tend to reduce substantially employment opportunities for those normally resident in the traditional sector. Implementation of Applicants' suggestion could, therefore, in this respect result in hardship for the majority of the Natives in the Territory.

40. Another fundamental consideration bears on the number of people involved. It is of course impossible to estimate the number of Natives who would, if permitted, remove with their families from the northern sector and settle in the Police Zone. Applicants' whole thesis, however, is based on a presumption that there will be a large exodus of the population from the northern territories—otherwise the whole point in Applicants' suggestion is lost. An absorption of such a large community into the Police Zone must surely, in addition to the economic problems attendant thereupon, bring about more and even greater social evils than the adverse effects of the present system of migratory labour. Thus, in the words of a United Nations publication already referred to,

> "[t]he multitudes that congregate in and around the cities of many of the under-developed countries today, technically living in an urban environment but socially and culturally still to a large extent peasants, by the sheer magnitude of their numbers pose social problems that the industrializing countries of Europe did not have to face [2]".

There are signs that, failing appropriate counter-measures, a similar condition could very easily develop in the Territory, for in the words of the Odendaal Commission:

> "From evidence submitted to the Commission it would appear that there is at present a considerable influx of non-Whites with their families from the rural areas [within the Police Zone] into the larger towns despite the fact that there are insufficient avenues of employment for them in the urban areas [3]."

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[1] *Vide* para. 31, *supra*.

[2] *U.N. Doc.* E/2670, ST/ECA/29, *Processes and Problems of Industrialization in Under-developed Countries* (1955), p. 119.

[3] *R.P.* No. 12/1964, p. 117.

In the circumstances Respondent would indeed be failing in its duty if it were to adopt a policy as suggested by Applicants, instead of taking steps to prevent the position from deteriorating into the chaos and misery which beset the urban areas of so many other under-developed countries.

Applicants' suggested solution of the problems of migratory labour, i.e., by permitting an uncontrolled influx of Native families from the northern sector into the Police Zone, can, to say the least, only result in economic regression and an aggravation of existing social problems.

The position which would be created by an implementation of Applicants' suggestion would be bad enough in times of relative prosperity, as is now being experienced in the Territory, but, inasmuch as the economy of the Territory is geared to exports of primary products and is therefore dependent on world market prices, the position must surely and inevitably lead to disaster in the event of industrial setbacks or economic depressions.

41. For the reasons aforestated, implementation of Applicants' suggestions would not foster progress in the reserves, nor would it be feasible from the general economic point of view. On the contrary it could only lead to economic disruption of the enterprises which have been built up in the Police Zone and which serve as the foundation of the economy of the Territory.

42. In the premises Respondent submits that, upon analysis, there is no substance in Applicants' charges that "[t]he . . . consequences of the policy [of migratory labour] are impossible to reconcile with the positive obligations, of Article 2 of the Mandate" [1], and that, in permitting a system of migratory labour to operate in the Territory, Respondent has violated its obligations towards the inhabitants of the Territory [1].

D. Applicants' Allegations regarding Low Wages in the Territory

I. General

43. Whereas in the Memorials Applicants made no complaint regarding wages paid in South West Africa [2], a complaint is now introduced in the Reply that Native labour is cheap, and that the wages paid to Native labourers are low. Thus, in support of an argument that the Native child is educated for a "distinctive role in the economic life of the Territory, that of agricultural and industrial labourer", Applicants rely, *inter alia,* on a statement by the Committee on South West Africa to the effect that—

> ". . . their training and education seems directed merely to preparing the 'Natives' as a source of *cheap labour* for the benefit of the 'Europeans' [3]". (Italics added.)

In dealing later with the opportunities offered to the Natives in the

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[1] **IV**, p. 409.

[2] The only reference in the Memorials to alleged "low wages" was contained in an extract from a petition by Hosea Kutako and others to the United Nations, quoted by Applicants at **I**, p. 171, as supplemental material in support of their allegations regarding "Government and Citizenship". Applicants themselves did not make such a complaint. *Vide* **IV**, p. 18 (para. 47).

[3] **IV**, p. 406.

economy of the Territory, Applicants refer to "[t]he predilection of employers for *low-cost* labour. . ." [1] (italics added), and, still later, there follows the categorical statement by Applicants that "[t]he wages paid to 'Native' labourers are *extraordinarily low*" [2] (italics added).

Respondent has some difficulty in dealing with Applicants' bald allegations that the cost of labour in the Territory is "low" and that the wages paid to Native labourers are "extraordinarily low" in that—

(a) Applicants themselves furnish very limited and, in fact, incorrect information regarding the wages paid to Native workers in the Territory [3], and may therefore, in drawing their conclusions, have been misled by their incorrect factual information; and

(b) they do not state by what criterion they have measured wages when drawing the conclusion that such wages are "extraordinarily low".

Respondent will hereinafter give consideration to both these aspects.

44. With regard to wages paid to Native workers in the Territory, Applicants say:

> "The average cash earnings per month of 'Native' workers in the Administration, the railways, the mines, on roads, in municipalities, in industries and in domestic service was reported by the Committee on South West Africa as estimated at £5 10s. 8d. [i.e., R11.06], for 1956 [2]."

That Applicants have in the above statement misrepresented the figures given in the Committee's report is clear when regard is had to the relevant part thereof, which reads as follows:

> "Average wage rates for recruited or local 'Natives' during 1956 were reported to be £5 8s. 9d. [R10.88] for farm labourers *and in urban areas £8 6s. 0½d. [R16.60]*. These calculations were based on wages earned by workers in the Administration, the railways, the mines, on roads, in municipalities, in industries and in domestic service. *The average cash earnings per month of the last mentioned group were stated to be £5 10s. 8d. [R11.06]* [4]." (Italics added.)

The figure given by the Committee was obtained by it from the report of the Commission of Inquiry into Non-European Education in South West Africa. The figure of £5 10s. 8d. (R11.06) quoted by Applicants was the average monthly wage of *domestic servants* and not the average monthly wage of the other classes of workers mentioned by Applicants, which was £8 6s. 0½d. (R16.60).

45. The only other particulars furnished by Applicants with regard to Native wages are contained in the following extract from a report of the Special Committee for South West Africa, viz., "[t]he basic wage under [the contracts for Northern labour] . . . is 18 cents a day, increasing

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[1] **IV**, p. 408.

[2] *Ibid.*, p. 417, footnote 3.

[3] In section (2) of Annex 6 to the Reply, **IV**, p. 437, reference is made in the *Report of the I.L.O. Ad hoc Committee on Forced Labour* to allegations in petitions received by it from Native persons and organizations in South West Africa to the effect that the wages paid to Native workers in the Territory are low. No information is, however, given in the Committee's report regarding wages in the Territory, and the Committee did not deal with the complaint, inasmuch as it considered that "investigation of [the] question would be outside its terms of reference" (para. 382).

[4] *G.A., O.R., 15th Sess., Suppl.* No. 12 (A/4464), p. 41 (para. 321).

slightly with length of service" [1]. The true position is that a minimum cash wage is fixed for all northern and extra-territorial Natives who enter the Police Zone in order to take up employment therein. The minimum wage differs as between the various occupations in which the said Natives are employed. The minimum wage rates which apply at present are the following [2]:

(a) *For Natives employed on mines and in industry*

17½ cents per shift for the first 155 shifts;
20 cents per shift for the next 77 shifts;
22½ cents per shift for the remaining 77 shifts.

This works out at an average of 19.3 cents per shift for 309 shifts in the contract period of a year. As Native industrial workers and mine employees work one shift per day, their minimum cash wage on an average is 19.3 cents per day, excluding additional remuneration for overtime.

(b) *Domestic servants*

The minimum cash rate rises from R4 per month for workers who are inexperienced, or have physical disabilities, to R5.50 per month for those who are experienced and have no physical disabilities.

(c) *Farm workers*

For farm workers, who are not employed as shepherds, the minimum cash rate rises, on the same basis as stated in *(b)* above, from R4.30 per month to R6.30 per month. In the case of shepherds, corresponding figures are R5.30 and R7.30 per month.

The minimum wages apply only to northern and extra-territorial Natives, and are administratively fixed by the Minister of Bantu Administration and Development in collaboration with the South West African Executive Committee, after consultation with the various groups of employers. From time to time the minimum wage rates are raised in accordance with the rise in the cost-of-living, or as a result of other changing conditions which bear upon the determination of a reasonable wage. The minimum rates at present applicable have been in effect since July 1961. It may be stated in this regard that the following minimum rates were fixed on 16 November 1964, to come into operation on a date to be determined by the Minister of Bantu Administration and Development [2].

(i) In all occupations, excluding work on mines, an increase of 50 per cent. over present rates;
(ii) In respect of mine workers, the rates are to be as follows:

30 cents per shift for the first 155 shifts;
35 cents per shift for the next 77 shifts;
40 cents per shift for the remaining 77 shifts.

46. While the aforementioned rates are minimum rates, the vast majority of Natives are paid well above the stipulated minimum. In addition, many receive annual or seasonal bonuses over and above their wages. Moreover, all the Native employees who are recruited from the northern areas are supplied with free accommodation and food, or rations, free

[1] IV, p. 417, footnote 3.
[2] Departmental information. The figures are given in Rand and cents: R1=10 shillings.

medical attention and also with some articles of clothing, as well as blankets.

The following tables furnish illustrative examples of the value of remuneration in cash and kind received by Natives who contract for employment in the diamond mining industry and in the fishing industry:

TABLE [1]

	Average monthly wages of Natives employed by Consolidated Diamond Mines of S.W.A. Ltd. during 1963	*Average monthly wages of Natives employed by fishing enterprises in Walvis Bay during 1964*
Basic wage	R6.85	R5.78
Proficiency and company allowance	R5.65	—
Overtime	R4.35	R10.05
Bonus	R2.11	R3.11
Expenses on Food	R7.57	R8.00
Clothing expenses	R1.36	R0.55
Hostel expenses	R4.13	R3.00
Recreation expenses	R0.23	—
Medical services	R2.57	R0.30
Total per month	R34.82	R30.79

It will be noted from the above tables that in both cases the cash wages and allowances paid far exceed the stipulated minimum wage, and that payments in kind form a substantial part of the total remuneration.

47. Respondent has already stated that the aforementioned minimum wage rates are applicable only to northern and extra-territorial Natives who are employed in the Police Zone. Although there is no minimum wage rate applicable to other Natives employed within the said Zone, i.e., Natives who are ordinarily resident therein, they generally receive wages which are well in excess of the aforestated minimum rates.

This is illustrated by the following table, which reflects the average monthly income of Natives employed in certain stated occupations in the rural and urban areas of the Police Zone during 1962:

TABLE [1]

	Average income per month	
Occupations	*Rural Areas*	*Urban Areas*
Teachers, policemen, clerks	R45.79	R48.57
Labourers in government service	R20.64	R22.11
Labourers in service of the railways and harbours administration	R22.77	R23.76
Labourers in industrial enterprises	R18.10	R24.38
Labourers in mines	R22.35	—
Municipal employees	—	R21.59
Labourers on farms	R14.72	—
Domestic servants (male)	—	R16.18
Domestic servants (female)	—	R13.00

[1] Departmental information.

The above figures stand in sharp contradiction to the average figure of R11.06 per month mentioned by Applicants in the Reply [1].

48. The second feature of Applicants' complaint to which Respondent drew attention above, is that Applicants nowhere indicate what comparisons they have made in order to conclude that the wages paid to Native labourers in South West Africa are "extraordinarily low" [2].

It is therefore impossible to deal with the complaint in this respect without speculating as to what comparisons Applicants could have had in mind. In so speculating, Respondent can conceive of only two bases upon which Applicants could possibly have made a comparison, namely a comparison of the wage level of the Native labourers of South West Africa with the wage level of Native employees in other countries, or a comparison thereof with the general wage level of the European employees of the Territory. Respondent will therefore deal with these in turn.

II. Comparisons of the Wage Level of the Native Labourers of South West Africa with that of Native Employees in other Territories

49. International comparisons of wage levels often create misleading impressions inasmuch as, for obvious reasons, it is almost impossible to present a complete, accurate and objective picture, mainly for the following reasons:

Firstly, the purchasing power of a given sum of money can, and very often does, differ considerably from one country to another.

Secondly, cash wages are often only a part of total wages, especially in Africa. Apart from free food and housing, which can be interpreted as wages paid in kind, the cash equivalents of medical care, educational and recreational facilities, free transport to and from work, free grazing of employees' stock, etc., are difficult to determine. Yet these benefits often represent significant contributions to the workers' welfare.

50. While conceding that, for the reasons aforestated, as well as for other lesser reasons, comparisons cannot be taken to be accurate in all respects, Respondent has endeavoured to meet Applicants' bald accusations with regard to low wages by preparing as accurately as it can a comparative table of the wage level of Native employees in South West Africa and in other comparable territories.

The table on the following page compiled from the most recent information available to Respondent, reflects the average monthly wages of African employees in the major divisions of economic activity in the territories mentioned therein.

51. While repeating that the said table cannot be regarded as an accurate comparison of wage-levels, Respondent submits that it gives a broad picture of the true position and, in that sense, indicates that the wages paid to Native employees in South West Africa compare favourably with the wages of African employees in the countries mentioned in the table, and particularly with wages paid in the two Applicant States, which appear to be very low when compared with those in other African territories.

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[1] *Vide* para. 44, *supra*.

[2] *Vide* para. 43, *supra*.

TABLE [1]

AVERAGE MONTHLY EARNINGS OF AFRICAN WORKERS

Monthly earnings in Rand

Country [2]	Date	General level of wages [3]	Major divisions of economic activity				
			Manufacturing	Mining	Construction	Transport	Agriculture
(a) *Total remuneration: partly in cash and partly in kind*							
South West Africa [4]	1964	26.8	27.6	25.9	27.6	26.8	13.8
Kenya [4]	1959	12.8 [5]	14.1 [7]	13.6 [7, 13]	14.3 [7, 13]	20.5 [7, 13]	6.9 [6]
Malawi (formerly Nyasaland) [7]	1962	13.4	11.4	8.2	11.4	19.0	6.4
Southern Rhodesia [7]	1962	21.2	23.4	18.2	20.4	32.6	10.0
Zambia (formerly Northern Rhodesia) [7]	1962	27.4	23.6	48.2	21.2	30.4	9.0
Nigeria [9]	1960	14.8	14.8	14.4 [10]	12.8	24.7	15.0 [11]
Tanganyika	1962	—	—	—	—	—	7.7
Ethiopia	1958	—	7.4—12.1	—	—	—	—
(b) *Cash remuneration only*							
Republic of South Africa	1963	23.1	35.2	12.0	31.7	33.0	7.5
Ethiopia [8]	1958	± 10.0	—	—	—	10.7—52.1	1.4—7.4
Liberia [8]	1957	± 11.0	—	5.9—10.4	—	—	4.6—6.5
Tanganyika	1962	15.4	13.6	14.1	12.7	21.0 [12]	—

[1] In this table wages paid in other currencies have been converted to Rand. R1 = £0.5 = 10 shillings.

Information obtained from the following sources:

All countries, except Ethiopia, Liberia, South Africa and South West Africa:
International Labour Office, *Year Book of Labour Statistics 1963*, tables 15, 16 and 18, pp. 309-361 and 414-429.

Ethiopia: State Bank of Ethiopia Statistical Office, *Money Supply, Cost of Living and Related Matters* (Sep. 1958), pp. 6-7.
Luther, E. W., *Ethiopia Today* (1958), p. 118.
Lipsky, G. A., *Ethiopia*: Its People, Its Culture (1962), pp. 272-274.

Liberia: U.S. Department of Labor, *Labor in Liberia* (May 1960), pp. 11-16.
Taylor, W. C., *The Firestone Operations in Liberia* (1956), p. 68.
Hempstone, S., *The New Africa* (1961), p. 457.
Hance, W. A., *African Economic Development* (1958), p. 238.
Carter, G. M., *African One Party States* (1962), p. 378.

South Africa: *Monthly Bulletin of Statistics*, Vol. XLIII, No. 5 (May 1964), tables B3, 7, 9 and 18, pp. 18, 20 and 26.

South West Africa: Departmental information.

[2] Footnotes appearing immediately behind name of countries *exclude* reference to agriculture.

[3] Including all divisions of activity appearing in adjoining columns, except agriculture.

[4] Males only.

[5] Nairobi. Adult males; including salaried employees.

[6] Regular adult male labourers.

[7] Including salaried employees.

[8] No figures on a strictly comparable basis are available for these countries; however, data taken from the sources listed above may be accepted as a fair indication of prevailing earnings. It is possible that some of the quoted figures include payment in kind without explicitly saying so.

[9] All unskilled employees.

[10] Refers to 1959.

[11] Unskilled males only. Remuneration wholly in cash.

[12] Excluding Tanganyika Railways.

[13] Adults only.

III. Comparison of the Wage Level of the Native Labourers with that of the European Employees in the Territory

52. If a comparison between the wages paid to Native and European workers, respectively, is the criterion upon which Applicants' charge of "extraordinarily low" is made, then Respondent says that the charge is wholly unfounded. All over Africa a large and inevitable gap exists in this regard, for reasons which will be dealt with hereinafter. The only useful guide to be afforded by this criterion would therefore be to see whether the gap in South West Africa is wider or narrower than in other parts of Africa.

53. In the Territory, as in all other countries characterized by the juxtaposition of a small but economically highly productive group and a large but economically backward group, two distinct wage structures are inevitable, and the reason therefor is twofold. In the first place, in a free market economy, such as obtains in South West Africa, wages reflect the productivity or the value of the services of the worker. With the exception of the physically or otherwise handicapped, where other considerations prevail, no one is paid more than he deserves on the ground of his productivity or the market value of his services. Secondly, wages in the Territory must, in order to attract and retain a highly productive and skilled European man-power, at least keep pace with the rate of earnings in neighbouring South Africa and elsewhere. In the succeeding paragraphs consideration will be given to each of these reasons.

54. With regard to productivity and value of services, it is only natural that, since the European employees are on the whole better educated, more experienced, and accustomed to skilled work, they generally fill the more highly remunerated posts, as compared with the Native employees, the majority of whom, by reason of lack of education, knowledge and experience, can only be employed as semi-skilled or unskilled workers. And it follows as a matter of simple economics that the general wage-level of the European employees would be higher than that of the Native employees.

This is generally recognized as the basic reason for a differential wage level between Europeans and Natives, in Africa. The point is made as follows in an article in an International Labour Office publication, the *International Labour Review*:

> "To a large extent, racial wage differentials in Africa are skill differentials. Europeans and Africans have been, and to a considerable extent still are non-competing groups [1]."

In the same article the following is stated with particular reference to the copper mining industry in Northern Rhodesia:

> ". . . the 'skilled' Africans do not have the same degree of skill as the Europeans and are not given, nor are they at present capable of accepting, the same amount of responsibility [2]".

Another authority, Professor Stephen Enke, has given the following general explanation for this situation:

> "The wages of natives in the colonies, as in other backward but

[1] "Interracial Wage Structure in Certain Parts of Africa", *International Labour Review*, Vol. LXXVIII, No. 1 (July 1958), pp. 20-55, at p. 21.

[2] *Ibid.*, p. 23.

independent countries, appear to be inhumanly low to most North Americans. These men *must* be 'worth' more! They are surely being 'exploited'!

It is often overlooked that native labor in the colonies, lacking many personal traits and skills that are taken for granted in more prosperous countries, is often of value for its muscular strength and little more . . . In Africa especially, 'cheap' labor has often proved very expensive, although the truth of this statement may be hard for anyone to believe who has not worked with it. Labor productivity depends largely on basic cultural attributes [1]."

In considering the relationship between the productivity of the African worker and his wage, the following statement in another issue of the *International Labour Review* is of interest:

"If the output of unskilled labour in industry were to be taken as a yardstick, the picture of the African worker's standards of productivity would undoubtedly be gloomy. It is unanimously recognised that the output of unskilled African workers is extremely low in almost all the undertakings that employ them [2]."

And J. Guilbat, writing on the same subject relative to workers in the Federation of Cameroon, has stated:

"As compared with a White worker's output, that of the Negro varies between one-third and one-seventh or one-eighth, depending on the employer and the trade (or within a given trade). The usual proportion is about one-quarter. In other words, it takes a Negro four days to do what a White does in one. And this opinion was confirmed by all the employers that we talked to [3]."

55. The following tables, taken from one of the aforementioned articles in the *International Labour Review*, clearly illustrate the wage differential between European and Native employees in certain African territories.

(a) Kenya

AVERAGE EARNINGS OF EUROPEAN, ASIAN, AND AFRICAN MALES, 1956 [4]

Race	*Private industry and commerce*	*Public services (including local government)*	*Agriculture*
Europeans*	100‡	100‡	100‡
Asians*	33.45	41.08	45.06
Africans†:	—	5.89	2.95
Domestic	4.87	—	—
Non-domestic	5.37	—	—

Notes: * In full-time employment.
† *All* Africans in employment; the proportion of women in the African labour force is quite small.
‡ Earnings of Asians and Africans expressed as a percentage of those of Europeans.

[1] Enke, S., *Economics for Development* (1963), p. 441.

[2] "The Productivity of African Labour", *International Labour Review*, LXXII, No. 2 and 3 (Aug.-Sep. 1955), pp. 119-137, at p. 120.

[3] Guilbat, J., *Petite étude sur la main-d'œuvre à Douala*, 1947, pp. 50-51, as quoted in "The Productivity of African Labour", *op. cit.*

[4] "Interracial Wage Structure in Certain Parts of Africa", *International Labour Review*, Vol. LXXVIII, No. 1 (July 1958), pp. 20-55, at p. 35.

(b) Southern Rhodesia

AVERAGE ANNUAL EARNINGS PER HEAD OF EUROPEAN AND AFRICAN EMPLOYEES, IN MANUFACTURING, CONSTRUCTION, AND WATER AND ELECTRICITY INDUSTRIES, 1938-1952 [1]

Year	*African earnings as percentage of European earnings*
1938	4.63
1943	5.08
1948	5.79
1952	6.65

(c) Zambia (formerly Northern Rhodesia)

EARNINGS IN CASH AND KIND OF AFRICANS AND EUROPEANS EMPLOYED BY THE COPPER MINING COMPANIES [2]

Year	*Average African earnings as percentage of minimum European earnings*
1952	7.39
1953	8.98
1954	9.64
1955	8.64

Commenting, *inter alia*, on the aforementioned statistics the article states:

> "Examination of available statistics indicates that the range between low and high wages is much greater in Africa than in most other parts of the world. This is a skill differential and at the same time a racial differential, since Africans are heavily bunched in the lowest-paid unskilled occupations and the highest-paid skilled jobs are occupied almost exclusively by Europeans [3]."

56. In regard to another African territory, Uganda, it was observed in 1962 that "[t]he average monthly cash wage in Kampala is for an African employee 107 shillings, for a European £100, for an Asian, a little below £40" [4].

And a publication of the Department of Labor of the United States of America gives the following description regarding wage differentials in Liberia:

> "Of the 74,000 persons employed in the money economy in mid-

[1] "Interracial Wage Structure in Certain Parts of Africa", *op. cit.*, p. 33.

[2] *Ibid.*, p. 24. *African average earnings* include "cash (basic wages, cost-of-living allowance, copper bonus) and cost of food, housing, light and water supplied free". *European minimum earnings* include "lowest basic wage, plus cost-of-living allowance, copper bonus and housing subsidy".

[3] *Ibid.*, p. 54.

[4] "Migrant Labour in Africa South of the Sahara—XIII Migrants and Proletarians", *Inter-African Labour Institute Bulletin*, Vol. IX, No. 1 (Feb. 1962), p. 60.

1958, approximately 2,700 were Europeans, Americans, Lebanese, and other non-Africans. Almost without exception, these persons were comparatively high salaried personnel, self-employed businessmen, or members of foreign diplomatic, economic, or religious missions [1]."

The position is very much the same in Ethiopia, in respect of which G. A. Lipsky wrote as follows:

"The difference in pay between skilled and unskilled labor is considerable, even though the particular skills involved may be very basic. The very highest rates for skilled work are paid to non-Ethiopians, a fact which greatly increases wage differentials between unskilled and skilled labor [2]."

Another authority, E. W. Luther, who made a study of conditions in Ethiopia, stated:

"Administrative and technical staff, mostly non-Ethiopian, receive salaries ten and fifteen times as high as ordinary workers, with a few top officials earning much more [3]."

And G. H. T. Kimble, in dealing with wage differentials, stated:

"Comparable disparities could be cited from most of the multi-racial territories. At Dakar (Senegal), for instance, the basic salary in the mid-1950s of a European clerk employed in a commercial house ranged from the equivalent of $170 a month to $300 a month, depending on his length of service in the country. The basic salary of an African clerk employed in the same kind of work ranged from the equivalent of $35 a month to $150 [4]."

57. No comparable figures of wage differentials are available for South West Africa, but the differential there cannot vary much from the differential in the Republic of South Africa, in respect of which the position is illustrated by the following table:

SOUTH AFRICA
AVERAGE ANNUAL EARNINGS AT CURRENT PRICES OF WHITES AND BANTU EMPLOYED IN PRIVATE MANUFACTURING AND CONSTRUCTION INDUSTRIES (IN RAND) [5]

Year	*Whites*	*Bantu*	*Bantu earnings as percentage of White earnings*
1955-1956	1,621	300	18.5
1956-1957	1,692	308	18.2
1957-1958	1,761	316	17.9
1958-1959	1,819	330	18.1
1959-1960	1,872	348	18.5
1960-1961	1,938	371	19.1

[1] U.S. Department of Labor, *Labor in Liberia* (May 1960), p. 6.

[2] Lipsky, G. A., *Ethiopia:* Its People, Its Society, Its Culture (1962), p. 274.

[3] Luther, E. W., *Ethiopia Today* (1958), p. 118.

[4] Kimble, G. H. T., *Tropical Africa*, Vol. I (1960), p. 600.

[5] Steenkamp, W. F. J., "Bantu Wages in South Africa", *The South African Journal of Economics*, Vol. 30, No. 2 (June 1962), pp. 93-118, at p. 96.

Commenting on the above statistics, Professor W. F. J. Steenkamp, from whose work the said table has been extracted, states as follows:

> "A comparison of the South African and European wage differential does not, in itself, show that local unskilled labour is, economically speaking, being grossly underpaid. If that were so, one would be justified in concluding that unskilled labour was being exploited in *most dual economies, for large skill differentials are a feature of these societies. Demand and supply conditions in the labour markets of the developed and underdeveloped economies differ so greatly as to invalidate comparisons of this nature* [1]." (Italics added.)

Although the differential figures in the above table on the whole cover a later period than those dealt with in the tables cited in the aforegoing paragraphs relative to other African territories, they do, in Respondent's submission, show that the position in South Africa compares favourably with that prevailing in the said territories and, inasmuch as the differential pattern in South West Africa cannot vary much from that of South Africa, the conclusion also applies for South West Africa.

58. A factor having an important bearing on the wage structure in South West Africa, is that alternative opportunities are open to European employees in the Republic of South Africa and elsewhere. This means that the Territory can only attract and retain a skilled and experienced European manpower by offering it a rate of earnings at least equal to, or greater than, that obtainable outside the Territory. On the other hand, this factor does not influence the general wage level of the Native workers, the large majority of whom are unskilled. This phenomenon is encountered in practically all the countries on the African Continent where European employees fill the higher and more skilled posts, while the indigenous people are largely unskilled workers.

59. The importance of offering a competitive remuneration in order to attract and retain skilled and experienced personnel, is emphasized in the following statement in a report of an Economic Survey Mission of the International Bank for Reconstruction and Development of Tanganyika, with regard to expatriate officials:

> "While expatriate officials are currently *well paid by local African standards*, their remuneration does not compare favorably with their market value in their own and many other countries. The Mission encountered various cases where the present salary scale in the territory appeared insufficient to attract qualified people and where, in other words, a greater salary differential is perhaps called for [2]." (Italics added.)

This phenomenon of paying relatively much higher wages to skilled and experienced expatriates than the wages paid to the indigenous people, has been noticed also in the other African territories to which reference has been made above [3].

60. In the premises aforestated, Respondent submits that, if Appli-

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[1] Steenkamp, *op. cit.*, p. 100.

[2] *The Economic Development of Tanganyika* (1961), p. 347—Similar statements are made in reports of the International Bank for Reconstruction and Development Missions to Kenya (*The Economic Development of Kenya*, 1963, pp. 37 and 47) and to Uganda (*The Economic Development of Uganda*, 1962, pp. 23-24 and 38).

[3] *Vide* paras. 54 and 55, *supra*.

cants' complaint regarding alleged low wages of the Native labourers of South West Africa is based upon a comparison between the general wage level of European employees of the Territory and that of the Native employees, then the comparison is meaningless, and the complaint unfounded. Not only is the differential wage structure that does exist inevitable in the economic circumstances of the Territory, as it also is in other countries with comparable conditions, but the differential appears, in fact, to be less in degree than in those territories in Africa in respect of which available statistics have been quoted above.

61. It will be convenient to deal in this context also with certain further accusations made by Applicants which are allied to their charges concerning alleged "low-cost labour" and "low wages".

In the Reply [1] Applicants quote an extract from a newspaper, the *Windhoek Advertiser*, in which the former Administrator of the Territory, Mr. D. du P. Viljoen, was reported to have made a plea to employers of labour in South West Africa to "do with as little non-European labour as possible. We must create a surplus of labour".

Applicants say with reference to this reported statement that Respondent "has not concealed the racially discriminatory motivation of economic *apartheid*" [1], thereby apparently contending that it is Respondent's policy to create a surplus of non-European labour in the Territory, with the implication that Respondent fosters the creation of a low wage level for non-European employees.

Applicants' contention, and the implication arising therefrom, are unfounded. With regard to the statement of the Administrator, Respondent states that the newspaper report related to a speech made by Mr. Viljoen at a social function at Walvis Bay during January 1960 in which he referred, *inter alia*, to labour conditions. When the newspaper report was brought to the notice of Mr. Viljoen, he stated that his speech was neither fully nor correctly rendered in the report. Indeed, if Mr. Viljoen had made the statement attributed to him, it would have been in direct conflict with the policy of, and pronouncements made by, Respondent regarding this self same issue. It has never been Respondent's policy to create a surplus of labour, or to reduce, or peg, the wages of Natives or other non-Europeans in the manner suggested by Applicants, or otherwise. On the contrary, Respondent's whole system of control of Native labour is designed, *inter alia*, to protect the Native population in the developed areas. If Respondent's existing control measures were to be abandoned, an influx of Natives to the urban areas would bring about a surplus of labour, and consequently a lowering of wages. And the very fact that a minimum wage is laid down for northern and extra-territorial Natives who enter the Police Zone to take up employment therein [2], dispels any suggestion of a desire to create a situation of "cheap labour".

62. In support of its denial of Applicants' allegations in this regard, Respondent quotes the following extracts from statements regarding labour policy made by the South African Prime Minister, Dr. Verwoerd, both before and after the occasion of Mr. Viljoen's speech in January 1960.

At the opening, on 17 December 1956, of the Fifth Annual Congress

[1] IV, p. 410.
[2] *Vide* para. 45, *supra*.

of the Administrators of non-European Affairs in Southern Africa, Dr. Verwoerd, then Minister of Native Affairs, said, *inter alia*:

> "In the long run it is perhaps the Native who will be the biggest victim of the selfishness of the European if he allows uncontrolled influx, because when excessive numbers of Natives are present then the consequences are low wages, inferior housing and vagrancy and from the vagrancy arise crime, poverty, distress, and the disintegration of family life. These are social evils which we must avert, *inter alia*, by seeing that unlimited, uncontrolled influx does not take place . . .
>
> In other words, uncontrolled influx merely to create an unnecessarily large pool of labour, in spite of the damaging effect on the Native and in the European community and notwithstanding the heavier burden of providing housing and finding land for locations which it brings about, is altogether wrong. Influx control which is sometimes represented as merciless in its operation, is in reality merciful and sensible as regards both European and non-European[1]."

And, as Prime Minister, Dr. Verwoerd said the following in the South African Parliament on 9 March 1960:

> "Influx control ensures that there will be no redundant pool of labour in the cities with consequential unemployment and low wages. Steps are being taken by means of influx control to see that the amount of labour while sufficient is sufficiently limited so that there can be competition for that labour, competition which is basic to the building up of any wage structure [2]."

Although the above statements relate more specifically to conditions and policy in South Africa, they are basically applicable also to South West Africa.

63. Another accusation made by Applicants relative to the cost of labour is the following:

> "The predilection of employers for low-cost labour, coupled with Respondent's concern that no 'European' person be placed in the position of 'serving under the authority of a Native' . . . assures that the horizon of 'Native' economic potential remains confined to the semi-skilled level [3]."

Here again is a case where Applicants utilize a wrong premise for the formulation of a charge which is baseless.

As Respondent has indicated [4], the wage-levels of the Native workers in the Territory are in fact not low by any comparable standards, and nothing is advanced by Applicants in support of their statement that there is a "predilection" on the part of employers for "low-cost labour" which, if intended to mean that employers in the Territory are generally not prepared to pay their workmen a reasonable wage, is wholly un-

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[1] *Local Authorities and The State*, Opening Speech delivered by the Hon. Dr. H. F. Verwoerd, Minister of Native Affairs, at the Fifth Annual Congress of the Administrators of Non-European Affairs in Southern Africa on 17 September, 1956 (1957), pp. 10-12.

[2] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 104 (1960), Col. 2996.

[3] **IV**, p. 408.

[4] *Vide* paras. 50-51, *supra*.

founded. On the contrary, as Respondent has indicated [1], many employers pay their workmen well above the stipulated minimum wage, and thereby a tendency is created for wages generally to rise above the minimum.

64. Likewise, when speaking of "Respondent's concern that no 'European' person be placed in the position of 'serving under the authority of a Native' ", Applicants make use of part of an explanation given by Respondent relative to certain provisions in the mining regulations of the Territory [2] in such a manner that it creates a wrong impression.

Respondent's explanation of the said measures was, *inter alia*, that, due to the traditional position of the European group vis-à-vis the Native groups in the economic field, "most Europeans would refuse to serve in positions where Natives might be placed in authority over them" [3], and that, accordingly, "[a] major and harmful degree of tension and friction could result from situations in which European employees in the mining industry could be placed by their employers before the choice of either serving under the authority of a Native or relinquishing their employment" [4].

It is not so much a case, as Applicants suggest, "of concern on the part of Respondent that a Native should be placed in a position of authority over a European", but rather a case of being concerned about the consequences of such an act in the situation which obtains in the Territory.

65. Finally, it may be observed that Applicants fail to indicate how the factors mentioned by them do, or could in any way, "assure" that "the horizon of 'Native' economic potential remains confined to the semi-skilled level"—which, as a factual statement, is in itself untrue.

Respondent has already indicated [5] that many Natives are employed in higher and skilled occupations in agriculture, in industry, in commerce and in the general administration of the Territory.

The fact that the majority of the Native workers of the Territory are still employed as unskilled or semi-skilled workers, cannot be attributed either to the aforementioned regulations, or to the wages which are paid to Native employees. It is, as Respondent has already stated [5], due to the fact that, inasmuch as the Natives generally are still on a path of transition from a traditional economic and social system to a modern one, the majority of them have not yet attained the skill or experience to hold higher and skilled posts.

The position which the majority of Natives occupy in the economy of South West Africa can no more be ascribed to the level of wages paid in the Territory than the labour position which obtains in the Applicant States can be ascribed to the wage levels in those countries [6].

With regard to the position in Ethiopia the following is stated in a publication of the United States Department of Commerce:

> "The labor force employed for wages is not known, but it is a small minority of the total working population. The unskilled labor force is virtually entirely Ethiopian. Much skilled labor is still non-

[1] *Vide* para. 46, *supra*.
[2] As to which *vide* III, pp. 55-56 and paras. 76-77, *infra*.
[3] III, p. 55.
[4] *Ibid.*, p. 56.
[5] *Vide* para. 6, *supra*.
[6] *Vide* in this regard para. 50, *supra*.

Ethiopian, but increasing numbers of Ethiopians are entering the skilled category as competence is acquired through education and on-the-job training [1]."

Another authority has described the labour position in this country as follows:

"One of the basic handicaps of industrial development is the shortage of skilled labor . . . Virtually the entire unskilled labor force is Ethiopian [2]".

The position obtaining in Liberia is very much the same. Thus, in another publication of the United States Department of Commerce, it is stated that—

"Liberian workers on the whole have had relatively little training in modern work methods and skills. Such training as they have received has come almost entirely from foreign employers and, to a lesser extent, from the Liberian Government . . . [3]"

And W. A. Hance wrote in 1958 that—

"[t]he shortcomings in quality of labor stem largely from the lack of training and educated Liberians . . . Almost the entire labor force is unskilled [4]."

66. Respondent, for the reasons aforestated, denies Applicants' allegations that wages paid to Native employees in the Territory are "low" or "extraordinarily low", or that the level of wages in the Territory "assures that the horizon of 'Native' economic potential remains confined to the semi-skilled level".

E. Rights of the Natives in Respect of the Acquisition and Occupation of Land

67. In this connection Applicants say:

"The relegation of 'Native' interests to a low priority occurred from the inception of the Mandate; it is apparent even from the manner in which Respondent describes certain historical situations, in its Counter-Memorial [5]."

Upon this statement there follow in the Reply four short passages extracted by Applicants from a part of the Counter-Memorial in which Respondent explained the policy which was applied from the inception of the Mandate in developing the agricultural potential of the Police Zone, and dealt with certain allegations made in the Memorials thereanent [6].

Applicants do not indicate in what respects the passages quoted by them are regarded as illustrating that there has been a "relegation of 'Native' interests to a low priority". However, from the fact that Applicants italicize certain words in the quoted passages, and from their remark that "the 'Natives' acknowledged as living on land . . . were not,

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[1] United States Department of Commerce, "Establishing a Business in Ethiopia", *World Trade Information Service—Economic Reports*, Part I, No. 59-16, p. 6.

[2] Lipsky, G.A., *Ethiopia*: Its People, Its Society, Its Culture (1962), p. 270.

[3] U.S. Dept. of Labor, *Labor in Liberia* (May 1960), p. 10.

[4] Hance, W.A., *African Economic Development* (1958), p. 238.

[5] IV, p. 410.

[6] III, pp. 10-38.

of course, in 'possession' thereof" [1], coupled with their submission that the said passages contain "mutually contradictory contentions" [2], Respondent understands the points sought to be made by Applicants to be the following:

(i) Whereas Respondent, on the one hand, averred that the Natives in the Police Zone were at the inception of the Mandate "to a considerable extent landless", and that Respondent had to create reserves to ensure possession of land by them, it stated, on the other hand, that when land was granted to European farmers, on which Natives were living at the time of the grant, such Natives had to remove from the land unless they were prepared to work for the farmers: Respondent's contentions were therefore "mutually contradictory".

(ii) Inasmuch as Natives who were living on land were thus forced off such land, unless they were prepared to take up employment with the farmers to whom the land had been granted, their interests were relegated to a "low priority".

Respondent states that both these conclusions, which can be reached only by contrasting, out of context, certain passages contained in the Counter-Memorial, are unsound. For a proper understanding of Respondent's contentions in question, regard must be had to the full context in which the said passages appear, in which an exposition was given of the situation in South West Africa at the inception of the Mandate, and in which the application and development of Respondent's policies relative to land tenure were described against the historical background.

68. Dealing first with Applicants' point that Respondent's contentions are "mutually contradictory", Respondent states that there is no contradiction between its statement that the Natives *in the Police Zone* were at the inception of the Mandate "to a considerable extent landless", and its further statement that in cases where land had been granted to European farmers on which there were Natives, such Natives were required to remove from the land unless they were prepared to work for the farmers. This will appear from the following brief restatement of the lengthier exposition given in the Counter-Memorial.

The limited extent to which the Native groups in the Police Zone were at the inception of the Mandate settled in defined areas of land to which their rights of occupation were recognized under the German regime, is described in the Counter-Memorial [3]. For the rest there had, as a result of the wars during the German regime, been a considerable confiscation of tribal lands by the German authorities [4]. As a result thereof, and also as a result of the severe conflicts which had taken place between the Native groups themselves, mainly due to conflicting claims to land, the Natives in the Police Zone, which had a low density of population, were at the inception of the Mandate largely detribalized persons scattered all over that Zone, in many cases separated from their clans and families [5], and without any recognized occupational rights to land. Many simply squatted on land which had not been occupied by them prior to the inception of

[1] IV, p. 410, footnote 3.
[2] *Ibid.*, p. 410.
[3] III, pp. 239-240.
[4] *Ibid.*, p. 239.
[5] II, p. 408 and III, p. 239.

the Mandate, and a large number were vagrants who moved from place to place.

It was in describing this situation that Respondent stated that the Natives of the Police Zone were "to a considerable extent landless", which in the context does not stand in contradiction to the other fact stated by Respondent, viz., that these Natives were in fact living on, or roaming over, land in the Police Zone.

69. With regard to the second point sought to be made by Applicants, viz., "the relegation of 'Native' interests to a low priority", Respondent explained fully in the Counter-Memorial the basic considerations of its reserve policy, in implementation of which it from time to time established new reserves for the Natives in the Police Zone and extended them over the years [1].

All these considerations had at heart the interests of the Native groups, who, through the creation of reserves, were provided with defined portions of land in which their rights of occupation were recognized and could not be disputed by others who originally made conflicting claims. The land was protected for them by prohibition against alienation thereof, and provided a basis for their advancement in a manner and at a pace appropriate to their circumstances.

At the same time, however, Respondent had to develop the agricultural potential of the Territory, and the most practical way in which this could be done was by encouraging European settlement of parts of the Police Zone that had not been reserved to the Natives as aforementioned [2].

In the process of settling European farmers on the land it was unavoidable that in those cases where Natives were present on farms granted to European settlers they should be required to remove therefrom and settle in the reserves created for them, or elsewhere—unless they elected to remain on the farms as employees of the farmers.

Looking at the situation as a whole, the requirement that Natives should in such circumstances remove from land and take up residence elsewhere, cannot, in Respondent's submission, be described as a "relegation of 'Native' interests to a low priority". In its entirety Respondent's policy made provision, by the establishment of reserves, for Natives who had to depart from land upon which they might, at the time of the grant thereof, have been living, but to which they had no recognized right of occupation.

Without such an arrangement economic development of the Territory would have been stultified, to the detriment of all the inhabitants, including the Natives.

70. *In support of a contention that also other* "mutually contradictory contentions of Respondent underscore its preoccupation with 'European' interests and its abdication of responsibilities with respect to 'Native' interests" [3], Applicants quote certain passages from the Counter-Memorial in which Respondent dealt with individual land tenure in the urban areas of the Police Zone.

By quoting these passages, Applicants seek to bring in contrast, as contradictory contentions, Respondent's statement, on the one hand,

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[1] III, pp. 241-252.
[2] II, pp. 409-410 and III, pp. 10-21.
[3] IV, p. 410.

that, although it has always been open to Natives to purchase land in the rural areas of the Police Zone, they have not done so or shown any interest in the possibility, with, on the other hand, the following statement relative to leases under Respondent's land settlement scheme, viz.:

> "The condition regarding miscegenation in the probationary lease cannot by itself be relevant to 'well-being, social progress and development in agriculture', except to the extent that it indicates a contemplation that *such leases would . . . be granted to Europeans only. That this has indeed been the contemplation, is admitted.* When Respondent deems the Native population ripe for individual land settlement, provision can be made therefor [1]." (Italics added by Applicants.)

Here, too, there is no contradiction. The fact that it was Respondent's purpose that the leases under the said scheme were to be granted to Europeans only, is not in conflict with Respondent's statement that no Native has ever, despite the absence of any legal impediment in that regard, purchased land in the Police Zone. The reason why the leases in question were intended only for European farmers was that the Coloured and Native persons were regarded by Respondent as on the whole not sufficiently advanced to meet the requirements of modern farming practices in the Territory [2]. In their case other provision was made, in the form of reserves, to meet their needs as these increased from time to time [3]. The fact remains, however, that most of the farms in South West Africa are already held in individual ownership without any restriction regarding alienation thereof, and while farms change hands from day to day, no Native has as yet purchased a farm.

71. In this connection Applicants say:

> "It is not surprising that no 'Native' has ever purchased land. '[A]ssistance under the land settlement laws had not been requested by, or granted to, Natives' [4]."

Respondent explained in the Counter-Memorial why its land settlement scheme has up to the present been applied only with respect to European farmers, by referring to—

> "[t]he difficulty of developing land in the Territory, the necessity for applying modern scientific methods of farming, soil conservation and water utilisation, and generally the complexity of agriculture and marketing in the adverse conditions existing in South West Africa [5]",

and by stating that the Natives generally have not yet reached the stage of development where, under the circumstances aforementioned, they would benefit from individual land ownership [5]. Inasmuch as Applicants fail to deal at all with Respondent's reasoning in this regard, it is considered unnecessary to take the matter further, save to deny Applicants' charge that there is in this connection a "preoccupation with 'European' interests" or "an abdication of responsibilities with respect to 'Native' interests".

[1] IV, p. 411. *Vide* also in this regard the allegations at p. 415.
[2] III, p. 33 and *vide* Chap. III, para. 25, *infra*.
[3] *Ibid.*, p. 31.
[4] IV, p. 411. The portion in single quotation marks is cited from III, p. 26.
[5] III, p. 33.

While Respondent has, on the one hand, granted assistance to European farmers, it has, on the other, also assisted the Natives by establishing and enlarging the Native reserves [1], and by contributing to the agricultural development thereof [2]. The form of assistance granted to each of the groups was, in Respondent's submission, appropriate to the circumstances of that group.

72. Applicants conclude their comments relative to Respondent's land settlement scheme with the following remark:

> "Furthermore, any such purchase [of land] would give to a 'Native' precarious tenure, inasmuch as he could at any time be moved from his land 'to any other place within the mandated Territory' by a government in which he is not represented [3]."

This remark is made with reference to section 1 of the *Native Administration Proclamation No. 15 of 1928* [4], which, *inter alia*, empowers the State President, "whenever he deems it expedient *in the general public interest*, [to] order the removal of any tribe or portion thereof or any Native from any place to any other place within the mandated Territory". (Italics added.)

Respondent explained fully in the Counter-Memorial the necessity for vesting the State President with powers of this nature [5], and mentioned the few occasions on which the said powers had been exercised, on each occasion to protect the public interest [6].

Applicants have not dealt at all with Respondent's arguments or with the facts adduced by it in this connection; instead they simply refer in a footnote [4] in the Reply to what they term a "survey of a number of such removals in the past". This reference is to a 1957 report of the Committee on South West Africa which dealt, *inter alia*, with newspaper reports and petitions received by it relative to (i) the voluntary removal of certain Natives from the Aukeigas Reserve to other and larger areas added to a proclaimed reserve for them [7]; (ii) a proposal to add a certain portion of land called the Corridor to the Aminuis Reserve in exchange for two inferior portions of the said reserve, and (iii) the proposed removal from a farm Hoachanas of certain Natives who were unlawfully resident thereon [8]. In fact none of the said matters was dealt with under the proclamation referred to by Applicants.

Respondent finds it strange that Applicants should refer to the so-called "survey" when Respondent had dealt fully with the above matters in the Counter-Memorial [9] and had given a detailed explanation

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[1] **III**, pp. 249-250. *Vide* also Chap. III, paras. 26-29, *infra*, regarding the recommendations of the Odendaal Commission for the further extension of the Native areas and the constitution of homelands for the various groups.

[2] *Ibid.*, pp. 6-8 and 17-18.

[3] **IV**, p. 411.

[4] *Ibid.*, footnote 4.

[5] **III**, p. 268 *et seq.*

[6] *Ibid.*, pp. 270-271.

[7] *Vide R.P.* No. 12/1964, p. 69 (para. 250).

[8] The report of the Committee also made mention of an exchange of a portion of land in the Eastern Reserve for land added to the Waterberg-East Reserve (*G.A., O.R., 12th Sess., Suppl.* No. 12 (A/3626), p. 16, para. 79). This exchange did not, however, involve any removal of Natives.

[9] With regard to Aukeigas, *vide* **III**, p. 130. With regard to the proposed addition to the Aminuis Reserve, **IV**, pp. 3-5. With regard to Hoachanas, **IV**, pp. 6-9.

which Applicants have not controverted or even mentioned in the Reply.

Applicants' contention that the existence of such powers as are vested in the State President by the Proclamation in question renders individual land tenure precarious for a Native, is so preposterous that it merits no consideration. One could equally say that the existence in the Territory, as in most countries of the world, of legislation which permits of land being expropriated by the State for public purposes renders land tenure precarious for everyone—European, Coloured and Native [1].

F. The Position of the Natives in the Mining Industry

73. With regard to the role of the Natives in the mining industry, Applicants say:

> "Respondent's assumption of inevitability of permanent maintenance of the *status quo* has led to deprivation of opportunity and incentive which helps in turn to assure the continuance of the *status quo* [2]."

In this connection they quote in contrast two passages from the Counter-Memorial [2]. In the first passage Respondent pointed out that, despite the fact that prospecting and mining in the Native reserves have for all intents and purposes been reserved for the Natives, they have thus far generally shown a lack of interest in mining activities. And in the second passage Respondent explained that, because of certain inherent difficulties in the conduct of mining operations in the Territory, such operations have to be on a large scale, requiring the employment of qualified and experienced technical personnel and substantial capital funds. In illustration of the latter statement Respondent pointed to the fact that as much as 96 per cent. of the mining output in South West Africa is controlled by two companies.

Respondent does not appreciate how, in the circumstances as above described, Applicants can speak of a "deprivation of opportunity and incentive", or of an "assumption [on the part of Respondent] of permanent maintenance of the *status quo*".

Far from there being a deprivation of opportunity and incentive, the position is just the opposite, inasmuch as opportunities for the Natives to prospect and mine in their own areas have been specially reserved for them [3]. The fact that the Natives have thus far generally shown a lack of interest in mining activities, save in participating as employed mine workers, is in no way due to any deprivation of opportunities but, as Respondent explained [4], to their stage of development, their background and traditional subsistence economy. And, as Respondent pointed out by reference to a United Nations publication, the position of the Natives in the mining industry in South West Africa is very much the same as that found elsewhere in Africa [4].

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[1] *Vide* in this regard the recommendations of the Odendaal Commission concerning the acquisition of certain European farms in its proposals for the establishment and extension of homelands for the various groups. *R.P.* No. 12/1964, pp. 87, 89-93, 95, 101 and 103; **IV**, p. 210.

[2] **IV**, p. 411.

[3] **III**, pp. 50-51.

[4] *Ibid.*, p. 56.

In the circumstances it is indeed strange that, while Applicants singularly fail to deal with the facts related and arguments advanced in the Counter-Memorial, they make a bald accusation in the Reply of a "deprivation of opportunity and incentive" without adducing *any* facts or argument in support thereof.

74. Equally unfounded is Applicants' charge regarding an "assumption [on the part of Respondent] of inevitability of permanent maintenance of the *status quo*", a charge which totally ignores the factual material presented in the Counter-Memorial.

While Respondent did state that at the present stage of development 96 per cent. of the mining output in the Territory is controlled by two companies—a state of affairs which was explained with reference to factors necessitating large-scale operations—it also mentioned future developments which it had in mind, particularly in so far as the Native inhabitants were concerned. Thus Respondent dealt with the reasons for the appointment of the Odendaal Commission, its composition and its terms of reference, which included the task of investigating and ascertaining how further provision should be made, *inter alia*, for the development of mining in the Native areas [1].

In its report the Commission gave a complete survey of mining activities in the Territory [2], and made extensive recommendations regarding the exploration and mapping of the Territory, and the exploitation of its mineral resources. Included in the said recommendations are the following with regard to prospecting and mining in the Native areas:

"*(f)* mineral rights, including mining rights, [to] be held in *trust* for the various homeland authorities and be transferred to them as soon as practicable; it is also important that the inhabitants of the Homelands should be encouraged and assisted to become *entrepreneurs* in their own areas, as well as managers and responsible officers in their own mining. The inhabitants should be encouraged as far as possible to take an active part in the economic development of their Homeland;

(g) under the guidance of the Division of Geological Survey of the Department of Mines and the Department of Bantu Administration and Development, those interested in the various Homelands be acquainted with characteristic properties of some important minerals so as to stimulate the interest of the inhabitants and encourage their participation in prospecting for mineral occurrences. In mining itself, too, the inhabitants of the various Homelands must as far as possible be encouraged and trained to occupy the most responsible posts [3]."

Although, for reasons which have been stated [4], Respondent has deferred its decisions on the Commission's recommendations relative to the constitution of homelands for the various population groups, it considered that the exploration and development of the mineral resources of the Territory were matters which required immediate attention, and announced that it had been decided "*(a)* to organize the exploration and

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[1] II, p. 476 and III, p. 56.
[2] *R.P.* No. 12/1964, pp. 335-343.
[3] IV, p. 457.
[4] *Ibid.*, pp. 212-216.

mapping of the whole Territory" and "*(b)* to assist and encourage the inhabitants of the non-White areas in prospecting and exploiting the mineral occurrences in such areas" [1].

75. In this connection it may be stated that large-scale mapping and exploration work is already under way, and prospecting operations are expected to follow soon after the preliminary work has been completed. It may also be stated that, in accordance with decided policy, the assistance to be given to Natives in connection with prospecting and mining in their areas will be of such a nature that the Natives will as far as possible be drawn into mining enterprises in such areas, not only as employees who may aspire to and occupy all posts to which they merit appointment, but also as entrepreneurs. Although developments in this direction will take some time and cannot be unduly rushed, Respondent hopes that, with due encouragement and appropriate assistance, Natives will before long become established in their own mining enterprises. In this connection Respondent points out that in addition to the instances mentioned in the Counter-Memorial of Natives and Coloured people already engaged in prospecting and mining operations of their own [2], a resident of the Kaokoveld, one Willem Hartley, is at present carrying on mining operations on a Sodalite deposit in the Kaokoveld [3].

In the premises, it is hardly necessary to say that Applicants' accusation regarding an assumption on the part of Respondent of "permanent maintenance of the *status quo*" is without substance, and is denied.

76. With regard to the mining regulations at present in force in the Territory [4], Applicants allude to concessions which Respondent is alleged to have made in the Counter-Memorial. Thus they say that Respondent conceded "that only 'Europeans' may be employed in levels above common labour in mining enterprises 'owned by a European' "[5]. This version of what was stated in the Counter-Memorial is entirely wrong. What Respondent did say was that in terms of the mining regulations certain specified posts in mines belonging to Europeans may not be occupied by Natives [6]. Respondent, however, went on to say that the role of the Natives in the mining industry is not confined to that of unskilled labourers, and listed a number of skilled occupations in which Natives are employed in European mining enterprises [7].

77. Applicants in the Reply repeatedly refer to what they term the "discriminatory provisions of the Mining Regulations" [8], Respondent must consequently point out again that when, by reason of the overriding advantages dealt with in the discussion of general principles earlier in this Rejoinder [9], a policy of separate development is decided upon in preference to attempted integration, the drawing of boundary lines becomes

[1] **IV**, p. 207.
[2] **III**, p. 61.
[3] Departmental information.
[4] *G.N.* No. 33 of 1956 in *The Laws of South West Africa 1956*, Vol. XXXV (II), pp. 499-723.
[5] **IV**, p. 405.
[6] **III**, p. 55.
[7] *Ibid.*, p. 56.
[8] These regulations, or their alleged effect, are referred to in the section of the Reply, dealing with the economic aspect at **IV**, pp. 405, 411 and 420.
[9] *Vide* sec. E, *supra*.

indispensable. And these boundaries are required not only in the political and territorial sense, but also, particularly in the transitional stages, in the economic sphere. If this is not done, and attempts were made at creating economic integration, the resultant tensions, reactions and struggles would render impossible progress towards the goal of separate development, viz., the peaceful co-existence of separate population groups. In the circumstances all measures at present having an adverse effect on some must be judged against the advantages envisaged for all in the application of the policy of separate development. In the light of the foregoing, Respondent proposes to elucidate in more detail than before the practical effect which the said mining regulations have in respect of Native mine employees, in so far as they may not in terms of the regulations be appointed to certain posts in mining enterprises belonging to Europeans.

The posts which Natives may not be appointed to in such enterprises are the following: Manager; Assistant, sectional, or underground manager; Mine overseer; Shift boss; Ganger; Engineer; Person in charge of boilers, engines and machinery; Surveyor; Winding engine driver; Banksman or onsetter [1].

At present the following numbers of persons of all groups are employed in the mining industry in the Territory:

Europeans	2,143
Coloureds	162
Natives	8,344
Total	10,649 [2]

In the whole of the mining industry there exist at present 190 posts which, in terms of the aforementioned regulations, may not be filled by Natives. This number is made up as follows:

Designation of Post	*Number of Posts*
Manager	6
Assistant, sectional or underground manager	4
Mine overseer	6
Shift boss	22
Ganger	104
Winding engine driver	20
Banksman and onsetter	28
	190 [3]

If, therefore, despite what is stated hereinafter relative to the qualifications and ability of Native mine employees generally, the assumption is made that there is a sufficient number of Natives competent to fill all the said 190 posts, then the regulations in question would at present prejudicially affect only 190 Natives, i.e., slightly more than 2 per cent. of the Native employees in the industry.

[1] III, p. 55. The two last-mentioned posts were inadvertently omitted from the list in the Counter-Memorial. *Vide* in this regard *G.N.* No. 33 of 1956, secs. 66 (2) and 71 (1), in *The Laws of South West Africa 1956*, Vol. XXXV (II), pp. 561, 563 and 569.

[2] Departmental information.

[3] *Ibid.* The said number does not include those posts in respect of which exemption has been granted from the provisions of the regulations as mentioned in para. 79, *infra*.

78. The fact is, however, that, save perhaps for a very few, the Natives employed in mining are as yet not qualified or competent to fill any of the said posts, and the few that constitute the exception could at best only aspire to the lower levels of such posts.

Enquiries made in this regard from the five largest mining concerns in the Territory, all of which are companies, are revealing. Three of the said companies intimated that the regulations do not prejudicially affect their non-White employees in that none of them would be competent to fill any of the posts from which they are excluded under the regulations. The fourth company took the position that it was quite impossible to estimate how many of its non-White employees might be eligible for any of the said posts, as no steps had been taken to classify them or train them for promotion to such posts. The fifth company replied that only one of its non-White employees might qualify for promotion to some of the said posts, but that he was holding a clerical post [1].

79. Finally, Respondent points out that, in terms of the regulations, exemption may in suitable cases be granted from the provisions which exclude non-White persons from the aforementioned posts in European mines. In this regard Regulation 167 provides as follows:

> "Whenever the circumstances at any mine or works are such as to render any provision of these regulations inapplicable or unduly onerous . . . the Inspector [of Mines] may grant exemption from such provision under such conditions as he may determine [2]".

Since 1962 five non-White mine employees have in terms of this provision been granted exemption in particular circumstances to enable them to occupy positions in mines owned by Europeans, which positions would otherwise have been closed to them.

In the premises aforestated, Respondent submits that Applicants grossly exaggerate the effect which the said regulations have on the Natives employed in the mining industry.

Respondent stresses again that the adverse effect which such regulations have at the present time must be weighed against the greater over-all advantages—for all inhabitants of the Territory—of a policy of separate development as compared with attempted integration of all the population groups. Seen in this light, it is submitted that the limited adverse effect of the said regulations is of little consequence in the total picture.

80. Applicants also question a further statement made by Respondent relative to the aforementioned provisions of the mining regulations, viz., the statement that such provisions are considered desirable in the present phase of transition through which the Natives are passing towards separate self-realization, and "are destined to fall away when developments in the latter respect remove the reason for them" [3]. They say in this regard—

> "[t]he implication is either that the 'Natives' will develop their own comparable mining enterprises or that they will, in any event, eventually be discharged from employment in the Police Zone mines. The first alternative is strikingly improbable, if only in view of the

[1] Departmental information.

[2] *G.N.* No. 33 of 1956, sec. 167 in *The Laws of South West Africa 1956*, Vol. XXXV (II), pp. 655-657.

[3] III, p. 56.

quotations set forth hereinabove; the second alternative would lead to the labour surplus desired by the Administrator, but to neither the material well-being nor the social progress of the 'Natives' [1]." (Footnotes omitted.)

Inasmuch as Respondent was specific in stating its contentions and expectations with regard to the future economic development of the Native areas, including the development therein of the mining industry, there was no need for Applicants to speculate on possible implications. Thus Respondent, after referring to the preference, encouragement and protection consistently given to members of the Native groups in their own areas [2], and after drawing attention to the task entrusted to the Odendaal Commission with regard to the development of mining in the Native areas [2], expressed the hope "that the Natives will in time show increased interest in the mining industry, and establish mining enterprises which will accommodate such Natives as aspire to the technical and higher posts in the industry" [2].

Respondent's attitude was therefore made clear, and, as indicated above [3], its views and expectations have been reaffirmed by the recommendations of the Odendaal Commission regarding encouragement and assistance to be given to the Natives in the development of mining enterprises in their own areas [4].

81. Although, as Respondent stated in the quotations cited by Applicants [5], the Natives have thus far generally shown a lack of interest in mining activities otherwise than as employees, and that in the circumstances of the Territory mining operations must, to be successful, generally be conducted on a large scale [5], which quotations Applicants now rely on for their statement that the "first alternative is strikingly improbable", there is, in Respondent's opinion, no reason why the Native inhabitants, or at least some of them, should not, with due encouragement and appropriate assistance, in time show sufficient interest in establishing their own mining enterprises. Respondent realizes, however, that progress and development in this regard may take time. Nevertheless it is Respondent's expectation that more and more Natives will gradually be offered employment in their own areas, resulting in a corresponding withdrawal of Native workers from the existing mines operated by Europeans, which must be expected to come to the end of production in the not too distant future [6].

There will in any event not be occasion for the drastic step referred to by Applicants as an alternative, viz., that the Natives at present employed in European mines "will . . . eventually be discharged from employment in the Police Zone" [1]—unless, of course, this may be occasioned by unavoidable circumstances such as the closing of a mine when it has reached the end of production, or for other economic reasons. Applicants' suggestion of a possibility that the Natives may eventually be discharged from employment in the Police Zone because of a desire for surplus

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[1] **IV**, p. 412.
[2] **III**, p. 57.
[3] *Vide* para. 74, *supra*.
[4] *Ibid. Vide* also Respondent's reaction as there set out.
[5] *Vide* **IV**, p. 411.
[6] *Vide R.P.* No. 12/1964, p. 333 (para. 1312 (v) *b*).

labour, does not merit further consideration inasmuch as Respondent has already explained[1] that it is not its policy to create a situation in which there will be a surplus of labour.

82. Applicants also state in this regard:

> "In fact, the actual result will be that the 'Native' labour forces will continue to man the mines, under the same 'unpopular control measures', for many years into the foreseeable future. These measures, although allegedly 'destined to fall away', have an indeterminate future, as they have had a long history [2]."

In support of the view thus expressed, Applicants rely on a statement made by the South African representative in a letter to the Permanent Mandates Commission in 1928, when he explained that Natives were not employed by the Administration or by the Railway Department in certain posts involving the risk of human life, because of their then low state of development, but that that practice was a temporary one which would come to an end when the Natives were sufficiently advanced to undertake such responsible work.

The point which Applicants apparently seek to make with reference to this statement is that, although many years have elapsed since the statement was made, Natives have not yet been allowed to undertake such responsible work. If this is their point, then Applicants have completely disregarded the factual information presented in the Counter-Memorial relative to the ever-increasing number of higher and skilled posts which are being filled by Natives in employment on the railways [3], and in the service of the Administration [4], as well as the reasons advanced by Respondent why in the process of separate development, Natives are not appointed to certain higher posts in the Railway Administration except where they serve their own people [5].

The South African representative, when giving the aforementioned explanation to the Permanent Mandates Commission in 1928, could, of course, not have foreseen the exact form which future developments would take in the application of the policy which has become known as "separate development", in accordance with which self-realization of the different population groups is sought to be attained by territorial separation, with protective measures for each group in its own area.

83. With progress in the implementation of the policy of separate development, and increase in the tempo of development, more and more opportunities will be created for the Natives in their own areas, and this, as Respondent had indicated [6], is expected to be the position also in the mining industry.

Although it may be true that Natives will for many years still be employed in European mining enterprises outside their own homelands, where they will be subject to control measures, the effect of such measures on their opportunities of employment—which, as Respondent has indicated, is in any event minor [7]—will automatically be reduced further

[1] *Vide* paras. 61-62, *supra*.
[2] IV, p. 412.
[3] III, p. 67.
[4] *Ibid.*, pp. 149-155.
[5] *Ibid.*, pp. 67-68.
[6] *Vide* paras. 74 and 75, *supra*.
[7] *Vide* paras. 77-78, *supra*.

as alternative opportunities become open to them in mining and other enterprises in their own areas. Moreover, developments along these lines are bound to reduce and remove situations in which members of one population group can feel themselves threatened with political, economic and cultural domination by others. And, as has been indicated in the treatment of the general principles of Respondent's policies, this factor must necessarily, in the long run, tend towards mutual agreement, by all concerned, upon removal of irksome controls, or their reduction to bare necessities. Exactly how long this will take, will depend to a very large extent on the capacity shown by the more talented members of the non-White population groups to grasp the opportunities for self-realization offered to them and their peoples by the policy of separate development, particularly in the phase of accelerated advancement in pursuance of the Odendaal Commission report.

G. The Opportunities of Employment for Natives in the Railways and Harbours Administration

84. In the Counter-Memorial Respondent described the progress which the Bantu people in South Africa had made in qualifying themselves for appointment to skilled and responsible positions in the Railways and Harbours Administration in which they serve their own people. In that regard Respondent stated further:

> "As the Natives become better qualified, educationally and technically, they will be able to perform more and more services for themselves, and it is hoped that they will eventually be able to occupy the highest posts in their own areas [1]."

Respondent also explained that in South West Africa the Native popu lation had not yet reached the same level of development as the Bantu population of South Africa, but that they had nevertheless made progress, and that a number of posts falling within the category of "better class work" [1] were open to them in the Railways and Harbours Administration.

Applicants' response to these statements is the following:

> "... any prospect for the disappearance of the policy of racial discrimination applied in the Railways and Harbours Administration, by 'Natives' becoming 'eventually ... able to occupy the highest posts in their own areas', will be confined for at least fifteen years to the stretch of approximately twenty miles of main railway line, from Keetmanshoop to Windhoek, which passes through the Berseba-Tses Reserve [2]". (Footnotes omitted.)

The basis stated by Applicants for their line of reasoning in the above statement, is that the Odendaal Commission mentioned in its report that "no railway expansion in South West Africa is contemplated for the near future", and that none of the Five-Year Development Plans put forward by the Commission "contemplate expansion" [3].

85. Applicants' description of the future opportunities of employment for Natives in the Railways and Harbours Administration in the Terri-

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[1] III, p. 68.
[2] IV, p. 412.
[3] *Ibid.*, footnote 7.

tory is, however, wrong in two major respects, both of which have an important bearing on the matter in issue.

In the first place, Applicants have, in order to draw the conclusion which they advance, and despite an apparently careful study on their part of the report of the Odendaal Commission, conveniently left out of account the fact that in addition to operating 1,453 miles of railway line in South West Africa [1], the Railways and Harbours Administration also operates a road motor transport service over a large network of routes in the Territory [2], totalling at present approximately 5,000 miles [3]. The latter service is utilized mainly by Natives, the number of passengers conveyed in 1959-1960 having been: Natives 77,621, and Europeans 39,840 [4].

Secondly, Applicants have, in predicting developments over the next 15 years, completely ignored the Commission's recommendations with regard to the extension of the existing Native areas and the constitution of homelands for the different population groups. It is of course true that Respondent has for the present deferred its decision on the Commission's recommendations regarding the constitution of homelands, but the reasons for such deferment can only be of temporary duration [5], and there is no justification for concluding that the homelands scheme will not come into operation well within the period of 15 years mentioned by Applicants, or that the existing Native areas will not, in any event, be extended within that period.

If consideration is given to both the factors which Applicants have ignored, the position, as indicated in the next succeeding paragraph, is at present, and will in future be, entirely different from that described by Applicants.

86. It is the policy of the Railways and Harbours Administration not to construct new railway lines unless there is justification on economic grounds for the introduction of a new service in an area not previously served by rail. Where a rail service cannot be justified, but public transport is nevertheless required, the Railways and Harbours Administration operates a road transport service until such time as a railway becomes an economically feasible proposition.

Although the Odendaal Commission stated in its report that no railway expansion in South West Africa is contemplated for the near future [2], there has over the last few years been a gradual expansion of the road motor service routes operated by the Railway Administration, and further extensions are expected, particularly in Ovamboland where large-scale development projects are under way.

If the recommendations of the Commission with regard to the constitution of Homelands for the different groups are to be accepted and implemented, the following stretches of the existing railways, and of the existing road transport routes operated by the Railway Administration, will pass through the homelands mentioned below:

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[1] *R.P.* No. 12/1964, p. 377 (para. 1373 2 *(a)* (i)).
[2] *Ibid.*, p. 381.
[3] Departmental information. *Vide* IV, pp. 213-216.
[4] Departmental information.
[5] IV, pp. 213-216.

(a) Proposed Namaland [1]

(i) existing railway line, 85 miles [2].

(ii) existing road transport routes, approximately 80 miles [3].

(b) Proposed Damaraland [4]

existing road transport routes, 337 miles [5].

(c) Proposed Ovamboland [6]

existing road transport routes, approximately 185 miles [7].

From the above information it is clear that, even without taking into account future extensions of either the present railway system or the present road transport service routes, there will be very much greater activity by the Railways and Harbours Administration in the Native areas than predicted by Applicants.

87. In so far as Applicants' allegations under consideration may have been intended as criticism to the effect that Respondent has been dilatory in its duties with regard to railway facilities in the Territory, or perhaps as criticism of the extent to which such facilities serve the interests of the Native inhabitants or provide opportunities of employment for them, Respondent draws attention to the comparative table of rail facilities given by the Odendaal Commission in respect of a large number of territories in Africa [8].

It will be noticed that the position in South West Africa compares very favourably with that of the other territories mentioned in the table, and particularly with the position in the Applicant States, in respect of which the following further information is here given.

According to a publication of the International Monetary Fund [9], Liberia has no state-operated railways. As at the beginning of 1963, there was only a private railway running for a distance of 94 miles, with a further 165 miles under construction.

Very much the same position obtains in Ethiopia, where, according to a United Nations publication [10], there were no state railways as at 1962, and only 500 miles of railways owned by foreign enterprises.

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[1] *R.P.* No. 12/1964, pp. 101 *et seq.*

[2] Departmental information. This stretch of the line passes through the existing Berseba and Tses Reserves for a distance of 30 miles, and through the existing Gibeon Reserve for a distance of 10 miles.

[3] Departmental information.

[4] *R.P.* No. 12/1964, pp. 89 *et seq.*

[5] Departmental information. Some of these routes pass through the existing Okombahe Reserve.

[6] *R.P.* No. 12/1964, pp. 81 *et seq.*

[7] Departmental information. Large sections of these routes pass through the existing Ovamboland territory. As soon as the Kunene Water Scheme (IV, p. 203) is completed, consideration will be given to an extension of the said routes by approximately another 100 miles.

[8] *R.P.* No. 12/1964, p. 379.

[9] International Monetary Fund, *Economy of Liberia* (Prepared by the African Department and Exchange Restrictions Department (Feb. 1963)), p. 11. *Vide* also United States Department of Commerce, "Basic Data on the Economy of Liberia", *World Trade Information Service—Economic Reports*, Part I, No. 59-57, pp. 11-12.

[10] *U.N. Doc.* E/CN. 14/171, *Economic Bulletin for Africa*, Vol. II, No. 2 (June 1962), p. 17.

88. In the light of the information given above, Respondent denies Applicants' allegations relative to the opportunities which are at present open to Natives, or will in the future be open to them, in the operations of the Railways and Harbours Administration in their own areas.

H. Respondent's Alleged Policy of "Laissez-Faire with Respect to Tribalism"

89. Applicants introduce this topic in their treatment of the economic aspect by referring to Respondent's explanation that one of the reasons why the families of migratory workers from the northern territories are not allowed to accompany the workers on their tours of employment in the Police Zone is that the tribal authorities are opposed thereto [1]. They say that "tribalism" has thus "been deliberately fostered through *apartheid*" [1], and they charge Respondent with an "abdication of the positive and progressive obligations of the Mandate by its policy of '*laissez-faire*' with respect to tribalism" [2]. The reason advanced for the averment of conflict with the obligations of the Mandate, is that—

> "... tribalism ... was one of the reasons why 'Native' inhabitants were 'not yet able to stand by themselves under the strenuous conditions of the modern world' ... [1]".

Although not clearly stated, Applicants' contention appears to be that the mandate system did not permit the fostering of tribalism but, on the contrary, imposed a positive duty to counteract it.

90. In this connection Respondent refers to what has already been stated with regard to tribalism, and denies that it was implied in the Mandates, or even contemplated by the authors thereof, that tribal systems should be abolished and tribalism as such be eliminated in the mandated territories. Whilst many tribal systems no doubt recognized customs and permitted practices considered to be in conflict with the concepts and standards of modern civilization, and whilst tribal traditions and ways of life, and tribal animosities and conflicts contributed to the factors which retarded the advancement of many of the indigenous peoples who at the end of the First World War were regarded as "not yet able to stand by themselves under the strenuous conditions of the modern world", it is, nevertheless, fallacious to say, as Applicants do, that tribalism in itself, i.e., the condition of existing as a separate population group or tribe [3], "was one of the reasons why 'Native' inhabitants were 'not yet able to stand by themselves ...' " [1]. And equally fallacious is Applicants' submission that the Mandate did not permit the fostering of tribalism but imposed a positive duty to the opposite end.

91. Respondent has already demonstrated in this regard that the authors of the Mandate could never have intended to impose a prohibition against differentiation on a group basis, when they themselves contemplated that there would be differentiation on that basis, and, in fact, themselves made express provision for such differentiation in

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[1] IV, p. 413.
[2] *Ibid.*, pp. 412-413.
[3] *Vide* Onions, C. T. (Ed.), *The Shorter Oxford English Dictionary* (1959), p. 2243, which defines the word "tribalism" as: "[t]he condition of existing as a separate tribe or tribes; tribal system, or organization, or relations."

respect of certain particular matters [1]. Respondent has also shown that throughout the lifetime of the League of Nations, it was allowed to follow a policy by which it took steps to eliminate such tribal customs and practices as were considered to be in conflict with civilized concepts and standards, and by which it sought to introduce the indigenous people to new methods and to lead them from their tradition-bound type of society to a more modern one, but by which, at the same time, it recognized the indigenous groups' own social, cultural and political institutions and adopted a system of "indirect rule", in which the said institutions could, and did, play a meaningful part. Indeed, Respondent was commended for doing so [2].

92. Applicants' attitude in this regard appears to be that they do not deny that fostering of tribalism, in the sense aforestated, was permissible when the Mandate was conferred and was, in fact, allowed during the lifetime of the League, but that they contend that it is not permissible today. Indeed, the phraseology which they use seems to indicate that this is what they have in mind. Thus, in the context of the charge under consideration, they speak of "Respondent's abdication of the positive and *progressive* obligations of the Mandate" [3]. And later they say—

> "[i]nasmuch as Respondent's policy is assertedly founded upon an 'evolution towards separate self-realization for Natives in homelands of their own', and inasmuch as such 'homelands' are to be oriented entirely to tribal considerations, Respondent's policy may fairly be characterized as a *headlong advance into the past* [4]". (Italics added and footnote omitted.)

Such an attitude, viz., that Respondent's obligations are not static, but "progressive", and that with the changing of views in the world new obligations take the place of the old, so that practices and policies which may originally have been permissible become impermissible, is in keeping with Applicants' basic proposition that there exists a *current* norm of "non-discrimination or non-separation".

If, as would seem to be the case, Applicants' argument relative to tribalism is intended to rest on the basis that there is a legal norm, formulated on current standards, which prohibits differentiation on, *inter alia*, a group basis, and that Respondent's "homelands" policy is violative of this norm because it is based on tribal considerations, i.e., because it distinguishes between tribal groups, then Respondent repeats its denial of the existence of such a norm and refers to its argument refuting the proposition that the Mandate must be interpreted as embodying such a norm [5].

If, however, in stating that "such 'homelands' are to be oriented entirely to tribal considerations", Applicants intend to convey anything more than has been stated above, for example, that Respondent's policies foster tribalism in the sense that they seek to bind the Native people to uncivilized customs or to outmoded traditions which hamper their advancement, then Respondent denies such allegation and refers to what

[1] *Vide* sec. B, paras. 8-11, *supra*.
[2] II, pp. 417-418 and sec. E, Chap. V, *supra*.
[3] IV, p. 412. (Italics added.)
[4] *Ibid.*, p. 413.
[5] *Vide* sec. B, *supra*.

has already been stated in this regard [1]. Applicants might mean to convey that inasmuch as they advocate the attempted creation of one integrated nation in South West Africa, as being in fact the best method to promote well-being and progress to the utmost, distinctions between tribes and ethnic groups are for that reason to be eradicated. Respondent has, however, already indicated the overwhelming advantages which separate development, in its view, has over attempted integration [2], and the importance of giving due recognition in this regard to the different ethnic identities, cultural heritages, and aspirations of the indigenous peoples of South West Africa [2].

93. In concluding this aspect of their case Applicants give what they term "an exposition of economic *apartheid*" by quoting a single passage from one of the lectures of Prof. de Kiewiet published under the title *The Anatomy of South African Misery*. In this passage Prof. de Kiewiet, whom Applicants describe as an authority with unquestioned first-hand knowledge, makes the complaint that by "trying to herd the native population back into separate economic and political areas" Respondent is "in effect allying itself with the primitive and backward components of native life, with those customs and practices which are the first cause of poverty and stagnation" [3]. Respondent's answer to this is that, far from it being an "exposition of economic *apartheid*", the said passage, as is the case with the larger part of the lecture from which it is extracted, is nothing more than an emotional expression of views not only devoid of objective appraisal, but showing a lack of understanding of the very subject on which the author is held out by Applicants to be an "authority".

It has already been indicated [4] that Prof. de Kiewiet's criticism of *apartheid* in both the political and the economic aspects stems largely from a wrong basic premise, namely that—

> "... *apartheid* is actually a system in which the power of the state is used to maintain the economic and political supremacy of the white community over a population of approximately ten million Africans, Indians and coloured men [5]".

Equally wrong is this "authority" when he says that Respondent is "in effect allying itself with the primitive and backward components of native life, with those customs and practices which are the first cause of poverty and stagnation" [3]. Respondent has in this regard already explained the manner in which, and the extent to which, tribalism plays a role in its policy of separate development.

Prof. de Kiewiet does not say what are the "backward components of native life", "customs", and "practices" to which he refers. But, perhaps there is no need to enquire as to what he had in mind, inasmuch as he has clearly indicated that he can see no good whatsoever in tribal affiliations or, indeed, in African traditions, cultures or customs. Thus, in another lecture, included in the aforementioned publication, he said:

> "The whole myth of a separate native culture collapses when it is recognised that, for the African, progress and emancipation depend

[1] *Vide* sec. E, Chap. V, *supra*.
[2] *Vide* sec. E, *supra*.
[3] IV, p. 413.
[4] *Vide* paras. 9-10, *supra*.
[5] De Kiewiet, C. W., *The Anatomy of South African Misery* (1956), p. 49.

upon an escape from the tribe and a deeper entry into the life of the West. At its best and strongest, native leadership aspires to abandon the past and seek a future in the western world. Its goals are education, opportunity and advancement in the environment created by European enterprise. In far-off East Africa the Mau Mau tragedy shows that the African has nothing to resuscitate in protest against the white man except tribalism, no tradition to invoke higher or more dignified than the cruel sanctions of witchcraft and barbarism. On the face of the earth there are few non-western peoples who depend more than the African upon the west for everything that can be called advancement and progress [1]."

94. It is difficult to understand how Applicants can in this regard rely upon Prof. de Kiewiet, when his views as to tribal institutions and African cultures and traditions are diametrically opposed to the views expressed on this subject by leaders of the governments of the Applicant States [2], to the policies which in fact are applied in the Applicant States [2], and to the declarations and resolutions in which Applicants have joined with other African countries regarding a revival of African cultures and traditions [3].

I. Applicants' Allegations regarding Economic Conditions in Dependent Territories

95. Applicants, whilst noting that this honourable Court has held that Respondent is not obliged to conclude a Trusteeship Agreement with respect to the Territory, and that Respondent has refused to do so, allege that policies pursued by governments administering trust territories, and standards enunciated by United Nations organs in regard thereto,

> "... are relevant indications of current norms in respect of the promotion of the well-being and social progress of inhabitants of dependent Territories [4]".

On the basis of the alleged relevance of such policies and standards, Applicants include in their treatment of the economic aspect what they term "... a summary of policies and practices in Trusteeship Territories involving situations analogous to those in South West Africa" [5]. According to Applicants this summary, which is contained in Annex 6 (1) to the Reply [6],

> "... demonstrates the generally accepted objective of maximum effort on the part of the Administering Authority to integrate inhabitants into the economy of the Territory *as a whole*, on an equitable and progressive basis [5]". (Italics added.)

96. The said summary is divided into three numbered paragraphs. In the first paragraph Applicants set out declarations and recommendations made by organs of the United Nations with respect to general aims

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[1] De Kiewiet, C. W., *The Anatomy of South African Misery* (1956), pp. 54-55.
[2] *Vide* sec. E, Chap. V, *supra*.
[3] **III**, pp. 378-382.
[4] **IV**, p. 413.
[5] *Ibid.*, p. 414.
[6] **IV**, pp. 426-430.

concerning participation by indigenous inhabitants of dependent territories in the economic life of such territories. The second paragraph contains adverse comment by Applicants on certain aspects of Respondent's economic policy in South West Africa, whilst the third deals with economic policies and practices in certain Non-Self-Governing Territories, presumably with a view to showing that such policies and practices are in conformity with the aims expressed by United Nations organs, as referred to in the first paragraph of the summary.

In the succeeding paragraphs Respondent deals with the contents of Applicants' summary, but will, for convenience, not follow the sequence of Applicants' numbered paragraphs. Respondent will first deal with the subject-matter of paragraph (1) of the summary; then with the allegations in paragraph (3); and, finally, with paragraph (2).

97. It will be observed that although Applicants purport to rely on the subject-matter contained in Annex 6 (1) as proof of alleged "standards enunciated by United Nations organs" and as indicative of "current norms in respect of the promotion of the well-being and social progress of inhabitants of dependent Territories" [1], paragraph (1) of the said Annex contains no declarations by United Nations organs (or by anybody, for that matter) which can in any way be regarded as objective "standards", or criteria. The various declarations and views recorded in the said paragraph of the summary amount, in Respondent's submission, to no more than a statement of broad aims and objectives to be pursued in the economic development of Non-Self-Governing Territories. Save for a statement of the broad principle that the indigenous inhabitants of such territories should be allowed and encouraged to participate in the economic life of the territories, and save for mentioning certain specific steps intended to achieve that end in particular territories—such as, e.g., the making of grants and loans, the expansion of existing systems of credit facilities, the encouragement of technical training, the raising of standards of living, increasing minimum wage scales, etc.—the said paragraph contains no evidence of a prescription of general standards or methods to be applied in pursuing the aforesaid broad objectives and aims. Indeed, it is significant that in the very report of the Committee on Information relied on by Applicants, the Committee noted that—

> "[c]ircumstances differ greatly in different Territories according to their degree of evolution and according to the extent and value of their natural resources [2]",

and stated, with reference to Chapter XI of the United Nations Charter, that development of Non-Self-Governing Territories should proceed "... according to the particular circumstances of each territory and its peoples and their varying stages of advancement" [3]. It is clear, therefore, that while the Committee formulated general economic objectives to be pursued in the Non-Self-Governing Territories, it also realized that, in pursuing such objectives, regard must be had to the different circumstances existing in, and to the problems peculiar to, the various territories.

Subject to the qualification recognized by the Committee, Respondent is in agreement with the Committee regarding the "fundamental aim of

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[1] IV, p. 413.
[2] *G.A., O.R., Ninth Sess., Suppl.* No. 18 (A/2729), p. 15.
[3] *Ibid.*, p. 16.

economic policy" [1], and states in this regard that it has always been Respondent's aim, in the words of the Committee, to—

> "... develop ... [the Territory] ... in the interest of all sectors of the population, to raise the standard of living by increasing individual real purchasing power, and to increase the total wealth of ... [the Territory] ... in order to make possible a higher standard of social services and administration [1]".

98. Paragraph (3) of the aforementioned summary [2] contains, for the larger part, particulars of a variety of steps taken in various territories for the economic advancement of their indigenous inhabitants. These particulars furnish no evidence of the recognition, or application, of any objective norms or standards, but merely of particular practical steps taken to improve the condition of the indigenous inhabitants of the territories concerned. Respondent does not propose to deal with any of these steps: the fact that they were apparently considered advisable in the circumstances pertaining in the said territories, does not seem to Respondent to have any important bearing on issues in this case. Applicants have made no attempt to show that conditions and problems in such territories are, in so far as is relevant to the particular steps, the same as in South West Africa, or even that, in that context, they can truly speak of "situations analogous to those in South West Africa" [3].

The remainder of the said paragraph contains allegations to the effect that "[t]here is no Mandated Territory or former Mandated Territory, other than South West Africa, in which land is divided along 'racial' lines" [4]; that "[s]uch stark dissociation of groups from centres of modern economic development would be illegal in any dependent territory" [4], and that "... geographical segregation is not allowed" [4].

It is not clear from the above allegations whether Applicants' contention in the present context is that geographical segregation is *per se* impermissible, or that such segregation is impermissible when it has the effect of separating, to their detriment, certain sections of the community from "centres of modern economic development". If the first, the contention would involve the application of Applicants' so-called legal norm of "non-discrimination or non-separation", in regard to which Respondent refers to what it has said elsewhere in demonstrating that no such norm is embodied in Article 2 of the Mandate, or is otherwise binding on Respondent [5]. If, however, Applicants' contention is that segregation is impermissible if it has the detrimental consequences aforestated, then it appears to link up with what is said in paragraph (2) of Applicants' summary, with which Respondent deals in the succeeding paragraphs.

First, however, Respondent may point out again that in weighing advantages and disadvantages of separation against those of attempted integration, the economic sphere cannot be considered in isolation from the political and social spheres. Consequently, the observations made earlier in this Rejoinder [6] regarding unsettled conditions, hostilities,

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[1] IV, p. 426.
[2] *Ibid.*, pp. 428-430.
[3] *Ibid.*, p. 414 and *vide* also para. 95, *supra*.
[4] IV, p. 428.
[5] *Vide* sec. B, *supra*.
[6] *Vide* secs. E and F, *supra*.

refugee problems, strained relations, etc., in some of the very territories referred to as examples by Applicants in paragraph (3) of their summary, are not without significance in the present context.

99. Applicants' first allegation in paragraph (2) of their summary reads as follows:

> "The legally enforced separation of the peoples of South West Africa into a predominately (sic) African 'labour' area in the North and a predominately 'European' industrial and urban area in the Police Zone exacerbates the gulf between 'Native' well-being and the benefits of the modern economy, as well as contributing to inefficient allocation of economic resources to the detriment of the people as a whole [1]."

The above allegation gives a misleading picture of the situation in the Territory. This will be apparent from various parts of Respondent's answer to Applicants' treatment of "The Economic Aspect", and need, therefore, not be demonstrated in any detail in dealing with their Annex 6 (1) and, more particularly, with the paragraph thereof now under consideration. Respondent merely points briefly to the following:

(i) A completely false impression is created by describing the northern territories merely as a " 'labour' area", without any mention of farming or other activities in, and the development potential of, these territories;

(ii) no mention is made of the reasons—historical, social and economic [2]—which underlie the fact that the role of the northern inhabitants in the modern economy has thus far been limited largely to one of supplying labour; the impression is created that this situation is the fault of Respondent, i.e., the consequence of "legally enforced separation", whilst it is a fact that similar situations are common in other countries in Africa where a modern economy has comparatively recently been introduced to an indigenous population with a traditional subsistence economy [3];

(iii) the impression is created that the inhabitants of the northern areas are being left to their own resources, and that by design they are destined to be labourers in the modern economy for all time, and no mention is made of progress already made in those areas, nor of development projects accepted for such areas and in some respects already in the course of implementation [4];

(iv) in referring to the so-called "inefficient allocation of economic resources", nothing is said of relevant historical circumstances pertaining to occupation of land; nor of climatic and other factors which affect the value and agricultural potential of land [5]; nor of the system of development of the Territory which, in Respondent's submission, was the most realistic to adopt in all the circumstances [6]; nor of future developments proposed for the benefit of the Native inhabitants of the Territory [4].

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[1] **IV**, p. 427.
[2] *Vide*, e.g., para. 35, *supra*.
[3] *Vide* para. 17, *supra*.
[4] *Vide* **IV**, pp. 202-211.
[5] **II**, pp. 304-306 and *vide* also Chap. III, paras. 18-21, *infra*.
[6] *Ibid.*, pp. 409-414; **III**, pp. 4-6 and Chap. III, paras. 15 and 23, *infra*.

100. The misleading impression created by Applicants' aforementioned allegation is aggravated by the "evidence" which Applicants quote in support thereof. The said quotation does not refer to South West Africa, but to certain other territories. The quotation, taken from a report of the Economic Commission for Africa, reads as follows:

> "... The setting aside of land for members of different racial groups has almost invariably led to overcrowding and exhaustion of much of the land set aside for Africans and under-utilization of other areas ... In brief, the division of the economy into arbitrary African and non-African sectors rather than treating the economy as one whole, has had and cannot but have deleterious consequences. Until land allocation is non-racial and all the other aspects of agriculture are seen as non-racial problems the process of economic development must remain heavily and artificially burdened [1]."

The Commission gave three reasons for its finding, viz.:

(i) "the setting aside of land for members of different racial groups has almost invariably led to overcrowding and exhaustion of much of the land set aside for Africans and under-utilization of other areas;
(ii) unequal agricultural services and restrictions on the growing of specific crops have retarded production;
(iii) rigid marketing controls and the discriminatory pricing system of agricultural commodities have similarly had adverse effects [2]".

None of these reasons are valid in the case of South West Africa, which was not included in the Commission's study. There are no discriminatory marketing controls, no price systems or restrictions on the growing of crops, and there is no question of the northern territories in South West Africa (i.e., the areas here in issue) being overcrowded or exhausted. Furthermore, it cannot be said that the economy of the Territory has been divided into "arbitrary" Native and non-Native sectors. In this regard Respondent refers to what is said elsewhere about land occupation at the inception of the Mandate [3]; the reservation of land for Native occupation and the protection of the Natives' rights to such land [4]; the traditional subsistence sector in the northern areas, and Respondent's method of development of the Territory by first concentrating on the expansion of the existing modern money economy in the southern portion of the country [5].

101. Applicants also say that the above-mentioned Commission—

> "... found that separation of heavy industry from the African reserves has 'turned these areas generally into economically inactive centres—denuded of the prime of their manhood, and incapable of attracting private European capital' [6]".

Whatever the position may be in the countries studied by the Commission, Respondent says that the above statement has little relation to the

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[1] **IV**, p. 427.
[2] *U.N. Doc.* E/CN. 14/132, Rev. 1, *Economic and Social Consequences of Racial Discriminatory Practices* (1963), p. 38.
[3] **II**, pp. 406-407 and 426.
[4] **III**, pp. 238-251 and Chap. III, paras. 15-16 and 23, *infra*.
[5] **II**, pp. 409-414 and para. 16, *supra*, and Chap. III, paras. 15-16 and 23, *infra*.
[6] **IV**, pp. 427-428.

realities of the situation in South West Africa. There is no question of the Native reserves having been "turned" into "economically inactive centres". Any suggestion that this is so fails to take account of the condition and level of development of the Native inhabitants of the Territory at the inception of the Mandate, and, more particularly, of their traditional subsistence methods and their capacity for development and change. Such a suggestion loses sight, furthermore, of the fact that the development and expansion of a modern money economy in the southern portion of the country have in the past had a beneficial effect on the economy of the Native areas, and that they will do so in future in progressively greater measure.

Respondent understands the allegation regarding reserves being "denuded of the prime of their manhood" to be a reference to the system of migratory labour, and in this connection it refers to what is said above [1].

As regards the allegation that reserves are "incapable of attracting private European capital", Respondent refers to what it has said elsewhere in connection with protecting Native interests in land [2].

102. With reference to the report of the Commission, Applicants also allege that—

> ". . . there is economic wastage in duplicating houses, since temporary accommodations must be provided for migrant workers who might otherwise be living with their families in their own homes [3]".

Applicants have not attempted to show that there is, in fact, such a "wastage" as referred to by them. The position regarding the accommodation of migrant workers is, briefly, that a large proportion of them are housed in hostels, which are permanent structures, and there is no question of providing "temporary accommodations", or of "duplicating houses", when new migrants arrive in the Police Zone to take the places of those who have completed their term of employment. Workers not housed in such hostels (e.g., those on farms or in domestic service) occupy houses, or rooms, provided by their employers, and here, too, there is no question of providing "temporary accommodations". Applicants' allegation of "wastage" is, therefore, based on a misconception of the position regarding the accommodation of migrant workers in the Police Zone. Respondent says, furthermore, that the question of housing Native workers from the northern areas with their families in the Police Zone, whether on a temporary or permanent basis, involves much more than a mere question of economics. Respondent refers to what has already been said in this regard [4].

103. Applicants' final allegation in paragraph (3) of the summary is that—

> ". . . the primary evil of territorial *apartheid*, such as that proposed by the Odendaal Commission, and endorsed in principle by Respondent, is maintenance of a bare subsistence economy among the 'Natives' outside the Police Zone, and prevalence in the reserves of frustration [3]",

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[1] *Vide* paras. 15 *et seq.*, *supra*.

[2] **II**, pp. 426-427; **III**, pp. 245-251 and *vide* Chap. III, paras. 2-13, *infra*.

[3] **IV**, p. 428.

[4] *Vide* paras. 19 and 36-39, *supra*.

and they then quote a passage from a report of the Committee on Information in which it is said, *inter alia*, that—

> "... material benefits to the advantage of only a limited group of peoples always breed discontent. If the advantage is to be found only outside the community concerned, such discontent will be bitter and justified [1]".

Respondent emphatically denies that "maintenance of a bare subsistence economy among the 'Natives' outside the Police Zone" forms any part of the policy of separate development or of "territorial *apartheid*, such as that proposed by the Odendaal Commission". It has never been Respondent's policy to "maintain" a bare subsistence economy in the northern territories. Nor do the proposals made by the Odendaal Commission involve the "maintenance" of such an economy as a matter of policy, as a reference to such proposals will immediately reveal.

No proof is given by Applicants of the alleged "prevalence in the reserves of frustration", nor is the nature of the said "frustration" stated. It would seem, however, from what is said by Applicants, and from what is stated in the passage quoted from the report of the Committee on Information, that Applicants are probably referring to "frustration" which allegedly arises from, or is linked with, the alleged "maintenance of a bare subsistence economy among the 'Natives' outside the Police Zone". Respondent has already denied that it is part of its policy to maintain such an economy. It is true, of course, that a subsistence economy is still practised by many Natives in the northern areas, but it is equally true that it is Respondent's aim to improve and develop their territories, and to make it possible for them to progress to higher standards of living than are at present enjoyed by them.

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[1] IV, p. 428.

CHAPTER III

THE RESERVES

A. Introductory

1. In this Chapter Respondent deals with the matters discussed by Applicants in Chapter IV. B.3.c.2. (C) of the Reply, headed "The Reserves" [1]. The subject-matter with which the said part of the Reply is concerned can conveniently be grouped under the following heads, and will hereinafter be dealt with in that order, viz.,

(a) development of the northern reserves outside the Police Zone;
(b) allocation and alienation of land to Europeans, and the alleged gradual extension of the Police Zone;
(c) measures taken for the relief of persons affected by drought;
(d) social welfare measures which are alleged to be discriminatory.

B. Development of the Northern Reserves outside the Police Zone

2. Applicants in the Memorials made a complaint to the effect that the Native population in the northern areas, outside the Police Zone, is "far removed from the principal areas of modern economic development and activity", and that the activities of the said population "do not make it part of the modern monetary economy" [2].

In reply thereto, Respondent, while admitting that that was the factual position [3], submitted that, in the circumstances which obtained, the situation could have been altered in one of two ways, namely either by encouraging or forcing the people to leave their lands and flock to the Police Zone, or, alternatively, by a process of rapid development of the northern territories with the aid of European initiative and capital [4]. Respondent further explained why both these alternatives were impractical and inadvisable, not only in so far as the economy of the Territory as a whole was concerned, but also, and particularly, in so far as the interests of the Natives themselves were concerned. Applicants do not contest the reasons advanced by Respondent for not following either of the aforementioned courses, but they submit that "Respondent's options were not in fact limited to such extremes" [5], inasmuch as there was, in their submission, a third course which could, and should, have been adopted by Respondent. They state in this regard:

> "Indeed, a sound sociological and economic approach would have been to develop the northern territories with outside capital, slowly at first, but with increasing speed as capital and surplus resources were created within the reserves themselves [5]."

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[1] IV, pp. 414-417.
[2] I, p. 112.
[3] Subject, of course, to their participation as wage-earners in the modern economy.
[4] III, p. 22.
[5] IV, p. 414.

Although the approach suggested by Applicants may appear attractive in theory, it stands divorced from the realities of the situation, and ignores the basic considerations involved. Their suggestion that the course advocated by them was feasible from the outset, and would, if adopted from the inception of the Mandate, already have brought about a radical change in the economic position in the northern territories, shows a complete lack of appreciation on their part of the economic implications and of the adaptability of the Natives concerned to modern economic methods.

3. There is, in the first place, the question of funds required for a project such as that suggested by Applicants. As has already been mentioned [1], at the inception of the Mandate, and for many years thereafter, the concept of financial aid by international agencies or others to underdeveloped or non-viable States was unknown. Of course, as Respondent has stated [2], it could have allowed "outside capital" to be introduced into the northern reserves by permitting European entrepreneurs to exploit the resources of the said areas; but Applicants themselves describe such a course, which was, for the reasons given by Respondent, not followed as one of the two "extremes" to which Respondent was not limited in its options. Consequently, the development of the reserves had to be financed out of the resources of the Territory and the contribution which South Africa itself could make towards that end. In this regard it has already been explained [3] that in the circumstances of the Territory, and with limited funds at its disposal, especially in the earlier years, Respondent was obliged to adopt a policy by which it was sought first to concentrate upon and encourage a rapid development of productive enterprises in the modern economy sector as growth points for further development of the Territory as a whole. In this process the modern economy sector could, and did in fact, provide funds for the administration and development of the Territory, as well as increased opportunities of employment also for the inhabitants of the northern territories. And opportunities of employment for them not only brought about an additional income in the form of a regular flow of cash earnings into the northern reserves, but also contributed generally towards progress in the said reserves, in that the workers gained new skills and experience and became adapted to modern methods which could be introduced into their traditional society. In this regard Respondent draws attention to the following remarks in a publication of the International Labour Organisation:

> "An opportunity for productive work is not merely a means to a higher income. It is a means to self-respect, to the development of human potentialities and to a sense of participation in common purposes of society [4]."

And the following observations are made in the said publication with regard to the role of opportunities of employment in economic development:

> "The purpose of economic development is to raise levels of living, and the main purpose of insisting that employment objectives should

[1] II, p. 410.
[2] *Ibid.*, p. 411.
[3] *Ibid.*, pp. 409-414; III, pp. 4-103 and *vide* also Chap. II, paras. 16-17, *supra*.
[4] International Labour Office, *Employment Objectives in Economic Development* (1961), p. iii.

be given weight in the choice of alternative paths of economic development is that this is the surest, if not the only, way of making certain that the improvements in levels of living that come about as economic development proceeds will be widely shared. Unemployment and underemployment are major causes of poverty, and the objective of providing more, and more productive, employment is the major element in the broader objective of promoting higher levels of living [1]."

In another publication of the said organization it was stated, with reference to African employees,

"[i]n particular, the extension of wage-earning employment means for an ever-increasing number of Africans a new way of life in the widest possible sense: because of the fact that centres of employment and previously existing concentrations of population often do not coincide, wage-earning employment generally begins with a change of residence and involves not only the learning of new skills and habituation to work routine, but also adaptation to the multifarious aspects of a new form of social organisation . . . [2]".

Although the Natives in the northern reserves would, at least in the earlier stages, participate in the modern economy of the Territory only as wage-earners, they would later, with progress generally in education and in their understanding of modern systems and methods, become receptive to changes in their traditional ways of life which would eventually lead to the establishment and development of modern economic enterprises in their own areas.

4. The course advocated by Applicants would not have permitted of economic development on the lines aforestated. It would of necessity have entailed that Respondent should, with the limited funds then at its disposal, have concentrated on developing both the southern sector (the modern economy sector) and the northern territories (the traditional sector) at the same time. Inevitably such a policy would have resulted in a retardation of progress in the modern economy sector, with a resultant loss of income and, therefore, of funds available for the development of the Territory, as well as in a curtailment of employment opportunities offered also to the inhabitants of the northern reserves. At the same time little benefit would, at least in the earlier years, have resulted from the establishment of new enterprises in the traditional northern sector, if only for the reasons mentioned in the succeeding paragraphs.

5. Applicants, in suggesting that, with the introduction of "outside capital", the northern territories could rapidly have been transformed from a traditional subsistence economy into a modern economy, show an unawareness of the importance of the human factor in economic development. In this regard it has been stated in a United Nations publication that—

". . . as most governments acknowledge, development is only possible with the active co-operation of the population. This, in turn, presupposes their desire for change and their confidence that the results of change will benefit them; but such understanding is again inhibited by poverty and suspicion and a general lack of awareness.

[1] International Labour Office, *Employment Objectives in Economic Development* (1961), p. iii.

[2] *Idem, African Labour Survey* (1958), p. 15.

A transformation of man himself will initiate and ensure the permanency of the advance. To describe economic development as a 'human' problem may be somewhat too general; but it is probably the most fundamental way of stating the problem [1]."

Professor Colin Clark has briefly stated the same view as follows: "The principal factors in economic growth are not physical but human [2]." This is so particularly in the case of tradition-bound people, such as the Native inhabitants of the northern territories, whose agricultural and pastoral practices are hallowed by age-old observance. Thus it has been said with regard to the modernization of under-developed countries generally that—

"... no division of the problem into parts permits escape from the fundamental proposition that the paramount requirement for the modernization of any society is that the people themselves must change. Our understanding of the process of modernization in the underdeveloped countries, and in turn our understanding of the policy problems involved, must be informed by awareness of the ferment of individual thoughts and emotions at the core of any drastic change in a society. Here, in what might be called the realm of psychological change, the requirements for modernization give rise to tensions and resistance, to visible and invisible conflicts which are often the hardest for the outside world to comprehend and accept [3]."

That modernization must necessarily be a lengthy process, is emphasized in the following passage, also from the aforementioned publication:

"American and free-world policies can marginally affect the pace of transition; but basically that pace depends on changes in the supply of resources and in the human attitudes, political institutions, and social structure which each society must generate. It follows that any effective policy toward the underdeveloped countries must have a realistically long working horizon. It must be marked by a patience and persistence which have not always been its trademark [4]."

6. That the problems which beset modernization of a traditional economy are common to under-developed countries, especially in Africa, appears from a recent United Nations Study undertaken by the Economic Commission for Africa. It was observed in this study that in the greater part of Africa—

"... the development of the modern sectors is still marginal and society on the whole is still tradition bound, 'old blocks and resistances' to change still prevail and dominate individual decisions, traditional attitudes determine and limit freedom of action [5]".

A former President of the World Bank, E. R. Black, has described the general position on the African Continent as follows:

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[1] *U.N. Doc.* E/CN. 14/67, *Economic Bulletin for Africa*, Vol. I, No. 1 (Jan. 1961), p. 87.

[2] Clark, C., *Growthmanship* (1961), p. 51.

[3] Millikan, M. F. and Blackmer, D. L. M. (Eds.), *The Emerging Nations:* Their Gowth and United States Policy (1961), p. 23.

[4] *Ibid.*, p. 142.

[5] *U.N. Doc.* E/CN. 14/171, *Economic Bulletin for Africa*, Vol. II, No. 2 (June 1962), p. 7.

"... nowhere in the world does the bulk of the population play so restricted a role in economic life and development as it does in Africa. The continent is uniquely dependent on foreign capital and foreign initiative [1]."

After stating that "[t]here is no mystery about this lag", he gives the following reasons for this state of affairs:

"Development initiative in Africa has always come, and still comes, almost exclusively from a small number of European, Indian and Levantine entrepreneurs ... Africa's growth has been limited by the pace at which the bulk of the population is willing and able to leave its traditional subsistence economy and participate more actively in the modern, money economy. A shift from subsistence living to a life of saving and investing, of course, requires fundamental changes and popular attitudes towards life and work [1]."

7. This phenomenon is not limited to the new emerging African States, but is common also in other African States which have been independent for a long time. Indeed, the two Applicant States serve as good examples of a traditional subsistence economy being rooted in the indigenous population. Thus it has been stated of conditions in Liberia:

"Liberia has always been an agricultural country and her climate is ideally suited for the cultivation of foodstuffs for home consumption and the production of cash crops for sale abroad. But the traditional methods used by the majority of the tribal population are so primitive that our soil yields only a very small fraction of what it could produce ... [2]"

The extent to which a traditional subsistence economy is still practised in Liberia has been summed up as follows:

"The basic economy of most of the people is subsistence agriculture. The vast bulk of the population depending on farming of a shifting fields type [3]."

The position is very much the same in Ethiopia, of which it has been said that "[o]ver 90 percent of the country's labor force derives its livelihood from subsistence agriculture of various kinds" [4].

In discussing a remedy for this state of affairs, C. Jesman says:

"To raise the productivity of Ethiopian agriculture, for example, something other than chemical fertilisers, foreign advisers and stud animals ... is needed. All this has been tried in Ethiopia in the past and has failed. The Ethiopian farmer, in order to become really interested in the yield of his land, must see the reason for it [5]."

8. Professors Buchanan and Ellis, who share the view of the aforementioned author that administrative action and aid from outside, or,

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[1] Black, E. R., "How the World Bank is helping to develop Africa", *Optima*, Vol VIII, No. 3 (Sep. 1958), pp. 105-112, at p. 107.

[2] Simpson, C. L., *The Memoirs of C. L. Simpson:* The Symbol of Liberia (1961), p. 247.

[3] Solomon, M. D., "Education in Liberia", *Science Education*, Vol. 43, No. 3 (April 1959), pp. 221-227, at p. 222.

[4] Department of the Army, *U.S. Army Area Handbook for Ethiopia*, 2nd ed., Pamphlet No. 550-28 (June 1964), p. 225.

[5] Jesman, C., *The Ethiopian Paradox* (1963), p. 4.

as Applicants put it, the introduction of "outside capital", cannot solve the problem, have stated the position thus:

> "... merely providing more capital equipment from abroad or demonstrating superior techniques of production will not create an environment from which innovations are bound to appear, or in which the entrepreneurial spirit and point of view are certain to flourish. If these could be assured, internal productive capital formation would almost certainly follow. Only in a very limited and comparatively trifling sense can economic development be 'imported'. In nearly all its important essentials it must be generated from within [1]."

And a United Nations report has in this regard pointed out that—

> "[t]he human qualities that promote economic growth are variously identified ... [but] Governments cannot create such qualities by legislative fiat or budgetary appropriation. There are no operative branches of government in sociology and pyschology disposing of funds to cultivate directly the desired qualities [2]."

9. With regard to the utilization of outside capital in carrying out development programmes in territories in Africa, Professor I. M. D. Little has said:

> "Few African countries could have usefully absorbed in recent years more capital than has been available to them: indeed, much of the capital expenditure made has been of little benefit [3]."

Reporting on the foreign operations of the United States of America in Africa, Allen J. Ellender, a member of the United States Senate, stated as follows with regard to financial aid programmes:

> "It seems to me that by now it should be fully understood that 'dollar diplomacy' is not the solution to the world's ills. We are told that, in addition to the development of economic and human resources in Africa, our aid must also provide a 'physical measure of achievement' to give a sense of direction and accomplishment to our program. Our past experience has proven this concept of aid to be fallacious because it is so wasteful and only invites corruption [4]."

Indeed, another authority, Professor S. H. Frankel, has expressed the view that the introduction of "outside capital" can in certain cases do more harm than good to economic progress in under-developed countries. He makes the point as follows:

> "The problems of the borrowers are not solved by the receipt of capital which leads to the adoption of an economic pattern which is not income-creating or is incapable of relatively permanent integration into the economic structure into which it is imported. Such injections of capital disrupt the existing but do not rebuild new and

[1] Buchanan, N. S. and Ellis, H. S., *Approaches to Economic Development* (1955), p. 407.

[2] *U.N. Doc.* E/CN.5/346/Rev.1, ST/SOA/42, *Report on the World Social Situation* (1961), p. 32.

[3] Little, I. M. D., *Aid to Africa* (1964), p. 4.

[4] United States of America: 88th Congress, 1st Session—Senate—*A Report on United States Foreign Operations in Africa* by Honorable Allen J. Ellender, United States Senator from the State of Louisiana (1963), p.13.

continuing patterns of economic behaviour. Such capital imports may in certain cases only postpone the need for meeting the real problem of the economy as long as the capital lasts [1]."

10. It is, however, not to be understood that Respondent adopts the attitude that it could not, and therefore did not, take any steps to educate and encourage the indigenous peoples of the northern territories to accept reforms and to adopt modern methods which would lead them to an understanding of, and to the gradual introduction of, a modern economy system—a contention which Applicants seem to advance elsewhere in the Reply, where they speak of "Respondent's maintenance, *up to the present*, of a subsistence economy in the Reserves" [2]. In this regard Respondent explained in the Counter-Memorial [3] that its policy was "to guide the population in the direction of greater productivity by means of a gradual adaptation of their traditional economic and social institutions, rather than by means of revolutionary changes". And Respondent described what had been done in this regard by way of improvement of livestock; measures for selective breeding of stock; experimentation in systems of crop rotation; introduction of tested and selected seeds; veterinary services and, particularly, the development of water resources and storage facilities [4]. These measures were, of course, in addition to the assistance and encouragement generally of the education of the Native people.

11. When Applicants say:

"Respondent's duty in this regard was one of education and systematic development. The situation required, and continues to require, special effort; all the more so if, as Respondent asserts, there existed a so-called 'lack of interest' on the part of the inhabitants of the Territory toward mining, land ownership, and other aspects of the 'strenuous conditions of the modern world' [5]",

Respondent's answer is that it has done precisely what Applicants in the above passage suggest should have been done, but at the same time Respondent stresses the human factors mentioned above, which made it inevitable that progress in leading the indigenous people from a traditional subsistence economy to a modern one would be slow.

12. That Respondent counselled itself wisely in making the reform a gradual one instead of attempting to bring about a revolutionary change, is borne out by the views of others who can speak with authority on the subject. In this connection it may be stated that a group of eminent scholars, representing different fields of interest, and having wide experience in the problems of under-developed countries, recently recommended a very similar approach in a comprehensive study designed to advise the United States Senate Committee on Foreign Relations in respect of under-developed parts of the world. As a choice of policy they recommended—

"... the gradual modification of the institutions, practices, and

[1] Frankel, S. H., *The Economic Impact on Under-developed Societies* (1953), p. 76.
[2] **IV**, p. 262.
[3] **III**, p. 6 (para. 6).
[4] *Ibid.*, pp. 6-8.
[5] **IV**, p. 414.

structure of the traditional society in the direction of modernization while retaining some of its traditional cohesive features [1]".

And they expressed the view that—

"... if the forms of modernization are adopted more rapidly than they can be made to function effectively, then traditional values, institutions, and gratifications will be destroyed before modern substitutes have been developed ... [1]".

13. With the progress which has already been made by the indigenous peoples in South West Africa, a stage has now been reached where more pronounced consideration can be given to their economic development, and where the rate of progress can be accelerated. In the words of the Odendaal Commission,

"[t]he second phase, namely where the non-White groups have increasingly to be given the opportunity, necessary assistance and encouragement to find an outlet for their new experience and capabilities, must in future receive special attention in a programme of development for South West Africa. On the one hand they must be afforded protection against the more effective competition of the White group, and on the other hand they must be given financial aid and technical assistance both from the local modern economy and from the Republic of South Africa [2]."

The Commission, therefore, felt that—

"... every effort must be made in the first place to ensure greater participation of the indigenous non-White groups in animal husbandry, agriculture, forestry and mining [3]",

and made extensive recommendations in that regard, particularly in respect of the northern territories [4].

That it is Respondent's object to give immediate attention to the development projects recommended by the Commission, is clear from the pronouncement of Respondent's decision relative to such recommendations [5], and several of the projects are already under practical consideration and even in the course of implementation.

C. Land Allocation and the Alienation of Land to Europeans, and the Alleged Gradual Extension of the Police Zone

14. One of the complaints made in the Memorials relative to well-being, social progress and development in agriculture, was that there had since the inception of the Mandate been excessive extensions of the Police Zone boundary, so that by the end of 1952 the European farm lands represented 45 per cent. of the total area of the Territory, whereas

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[1] Millikan, M. F. and Blackmer, D. L. M. (Eds.), *The Emerging Nations: Their Growth and United States Policy* (1961), p. 98.

[2] *R.P.* No. 12/1964, p. 429 (para. 1437).

[3] *Ibid.* (para. 1438).

[4] As to agriculture *vide R.P.* No. 12/1964, pp. 307-311.
As to water supplies, *vide* pp. 449-455.
As to mining, *vide* pp. 457-459.
As to industries, *vide* p. 459.

[5] **IV**, pp. 203 and 207.

the European population of the Territory constituted less than 12 per cent. of the total population [1].

Respondent, while admitting the factual allegation contained in the said complaint, explained the reasons for the extension of the Police Zone boundary, as well as the reasons for encouraging the settlement of European farmers on available land in the Police Zone [2].

In the Reply Applicants comment as follows on the explanations given by Respondent:

> "Respondent marshals detailed argument in reply to Applicants' observation about the allocation and alienation of land to 'Europeans' and the gradual extension of the Police Zone without, however, explaining why 'the Mandatory has progressively reduced the proportion of farm land available for cultivation or pastoral use by the 'Native' population, while it has progressively increased the proportion of such farm land available to 'Europeans' [3]." (Footnotes omitted.)

In so restating their complaint, it seems that Applicants have either misunderstood the explanations given by Respondent, or have simply disregarded them.

15. With regard to the allegation that Respondent had progressively increased the proportion of farm land available to Europeans, it was explained in the Counter-Memorial that for economic reasons it was necessary to develop the agricultural resources of the Territory in order to increase and stabilize income, exports and revenue [4].

The Native inhabitants of the Territory, who were unaccustomed to agricultural practices other than of a traditional subsistence nature, and whose general level of development was such that they could not provide the capital, initiative or entrepreneurial skill required for the exploitation of the agricultural resources of the Territory, could not be relied upon for the development of such resources on a modern commercial basis. It was for this reason that Respondent was obliged to look to European settlers who had the experience, initiative and skill for its land development schemes [5]. And it was in the process of such development that over the period 1920 to 1960 a substantial area within the Police Zone, which had previously been government land, or land owned but not used productively, was made available for settlement by European farmers [6].

There is, however, no justification for the conclusion drawn by Applicants, namely that by allocating such land for occupation by European farmers Respondent "progressively reduced the proportion of farm land available for cultivation or pastoral use by the 'Native' population" —unless this conclusion is based on the premise that by right all land in the Territory should have been allocated to, or reserved for, the Native population, and that any grant of land to a European *pro tanto* reduced the land available for the Natives, a premise which would, of course, be absurd.

As Respondent has indicated, although land was allocated for settle-

[1] **I**, p. 115.
[2] **II**, pp. 409-411 and **III**, pp. 29-31.
[3] **IV**, p. 414.
[4] **II**, p. 411.
[5] *Ibid.*, and **III**, p. 31.
[6] *Ibid.*, and **III**, pp. 28-29.

ment by European farmers, there was no reduction of the land set aside or reserved exclusively for the use of the Natives. On the contrary, the reserves within the Police Zone were gradually increased by the extension of the land reserved for the Native population from 998,101 hectares at the inception of the Mandate [1] to 6,092,245 hectares in 1961 [2].

16. With regard to the northern territories outside the Police Zone, substantial increases were also made in the land reserved for the different groups. In Ovamboland the Natives at the inception of the Mandate occupied only about one-half of the area which was later proclaimed as a Native reserve for the Ovambo people [3].

The position is the same in the Okavango. At the inception of the Mandate only a narrow strip along the Okavango River was occupied by the Native people. A very much larger area of land was proclaimed as a reserve for the Okavango group [4].

In the Kaokoveld three small pieces of land, totalling in all 418,500 hectares, were orginally set aside for occupation by certain tribes of this region [5]. The total area of land reserved for the people of the Kaokoveld eventually exceeded 5,500,000 hectares [6].

With regard to the Caprivi, approximately 500,000 hectares of land was in 1939 added to the area originally occupied by the Caprivians [6]. In addition to the extension of the defined northern reserves, an unnamed area of 356,433 hectares was set aside in 1952 for Native occupation [7].

It is clear from the above that there has at no time been any reduction in the extent of land included in the reserves in the northern territories outside the Police Zone. In this connection Applicants err when they say that the extension of the Police Zone boundary has reduced the farm land available for use by the Native population. Respondent, in explaining the reasons for extending this boundary from time to time [8], stated, *inter alia*, that there was no question of encroaching on the northern reserves inasmuch as there has always been a substantial area of uninhabited land of varying width adjoining the Police Zone which does not form part of the northern reserves [8].

17. Although, as is indicated above, Applicants' conclusions under consideration are unsound, it would seem that in the present context they are, without saying so explicitly, merely repeating a complaint made

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[1] **II**, p. 411, and **III**, pp. 240 and 246, i.e., excluding the Rehoboth *Gebiet* of 1,750,000 hectares.

[2] **III**, pp. 249-251. There is in this respect a small difference between the figures given in the Counter-Memorial and those reflected in the report of the Odendaal Commission (*R.P.* No. 12/1964, p. 71). The figures in the Counter-Memorial were based on the latest revised extents as furnished by the Surveyor-General, and can be accepted as correct.

[3] *Proc.* No. 27 of 1929 in *The Laws of South West Africa 1929*, Vol. VIII, pp. 258-264 and **III**, p. 250.

[4] *Proc.* No. 32 of 1937 in *The Laws of South West Africa 1937*, Vol. XVI, pp. 306-312 and **III**, p. 250.

[5] *Vide* **III**, p. 247.

[6] *Ibid.*, p. 250.

[7] *G.N.* No. 193 of 1952 in *The Laws of South West Africa 1952*, Vol. XXXI, pp. 850-852. *Vide* also **III**, p. 250. The Odendaal Commission has now recommended that this area be added in part to Ovamboland, and in part to the Okavango (*R.P.* No. 12/1964, pp. 83 and 85).

[8] **III**, p. 30.

elsewhere in the Reply, namely that, relative to the difference in numbers between the Native and European inhabitants, there is a gross disparity between the extent of land occupied by Europeans and that reserved for the Natives [1]. That they indeed intend to repeat that complaint in the present context, is evidenced by their further statement that there is no valid basis for Respondent's conclusion that "the provisions that have been made [relative to the allocation and occupation of land] are not unreasonable" [2], and their reference to a comment by Professor Wellington to the effect that "[w]e seem to have looked after ourselves very well" [3].

On the understanding that this is in fact the complaint which Applicants intend to make in the present context, Respondent will in the succeeding paragraphs demonstrate the basic fallacies underlying the conclusions drawn by Applicants from the fact that, in respect of extent, there is a disproportion between the areas of land occupied by Europeans and the areas reserved for the Natives.

18. The first, and perhaps the major, respect in which Respondent submits that the comparison sought to be drawn by Applicants is fallacious, is that they have completely ignored the physical attributes which circumscribe the potential utilization of the different regions in South West Africa for agricultural purposes.

As has already been stated [4], agricultural operations in South West Africa are crucially influenced by climatic conditions, particularly rainfall and evaporation. Any comparison between the various agricultural regions of the Territory is therefore meaningless unless it takes account of these factors.

For agricultural purposes, the areas reserved to the non-European groups in the Territory are generally much more favourably endowed by nature than those occupied by the Europeans. This applies especially to rainfall. Thus only 32.1 per cent. of the Territory receives an average annual rainfall of more than 400 mm. (16 in.), which can be regarded as the absolute lower limit for dry-land agriculture in warm-temperate summer rainfall regions such as South West Africa [5]. This area of approximately one-third of the Territory lies entirely to the north-east [6], where nearly 65 per cent. of all the inhabitants live, composed of 96 per cent. non-Europeans and 4 per cent. Europeans. In other words, 70 per cent. of the total non-European population of South West Africa and only 20 per cent. of the Europeans are to be found in this most favourable region. On the other hand, only 15 per cent. of that area of the Police Zone to which the European group is confined (that is, excluding non-European reserves and diamond concession areas), falls within this comparatively better region. In other words, 85 per cent. of the area to which the European population is confined, falls within the lower rainfall region.

19. A clear indication that the non-European areas are largely situated

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[1] *Vide*, e.g., IV, pp. 405 and 458.

[2] *Ibid.*, p. 415.

[3] *Ibid. Vide* also Applicants' reference at IV, p. 408 of the Reply, to a statement in a 1962 report of the Special Committee for South West Africa that "certain inadequate areas are reserved as the homelands of the indigenous groups".

[4] II, pp. 304-306.

[5] *Ibid.*, p. 295.

[6] *Ibid.*, map on p. 294.

in the better rainfall regions, is furnished by the following table, which shows the distribution of European and non-European farming areas according to the average incidence of rainfall:

TABLE[1]

Rainfall in millimetres	*Area of non-European reserves* %	*European farming area* %
Below 100	11.6	8.6
100-200	17.9	39.2
200-300	11.9	12.3
300-400	10.6	19.9
400-500	23.6 }	14.8 }
500-600	21.0 } 48.0	5.2 } 20.0
Over 600	3.4 }	— }

According to the above table, only 20 per cent. of the European farming area receives an average rainfall of 400 or more millimetres, which is the minimum for dry-land agriculture, whereas the corresponding figure for non-European areas is 48 per cent.

In this context it may also be mentioned that the area of land in the non-European areas receiving an annual average rainfall exceeding 500 millimetres, which is the lower limit for marginal dry-land farming, is nearly two-and-a-half times larger than land similarly placed in the European farmland area [2].

20. Attention must be drawn to the more favourable position of the northern and north-eastern regions of the Territory with respect to the seasonal distribution, effectiveness and variability of rainfalls, and with respect to evaporation [3]. Similarly, the said regions also enjoy an advantage with respect to vegetation and water resources [4]. Indeed, the only considerable water potential in South West Africa is confined to these areas, which are exclusively occupied by the non-European population groups [5].

Furthermore, the livestock carrying capacity of the northern and north-eastern regions is the most favourable in the Territory, being 8 and less hectares per large stock unit [6], whereas in the regions occupied by 47 per cent. of the European farmers the carrying capacity is extremely poor, decreasing from north to south progressively from 9 to 45 hectares per large stock unit [6].

21. From the aforegoing comparison of the physical attributes of the different regions of the Territory, it is clear that the areas reserved for the exclusive occupation of the large majority of the Native population are

[1] Departmental information.

[2] II, map on p. 294. The approximate comparative figures are 53,600 square kilometres as against 21,600 square kilometres.

[3] *Ibid.*, pp. 295-298.

[4] *Ibid.*, p. 302.

[5] *Ibid.*, pp. 301-304.

[6] *Ibid.*, map on p. 305.

far more favourably endowed by nature, and hence offer much greater potentialities, than the areas to which the European farming community is confined. Indeed, this is confirmed by the fact that at the time of their first contacts with modern development, the Native groups were already concentrated largely in the areas at present occupied by their descendants.

22. Another factor which Applicants leave out of consideration when making their comparison regarding the allocation of land is the human factor. This factor may indeed account for varying levels of individual performance even where territories are equally gifted by nature. In this regard an authority on African economic development has stated:

> "Differences of wealth may be found, however, even when one country has no noticeable advantages over another. In such cases the differences are due to other factors, such as the degree of knowledge, skill and energy of the people in using the resources the land provides [1]."

This statement is particularly applicable to South West Africa, where European farmers have succeeded in achieving a high level of productivity and income in the southern areas, which are less favourably endowed, while the Native inhabitants with their traditional agricultural practices have generally not progressed beyond a stage of subsistence economy even in the more favourable regions.

In addition to what has already been said in this regard [2], Respondent finds it apposite to refer here to what has been stated by Professor Richard F. Logan, Professor of Geography at the University of California, U.S.A., who has made a thorough study of the conditions of the indigenous peoples in South West Africa. After comparing conditions in the Berseba Reserve with those on a European farm immediately adjoining the reserve, Professor Logan concludes as follows:

> "Thus, in short, the European farmer has succeeded in gaining for himself and his family and his native employees a far better way of life than is obtained by the natives in the adjacent reserve, although the physical geography and resources of the two areas are identical. The difference lies solely in the initiative and the managerial ability of the European owner in contrast to the apathy and inefficiency which characterizes the South West African native where handling his own affairs [3]."

And, speaking of the Herero in the Waterberg Reserve, Professor Logan mentions the fact that although the Administration, in its efforts to control the spread of foot-and-mouth disease, had provided the inhabitants of the reserve with fencing material, they made little effort to erect the necessary fences. In this regard Professor Logan says:

> "Yet, at the same time, one could visit any village on the reserve at any time, on any day of the week, and find the total male population sitting under their favourite tree, talking, despite the fact that they repeatedly complain that they have not had the time to build the mangas and corrals. The patience of the European administrators working in such Reserves must be infinite. The Natives are

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[1] Batten, T. R., *Problems of African Development* (1954), Part I, p. 23.

[2] *Vide* paras. 5-11, *supra*.

[3] Logan, R. F., *A Study of Conditions in S.W.A. Relating to the Indigenous Peoples*, Unpublished (1962), p. 12.

fully aware of the need of such devices, and agree whole-heartedly that they should be constructed; yet they seem unable to stir themselves from the shade of the village Council-tree long enough to do that which will save their herds and greatly increase the prosperity of the group. Even more annoying is the fact that they will not undertake such work for their own betterment unless they are paid in cash wages for so doing [1]."

23. As stated above [2], Respondent, in order to develop the agricultural resources of the Territory on a commercial basis, had to rely on the capital, initiative and skill of Europeans and was consequently obliged to settle European farmers on land in the Police Zone which could be productively used for the said purpose.

Applicants, in suggesting that the allocation of land should have been proportionate to the numbers of the population groups involved, and should have been based only on the extent of land available, ignore not only the fact that the different regions of the Territory are not equally endowed with natural resources, but also the significant differences in productive utilization thereof by Natives and Europeans respectively. Not only do they tacitly assume that the physical potentialities of all the land areas are the same, but they also appear to assume that the productive capacities of the various population groups, at their present stage of development, are the same—an assumption which would, of course, be absurd. On the other hand, if they do not make the last-mentioned assumption, and were to contend that, despite the substantial difference in the productive capacity of the Native and European groups, Respondent should nevertheless have allocated the land resources to the said groups in proportion to their numbers, they would in fact be advocating that Respondent should deliberately have smothered all prospects of building up and expanding the economy of the Territory.

24. It is precisely in the respects aforestated that Professor J. H. Wellington, to whom Applicants refer in the Reply, errs when he comments that "we seem to have looked after ourselves very well" [3]. Not only does Professor Wellington fail to take into account the economic considerations mentioned above, but the conclusion which he draws is based largely on the following incorrect factual statement made by him, which is not included in the extract cited by Applicants from his address, viz.,

> "The Natives, numbering 400,000 now held 20 million hectares, whereas the Europeans, settled mainly by South Africa since 1952 and numbering 60,000, held altogether 37.6 million hectares *of the best land* [4]."(Italics added.)

Respondent has indicated above that the bulk of the land occupied by European farmers, far from being "the best land", is in fact the least endowed with physical resources and potentialities. Professor Wellington errs further when he states—

> "South Africa ... had allocated only a small area to the Hereros in

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[1] Logan, *op. cit.*, p. 22.

[2] *Vide* para. 15, *supra*.

[3] **IV**, p. 415.

[4] *The Windhoek Advertiser*, 5 July 1960. Respondent regards the allegation concerning settlement of Europeans "mainly ... since 1952" as irrelevant for present purposes. For particulars of allocations of farms, *vide* **III**, p. 29.

the Southern Hardeveld and had sent the remainder of the Hereros to the barren Kalahari sand area. The Union had then settled South African farmers on the fertile Hardeveld area [1]."

The area referred to by him as the Hardeveld is that described in the Counter-Memorial as the Central plateau [2].

The Herero reserves [3] in South West Africa are the following:

(a) The Kaokoveld, in extent 5,514,617 hectares, situate partly in the Namib, but mainly in the Central plateau (Hardeveld);

(b) The Otjohorongo and Ovitoto Reserves, in extent 426,299 hectares, situate wholly in the Central plateau (Hardeveld);

(c) The Aminuis, Epukiro, Waterberg-East and Otjituo Reserves, in extent 2,687,809 hectares, situate in the Kalahari area.

All these reserves, with the exception of Aminuis, fall within the region over which the Herero had in early years trekked and grazed his stock.

From this information it is clear that Professor Wellington is wrong when he says "only a small area ... in the Southern Hardeveld" had been allocated to the Hereros. He is also wrong in saying that the reserves mentioned in *(c)* above, i.e., in the Kalahari, are in a "barren ... sand area". The large stock increases in the said reserves referred to in the Counter-Memorial, especially in the Aminuis Reserve [4], serve in themselves to show that the area is a good one for farming. In this regard it is apposite to quote the following observation made by Lord Hailey: "... on the whole the conditions of soil and grazing in the Reserves are not inferior to those in the farming areas of the Police Zone [5]." It may also be mentioned that before the Aminuis and Epukiro Reserves were proclaimed as such, the leaders of the Herero people inspected these areas and declared themselves satisfied with the land.

Professor Wellington's further statement that "the Union had then settled South African farmers on the fertile Hardeveld area" is only partly true. European farmers were settled in the Hardeveld area, but the larger (southern) part thereof has an extremely low rainfall [6], and can be described from an agricultural point of view as being of the least favourably endowed regions in South West Africa.

25. Respondent has already dealt with certain allegations made by Applicants elsewhere in the Reply which are in the present context repeated in the following terms:

"In view of the poverty of 'Native' inhabitants, the fact that financial assistance was available to 'European' settlers but not to 'Natives', and that Respondent's laws and practices render residence by any 'Native' anywhere in the Territory insecure and make it impossible for 'Natives' to lease land, there is no valid basis for Respondent's conclusion that '... the provisions that have been made, are not unreasonable' [7]."

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[1] **IV**, p. 415, footnote 4.

[2] *II*, map on p. 292. Prof. Wellington divides the Territory geographically into three areas, "the arid Coastal Desert, the Eastern Kalahari Desert sand area and the central Hardeveld".

[3] Reserves in which the Herero preponderate.

[4] **IV**, pp. 10-11.

[5] Lord Hailey, *An African Survey*: Revised 1956 (1957), p. 764.

[6] *Vide* **II**, map on p. 294.

[7] **IV**, p. 415.

These allegations are made relative to Respondent's statement that Natives are entitled to purchase agricultural land in the Police Zone.

Respondent, in dealing with this matter [1], explained why, on the one hand, financial assistance was made available to European settlers to acquire land in individual tenure, whereas, on the other hand, the Natives were assisted by the establishment and extension of reserves set aside for exclusive occupation by them. It has also been shown that the allegation that Respondent's laws and practices "render residence by any 'Native' anywhere in the Territory insecure", is absurd and devoid of truth [2].

Applicants' further allegation relative to the "poverty of [the] 'Native' inhabitants" hardly calls for a reply, inasmuch as no averment is made that this alleged state of affairs is due to any act or omission on the part of Respondent. Admittedly the Native inhabitants of the Territory generally have less financial resources than the Europeans. That is so, however, not because of any limitation placed on opportunities for them, but because of their traditional outlooks and practices which result in their own economy being on the whole still of a subsistence nature. And to say, as Applicants do, that Respondent's laws and practices "make it impossible for 'Natives' to lease land", is also *untrue*. Respondent has explained [3] why the probationary leases in its land settlement schemes prohibit assignment or cession of such a lease to a non-European during the subsistence of the lease. There is otherwise no legal impediment to agricultural land in the Police Zone being sold or leased to Natives.

26. In addition to what has been stated above in refuting Applicants' allegation that Respondent "has progressively reduced the proportion of farm land available for cultivation or pastoral use by the 'Native' population", reference can also be made to more recent developments which belie the very basis of Applicants' complaint that Respondent's policies are directed at the oppression of the Native inhabitants of the Territory for the benefit of the Europeans in so far as, *inter alia*, the economic situation is concerned.

The Odendaal Commission, the most recent of a number of official commissions appointed over the years to report on the needs of the non-European population groups of the Territory, has in its report recommended a development programme which will entail that the existing non-European areas be enlarged by more than 50 per cent. In order to implement this recommendation it will be necessary not only to make use of State lands which are at present unalienated, but also to acquire from European farmers, at large expense, substantial areas of land which they have developed and improved over the years [4].

The proposed extension of the existing reserves, however, forms part of a complex of recommendations made by the Commission with a view to the establishment of separate homelands for each of the population groups; and as Respondent has, for reasons which are known, decided to defer its decision relative to the creation of the proposed homelands, the question of extending the reserves is therefore also held in abeyance for the present.

Despite such deferment, however, Respondent is proceeding with the

[1] *Vide* Chap. II, paras. 70-71, *supra*.

[2] *Ibid.*, para. 71, *supra*.

[3] III, pp. 32-33, and *vide* also Chap. II, para. 70, *supra*.

[4] *R.P.* No. 12/1964, pp. 87, 89-93, 95 and 101-105.

acquisition of the European farms involved in the proposals, so that when the time comes for deciding upon the homelands scheme, the demarcation of the new borders can be facilitated [1].

27. A clear indication of the substantial additions to the non-European areas involved in the recommendations of the Commission is given in the following table, which reflects the present functional subdivision of the Territory as compared with that proposed by the Commission.

TABLE

PRESENT AND PROPOSED FUNCTIONAL SUBDIVISION OF LAND

Subdivision	Present		Proposed	
	Square km.	Percentage of the whole	Square km.	Percentage of the whole
Farms: European	389,650[2]	47.34	355,744[7]	43.22
Others	21,249[3]	2.58	21,249[7]	2.58
Towns and township areas	4,740[4]	0.58	4,740[7]	0.58
Non-European areas	219,642[5]	26.68	329,858[8]	40.07
Nature reserves, government lands, etc.	187,864[6]	22.82	111,554[9]	13.55
Total	823,145	100.00	823,145	100.00

28. On the assumption that the recommendations of the Commission will be accepted without modification, the following table reflects the availability of land for the different non-White groups as at 1920, at present, and as proposed by the Commission.

It will be observed from this table that, in spite of the fact that the population doubled itself over the last 40 years, the increase in hectares *per capita* of the Native population will, if the Commission's proposals are adopted, be more than twofold, i.e., from 31 hectares to 74 hectares *per capita*.

29. The figures in the tables must be viewed in conjunction with the fact that, whereas European-owned land has since the inception of the Mandate been purchased by the owners thereof, all the additions to the

[1] **IV**, p. 210.

[2] *Vide* **III**, p. 30. (Refers to May 1961.)

[3] Obtained by deducting area of European farms from the figure for *all* farms given in the Commission's report, p. 29, table XI, viz., 158,653 square miles (= 410,899 square kilometres).

[4] *Vide R.P.* No. 12/1964, p. 29, table XI, where the area is given as 1,830 square miles.

[5] *Ibid.*, p. 111.

[6] *Ibid.*, where the figures quoted add up to 77,314 square miles (=200,243 square kilometres).

[7] *Ibid.*, p. 109 (para. 425, A. and B.).

[8] Obtained by adding increases proposed by the Commission (*ibid.*, item G.), viz., 11,021,619 hectares (=110,216 square kilometres) to present area. It will be noted that the resulting figure is 3,564 square kilometres *more* than the 326,294 square kilometres shown on p. 111 of the report.

[9] Obtained by subtracting increases to non-European areas proposed by the Commission (*ibid.*, p. 111, item G.) from farms and government lands in table XI on p. 29 of the report.

TABLE [1]

AVAILABILITY OF LAND IN VARIOUS NON-EUROPEAN HOME AREAS: IN 1920, AT PRESENT, AND AS PROPOSED BY THE ODENDAAL COMMISSION

Home area	Population		Area in hectares			Hectares *per capita*		
	1920 (1)	1960 (2)	1920-21 (3)	Present (4)	Proposed (5)	1920-21	Present	Proposed [6]
Ovamboland . . .	91,500	239,363	±2,000,000	4,201,000	5,607,200	22	18	23
Okavangoland. . .	20,000 [2]	27,871	± 500,000	3,299,617	4,170,950	25	118	150
Kaokoveld	1,500 [3]	9,234	418,500	5,525,129	4,898,219	28	600	530
Damaraland . . .	20,883	44,353	172,780	626,375	4,799,021	83	14	108
Hereroland	31,063 [2]	35,354	—	4,374,469	5,899,680	—	124	167
Eastern Caprivi . .	4,249	15,840	600,000	1,153,387	1,153,387	141	72	72
Tswanaland. . . .	200 [4]	9,992	—	—	155,400	—	—	59
Bushmanland . . .	3,931	11,762	—	—	2,392,671	—	—	203
Rehoboth Gebiet .	5,719	11,257	1,750,000	1,312,239	1,386,029	307	117	123
Namaland	20,968	34,086	825,321	1,115,529	2,167,707	39	32	62
Unallocated Land .	—	—	—	356,433	—	—	—	—
Total . . .	200,013	447,192 [5]	6,266,601	21,964,178	32,629,364	31	50	74

[1] The information given in the different columns in this table has been taken from the following sources: Col. (1) *R.P.* No. 12/1964, p. 37, table XVI. Col. (2) *Ibid.*, p. 41, table XIX and p. 99 (para. 378). Col. (3) Counter-Memorial, Book VI, III, pp. 239-240 and pp. 246-247. Col. (4) *R.P.* No. 12/1964, p. 111, table G. Col. (5) *Ibid.*

[2] This was probably a complete over-estimate.

[3] This figure is based on a 1925 estimate of 2,000. *U.G.* 22-1927, p. 22.

[4] This figure also includes "others".

[5] This figure of 447,192 includes 7,360 non-European persons not listed in this column.

[6] The figures in this column are calculated on the present population figures.

Native reserves have been made on a gratuitous basis, except for one farm in the Otjiwarongo district which was added to the Waterberg-East Reserve, and which was paid for out of the trust fund of the reserve [1].

In addition to the above consideration, there is the fact that by far the greatest amount spent, and to be spent, on improvements in the Native reserves, e.g., on fencing, boreholes, engines, windmills, dipping tanks, dams, reservoirs, canals, etc., has been, and will be, derived from public moneys. On the other hand, all improvements on private farms owned by Europeans have been, and will be, paid for by the owners concerned.

30. In view of what is stated above, and bearing in mind the economic considerations involved, Respondent denies Applicants' accusations that its policy with regard to the allocation of agricultural land to the different population groups has been unreasonable, or unfair, in so far as the Native population group, or any other population group, is concerned.

D. Measures Taken for the Relief of Persons Affected by Drought

31. In the Counter-Memorial Respondent stated that the picture drawn by Applicants in the Memorials with regard to the assistance given in South West Africa to persons affected by drought conditions was misleading, largely because Applicants failed to distinguish between the types of assistance given to the European population and the Native population respectively [2]. Respondent went on to explain that assistance given to European farmers largely took the form of loans repayable together with interest at stipulated rates, whereas the assistance given to the Natives was by way of direct or indirect grants, although loan facilities had also been created for those Natives who had suffered stock losses as a result of the drought and the foot-and-mouth epidemic [3].

Applicants revert to this matter in the Reply, and compile a table in which they distinguish between the types of assistance given over the period 1959 to 1961, and in which they compare the value of assistance given to Europeans and Natives respectively in the form of loans and grants [4]. Commenting on the position as reflected in the said table, Applicants say—

> "[t]he 'Native' population composes 85.24 per cent. of the combined total 'Native' and 'European' populations, yet was restricted to 2.4 per cent. of the total loans and 36.17 per cent. of the total grants made available for drought relief. Its share of the total outlay was but 4.53 per cent.[4]"

32. Again, as in the Memorials, the picture drawn by Applicants is not only factually wrong in certain respects, but is also generally misleading.

In the first place, it is unrealistic and illogical to make a comparison of the assistance given respectively to Natives and Europeans who have been affected by drought conditions on the basis of total population figures. Many people, European and Native, are not dependent on personal income from farming, and are therefore not directly affected by drought conditions. Many, however, may well be indirectly affected. In this connection mention may be made of the large number of Natives who

[1] Departmental information.
[2] III, p. 33.
[3] *Ibid.*, pp. 35-37.
[4] IV, p. 416.

are employed as wage-earners on European farms. Whereas a relief loan granted to a European farmer may be looked upon as assistance to him, it enures also, at least in part, to the benefit of the Native farm worker, in the sense that he is assured of payment of his wages and employment despite setbacks occasioned by drought. The Native farmers, on the other hand, save perhaps with a few exceptions, do not, in the form of agriculture practised by them, employ the help of wage-earners.

Then also, drought conditions differ from place to place in the various parts of the Territory, and the consequences thereof are different for the members of the various population groups. Thus, for the European farmer who must, in order to subsist in the modern economy, of necessity maintain a large number of livestock, the type and the measure of assistance, in order to provide adequate relief, must necessarily be different from that required by the Native farmer, who practises a form of subsistence economy [1].

This situation provides the answer to Applicants' question "why the 'Natives' with far fewer financial resources to begin with, should be less damaged in the overall by the drought than the 'Europeans' "[2]. The European farmer, who is obliged to pay interest or capital instalments on mortgages and also the wages of his workmen, as well as other operational costs, cannot, when seriously affected by drought conditions, carry on his farming operations unless he is given assistance of the nature explained. In the absence of such assistance he and his employees and their families are forced off the land, with the resultant loss of the contribution which he makes to the economy of the Territory. In the case of the Native farmer, the position generally is different. Although he admittedly suffers a setback in drought conditions, the consequences are not nearly the same for him as for the European farmer. Farming in the reserve, he is not subject to the burden of capital charges, interest or an outlay of operational costs. For him, drought conditions mainly affect his subsistence resources, which can be augmented by grants to tide him over the periods of difficulty, or, if he so elects, by making use of loan facilities created for him [3]. And many Native farmers in the reserves, who are also migrant workers, can, with the assistance of the wages earned by them, manage to "weather the storm" in times of drought, whereas the European farmer whose sole income is derived from his farming operations is more materially affected.

It is in the circumstances entirely fallacious to draw a comparison between the share of the total outlay made available, on the one hand, to Europeans by way of loans repayable with interest, and, on the other hand, the share made available to Natives by way of grants in aid.

33. In the second place, the figures upon which Applicants have based their conclusion are wrong.

Applicants say in this regard that the "financial data" given in the table compiled by them "is derived solely from examination of [the] Counter-Memorial" [4]. What they omit to state, is that in certain respects they have adapted the figures to suit their purpose. Thus, their compara-

[1] Compare in this regard the figures of livestock owned by Natives and Europeans, respectively. **III**, pp. 8 and 13.

[2] **IV**, p. 415.

[3] *Vide* para. 31, *supra*.

[4] **IV**, p. 416, footnote 2.

tive table reflects a figure of R300,000 as having been utilized to assist European farmers by way of grants, but nowhere in the Counter-Memorial was it stated that such a sum, or any particular sum, was expended in the form of grants to Europeans. What Respondent did say was that—

> "[s]ave for the . . . sum of £150,000 [R300,000] [which was intended for unforseen emergency relief] the whole amount [of £2,600,000] was applied solely towards providing *loans* for farmers, and not, as Applicants would seem to suggest, free grants [1]".

Applicants, without justification, draw the conclusion that the said sum of R300,000 was applied in making grants to European farmers. In fact it was not. It was applied as follows:

(a) A sum of R200,000 was used to purchase mealies, mealie-meal and other foodstuffs for Native scholars and patients in Ovamboland and in other Native reserves, as well as for emergency relief in the Rehoboth *Gebiet* [2].

(b) The balance of R100,000 was applied in making a loan, repayable with interest at the rate of 4½ per cent. per annum, to a company, Damara Meat Packers Limited. The loan was to enable the said company to buy cattle in the drought-stricken areas, including the Native areas, which were not in a marketable condition, but could be used for canning purposes [2].

In the premises it is clear that Applicants' whole table, in so far as it deals with grants, and Applicants' calculation that the Native population "was restricted to . . . 36.17 per cent. of the total grants made available for drought relief"[3], fall by the board. In fact, by far the larger portion of the moneys expended by way of grants was appropriated directly or indirectly to the relief of the Natives; the European farmers did not share therein, save in so far as provision was made for subsidized transport of drought-stricken stock and for a subsidy on maize sold to farmers affected by the drought [1].

34. With regard also to loans, the figures in Applicants' comparative table are not correct. Respondent stated in the Counter-Memorial [4] that loans totalling R120,500 were granted by the South West Africa Administration to tribal funds to enable Native farmers who had lost stock in consequence of the drought and foot-and-mouth disease to replace such stock. In fact the said sum was made available for the purpose stated, but only R47,000 was taken up by certain of the reserves. The balance of R73,500, although allocated for use, was not taken up, the Reserve Boards concerned refusing the assistance offered. The reasons given for the said refusal were either that the inhabitants of the reserves were not prepared to burden themselves with loan debts, or that they were not prepared to replace stock lost in the drought as they feared that there would be a repetition of drought conditions in the next year, with a resultant loss also of the stock purchased in replacement. Furthermore, of the sum of R4,900,000 reflected by Applicants as loans to Europeans, an amount of R2 million was made available to commercial banks on investment to enable them to grant greater credit facilities. Although

[1] III, p. 34.
[2] Departmental information.
[3] IV, p. 416.
[4] III, p. 36.

such credit facilities would generally have enured to the benefit of Europeans, they were not limited to them, and there was no reason why Natives, if able to provide the necessary security, could not have availed themselves of such facilities.

In the premises, Respondent contends that also in respect of the loan position the comparison sought to be drawn by Applicants does not lead anywhere. Surely, Applicants cannot justly complain that the loan facilities provided for the Natives were inadequate, when the Natives themselves did not make full use of such facilities as were offered to them.

35. In concluding their discussion of this topic, Applicants say that the figures in the table compiled by them must be viewed—

> "... in conjunction with the obvious factor that the margin of financial elasticity, or 'cushion' against adverse circumstances, is infinitely less for the 'Natives' than it is for the 'Europeans' in the Territory in spite of the fact that the 'Europeans' have progressed to the point where they may incur debt obligations [1]".

This statement may be true, but only up to a point. Although the European farmers may, generally speaking, have greater financial resources than the Natives, assistance was given only to those who, as a result of the drought, were in need of aid; and, as has already been pointed out, the consequences of a prolonged drought are not only more disastrous, but also entirely different, for the European farmer who needs assistance than for the Native farmer. The result is that the type and measure of assistance given are not comparable.

E. Alleged Discrimination in Social Welfare Measures

36. In respect of alleged discrimination in what they term "other legislative policies in the Territory as a whole" [1], Applicants refer to the following legislative measures:

(a) Pneumoconiosis Compensation Act [2].
(b) The Workmen's Compensation Act [3].
(c) The Social Pensions Amendment Ordinance [4].

The first-mentioned of the said measures was referred to in the Counter-Memorial [5] in answer to certain allegations made in the Memorials [6] relative to the Pneumoconiosis Act No. 57 of 1956, which had been repealed. The other two measures were, however, not referred to in the Memorials or in the Counter-Memorial, and are now brought up for the first time in the Reply.

These three measures will be dealt with separately hereinafter.

I. The Pneumoconiosis Compensation Act

37. Respondent denies that this Act implements "legislative policies in the Territory". As pointed out in the Counter-Memorial [5], the Pneu-

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[1] **IV**, p. 416.
[2] Act No. 64 of 1962 in *Statutes of the Republic of South Africa 1962*, Vol. II (Nos. 59-93), pp. 1023-1183.
[3] Act No. 30 of 1941 in *Statutes of the Union of South Africa 1940-1941*, pp. 366-480.
[4] *Ord.* No. 2 of 1962 in *The Laws of South West Africa 1962*, Vol. XLI, pp. 5-21.
[5] **III**, pp. 62-63 and 91.
[6] **I**, pp. 121-122 and 128-129.

moconiosis Act, No. 57 of 1956, which was concerned with mines in South Africa, did not apply to mines in South West Africa, although certain of the sections of the Act relating to medical and *post-mortem* examinations referred to the Territory [1]. And, as stated [1], the position is the same under the Pneumoconiosis Compensation Act of 1962, which repealed the 1956 Act.

Applicants, in reverting to this measure in the Reply, state:

> "Respondent asserts that the new Act is 'in no way relevant to mine workers within the Territory'. This may be true as long as no Territorial mines have been scheduled as 'controlled mines' within the meaning of secs. 1 (12) and 54 (4) of the Act, but it is applicable to South West African 'Natives' who may contract pneumoconiosis in 'controlled mines' in the Republic, and is therefore relevant in the premises [2]."

In answer to this statement Respondent says that, in the first place, Applicants' suggestion that mines in the Territory can be scheduled as "controlled mines" in terms of the Act is unfounded. The Act is in no way applicable to mines in South West Africa, and no mines in the Territory can be brought within the scope of the Act.

38. Secondly, Applicants' submission that the provisions of the Act are relevant in the present enquiry merely because South West African Natives may contract pneumoconiosis in controlled mines in the Republic of South Africa, is a change of front to which they have been driven, and is ridiculous. Surely the mere fact that the Act may affect individual Natives from the Territory who voluntarily take up employment in the Republic, cannot make it relevant to an enquiry regarding "legislative policies in the Territory".

All persons from the Territory, be they Europeans, Coloured or Natives, who accept employment on mines in the Republic, do so of their own choice. Although the number so employed is not known, it is considered to be negligible. What can be stated, is that over the last five years only 15 Natives from South West Africa qualified for, and received, compensation under the Pneumoconiosis Act, No. 57 of 1956, and the present Act of 1962 [3].

In the premises aforestated, Respondent reaffirms the attitude adopted in the Counter-Memorial, viz., that the provisions of the Act are not relevant to the issues before the Court.

II. The Workmen's Compensation Act

39. Applicants say that this Act—

> "... differentiates between racial groups in the following ways: on his death, a 'European' or 'Coloured' workman's family receives a pension, with allowances for children, whereas a 'Native' workman's family receives a lump sum settlement; a 'European' or 'Coloured' workman's family receives £45 for burial expenses, and a 'Native' workman's family receives £15 [4]".

The factual allegations in this statement are correct, save that the

[1] III, pp. 62-63 and 91.
[2] IV, p. 417, footnote 4.
[3] Departmental information.
[4] IV, pp. 416-417.

figures mentioned in respect of burial expenses have since 1961 been increased to £50 (R100) and £20 (R40) respectively [1].

40. The reason why compensation is paid to the dependants of a Native workman in a lump sum, instead of in the form of a monthly pension, derives purely from practical considerations. Many thousands of workmen are recruited from tribal territories, both inside and outside the borders of South West Africa, where the payment of pensions to their dependants would be quite impracticable, and where in most cases it would be difficult to ensure that periodical payments over long periods are made to the right persons. And in the areas outside the reserves, the dependants of many deceased workmen are inclined to move from place to place in seeking new avenues of employment. It would therefore be extremely difficult to keep track of them from month to month, and year to year.

Another consideration is that in many cases there is no evidence to establish the ages of Native children who are dependants of a deceased workman. This makes it impossible to apply a system of paying a monthly pension terminable on the child attaining a fixed age, which is the system operating in the case of dependants of a European workman. Support for the children of a deceased Native workman is therefore provided for in the lump sum paid to his family. It is anticipated that as the Native labour force becomes more settled, and the practical difficulties can be overcome, provision for monthly payments will also be made for the dependants of deceased Native workmen.

In this regard it may be pointed out that there is already provision in the Act in terms whereof periodical payments, instead of a lump sum, can be made to a Native workman or his dependants where arrangements in that regard are practicable. In this connection section 46 of the Act, as amended, provides as follows:

> "46. (1) Any compensation payable to or in respect of any person under this Act may, in the discretion of the commissioner and for reasons deemed by him to be sufficient, be—
>
> . . . .
>
> *(b)* invested or applied from time to time as the commissioner may deem to the advantage of the workman, or those dependent on him for maintenance . . . [2]"

In practice there are a number of cases where, in terms of the aforementioned provision, the amounts awarded are invested, and monthly payments are made to dependants of Native workmen instead of lump-sum payments.

41. The fact that there is a difference between the amounts awarded in respect of burial expenses of Natives and non-Natives respectively, is due to the different stages of development and living standards generally attained by, on the one hand, the European and Coloured groups, and, on the other hand, the Native groups. On the whole, the Native workers have a lower income level than the two other groups, and their individual cost of living is also lower: in the result amounts usually spent by them on

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[1] *Vide* Act No. 7 of 1961, secs. 6 *(d)* and 16 in *Statutes of the Republic of South Africa 1961*, Vol. I (Nos. 1-41), pp. 40 and 44.

[2] Act No. 30 of 1941, sec. 46 (1) in *Statutes of the Union of South Africa 1940-1941*, p. 428.

occasions such as funerals are also lower, and customs and charges pertaining to funerals are attuned to this fact.

The different amounts fixed as awards in respect of burial expenses are based on Respondent's experience of the costs generally involved in the burial of members of the different population groups.

42. Applicants also say, with reference to the Act, that benefits for disability are "calculated by percentages of wages, and therefore are not visibly discriminatory by themselves" [1]. They, however, add to this remark the comment that "[t]he wages paid to 'Native' labourers are extraordinarily low" [2].

Respondent has already dealt with Applicants' allegations regarding low wages paid to Native labourers in the Territory [3], and in the present context need merely repeat its denial of Applicants' charge in that regard.

There can otherwise be no complaint against a system under which benefits for disability are calculated on the basis of percentages of wages.

III. The Social Pensions Amendment Ordinance

43. Applicants point out that, in terms of the above measure, European and Coloured persons in the Territory are entitled to old age, disability and blind persons' pensions or grants, although on a differential scale, whereas in the case of the Native population no provision for such pensions or grants is made [1].

Their complaint in this regard is a twofold one, viz., firstly, that the provision made for such benefits in the case of the Europeans and the Coloureds is "on a discriminatory basis", and, secondly, that " 'Natives' . . . are excluded from these public pension schemes" [1].

It is true that the measure in question differentiates between the scale of benefits which are applicable to Coloureds and Europeans respectively and that the Natives of the Territory have thus far not shared in the benefits provided for in the measure. There are, however, as will be indicated below, good reasons for this differentiation between the said population groups.

44. The pensions and grants provided for in the Ordinance in question are not funded by direct contributions from the inhabitants of South West Africa, all the funds required being supplied from the ordinary revenue of the Territory.

The fact that the income of the European inhabitants of the Territory is, on the whole, substantially more than the income of the Coloured inhabitants, has an important bearing on the difference in the awards provided for in the Ordinance for the members of these groups. In the first place, the contribution of the Coloured people to the revenue of the Territory, by way of taxes on incomes and on persons, is but a fraction of the contribution made by the European population. Secondly, with their lower income levels, the cost of living for the Coloured people and their general standards of living are lower than those of the Europeans. In addition, Coloured people in urban areas are provided with housing, water, electricity and sanitation at lower rates, and in many cases they are wholly exempt from taxes on property.

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[1] IV, p. 417.

[2] *Ibid.*, footnote 3.

[3] *Vide* Chap. II, paras. 43-66, *supra*.

It stands to reason, therefore, that, while the object of the Ordinance is to provide assistance to people who are in need by reason of old age or disability, the measure of relief required by the members of these two population groups must of necessity be different.

It would in the circumstances have been unrealistic to pay pensions to Coloured persons at the same rates as those applicable to Europeans.

In fixing the scales of benefits applicable to the members of these two population groups, Respondent has given due consideration to the general standards of living of the two groups. Consequently, the income entitling a European to a pension is fixed at a higher rate than that for a Coloured person, and the maximum pension rates are higher for a European than for a Coloured person.

45. In the case of the Native population different considerations have thus far applied. In their traditional ways of life they are accustomed to traditional forms of assistance, and the concepts of mutual aid and care of the extended family have wide prevalence amongst them. This is particularly so in the reserves, where a form of communal subsistence is practised within the family group. In this system old age and physical disability do not have the same consequences for the Native living within his communal society as they have for the European or Coloured person who is wholly dependent upon his own efforts and resources.

46. It must, however, not be understood that Respondent does not contribute to such traditional forms of assistance. Indeed, the very establishment and maintenance of reserves for the Native groups [1] permits of the continuation of the traditional systems which promote, *inter alia*, the welfare of the aged and the infirm members of the groups. In individual cases where Natives cannot benefit from traditional forms of assistance, relief is granted in other ways, such as the provision of weekly rations.

47. Development and progress in the Territory in recent years have made it feasible to consider the introduction of a system of social pensions also for the Natives, and Respondent has in fact already decided in principle upon the introduction of such a system.

Inasmuch as the administration of such a scheme for all the Native inhabitants of the Territory must, in the nature of things, require careful and detailed planning, particulars thereof are at present being worked out, and it is expected that the scheme will be brought into operation in the near future.

48. While Respondent admits that the measures at present in operation differentiate in the respects aforestated between the different population groups, it denies Applicants' suggestion that such differentiation is inspired by a motive to discriminate between the said groups in an unreasonable or unfair manner.

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[1] *Vide* para. 29, *supra*.

CHAPTER IV

THE POLICE ZONE

A. Introductory

1. This Chapter is devoted to a treatment of the matters raised by Applicants in Chapter IV B.3.c.2 (D) of the Reply under the heading "The Police Zone" [1]. The subject-matter of this part of the Reply is divided by Applicants into three so-called "areas of economic rights" [2], as summarized below, and will be dealt with by Respondent in the same order, viz.:

(a) Admission to employment and access to vocational training;
(b) Measures allegedly having the effect of compulsion to labour;
(c) Freedom of association and the right to organize.

2. Inasmuch as Applicants purport to discuss Respondent's policies and practices relative to the above matters in the light of what they term "recognized standards applicable to the three said areas" [3], it is necessary, before proceeding to deal with Applicants' specific charges, to give consideration to these so-called "recognized standards". This will be done in the following paragraphs.

3. Applicants themselves nowhere define the content of the "standards" on which they rely. They merely refer to the "I.L.O. Programme for the Elimination of 'Apartheid' in Labour Matters in the Republic of South Africa", which forms an Annex to the I.L.O. "Proposed Declaration concerning the Policy of 'Apartheid' of the Republic of South Africa" [4], and they say that the said "Programme" is included among the documentation in these proceedings inasmuch as it expresses—

> "... the judgment of the Organisation with respect to recognized standards applicable to the three said areas, and is based upon examination of a legal and administrative system which is analagous [sic], in all relevant aspects, to that existing in the Territory [3]". (Footnote omitted.)

From a perusal of the said "Proposed Declaration" it appears that the "Programme" in question was drawn up by the I.L.O. in compliance with a request of the Governing Body of the International Labour Office for—

> ". . . suggestions concerning the contribution which the I.L.O. could make to the complete elimination of *apartheid* and to suggest what action should be taken to secure the observance of the

[1] IV, pp. 417-424.
[2] *Ibid.*, p. 419.
[3] *Ibid.*, pp. 417-418.
[4] International Labour Office—International Labour Conference, Forty-Eighth Session, 1964, Tenth Item on the Agenda: *Proposed Declaration concerning the Policy of "Apartheid" of the Republic of South Africa* (Report X).

principles in the Constitution and to protect human dignity" [1].

The said "Programme" avowedly concentrates on what is referred to therein as the aforementioned "three broad areas" [2]. It contains a short discussion of various legislative measures and practices in the Republic of South Africa relative to the said "areas", and concludes with "Recommendations for Action" which would involve the repeal and/or amendment of certain legislative measures at present in force in South Africa.

Neither the "Proposed Declaration" nor the "Programme" annexed thereto contains any clear statement as to any particular standards applied by the Organisation in evaluating Respondent's said legislative measures and practices. However, in advancing reasons for concentrating on the aforementioned "three broad areas", the I.L.O. stated, *inter alia*—

> "... well-established standards approved by the International Labour Conference with near unanimity exist in respect of all of them; these standards give expression to principles proclaimed in the Declaration of Philadelphia as being among the aims and purposes of the International Labour Organisation ... [2]",

and

> "... the widespread acceptance of these standards in Africa generally, and in substantial measure by South Africa's immediate neighbours in southern Africa, refutes the suggestion that 'the present stage of social and economic development' of South Africa, which is generally conceded to be technically the most advanced of all African countries, precludes their immediate application there ... [2]".

These statements in no way elucidate the nature and content of the so-called "standards" purported to have been applied in the enquiry made by the Organisation. A reference to the provisions of the Declaration of Philadelphia [3], referred to in the above quotation, takes the matter no further, inasmuch as the said Declaration merely expresses in the following broad terms, humanitarian concepts which are considered to underlie the aims and purposes of the International Labour Organisation, viz.:

> "... all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity ... [4]".

4. In this particular respect, therefore, as is the case generally in the Reply regarding undefined so-called "norms and standards" [5] upon which Applicants seek to place reliance, there is an avoidance of any treatment which could throw light on the alleged juridical nature or content of such norms or standards.

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[1] International Labour Office—International Labour Conference, Forty-Eighth Session, 1964, Tenth Item on the Agenda: *Proposed Declaration concerning the Policy of "Apartheid" of the Republic of South Africa* (Report X), p. 13.

[2] *Ibid.* (i.e., *(a)*, *(b)* and *(c)* in para. 1, *supra*).

[3] International Labour Office, *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference* (1963 edition), Annex, pp. 21-23.

[4] *Ibid.*, p. 22 and *vide* also International Labour Office—International Labour Conference, Forty-Eighth Session, 1964, Tenth Item on the Agenda: *Proposed Declaration concerning the Policy of "Apartheid" of the Republic of South Africa* (Report X), p. 7. In this regard *vide* also sec. B, para. 25, *supra*.

[5] *Vide* sec. C, para. 34, *supra*.

There seems to be little doubt, however, that Applicants are not in the present context relying on norms or standards allegedly possessing a defined and certain legal content—like their oft mentioned legal norm of "non-discrimination or non-separation"—but rather on norms or standards which are not advanced as having attained the status of legal norms, but which are said to enjoy wide acceptance in practice. Respondent has already dealt with Applicants' norms and standards of the latter type, and has demonstrated that "evidence" tendered by Applicants regarding the existence of such norms and standards cannot serve to introduce new obligations into the Mandate, and that such evidence can at most be relevant only on the basis of an enquiry whether Respondent's policies and practices are inspired by improper motives [1].

It is, therefore, only on this basis that the "judgment" of the International Labour Organisation as expressed in the I.L.O. "Programme" with respect to so-called "recognized standards", can be relevant to the present enquiry, and it is upon this basis that Respondent will give consideration thereto. In this regard Respondent at the outset makes the following observations:

(a) The whole approach of the International Labour Organisation in the examination of Respondent's policies and legislative measures rested upon an *a priori* assumption that such policies and measures, being founded on a general policy of apartheid, were impermissible. In this regard Respondent has already indicated that the "Programme" was drawn up by the Organisation in performance of a specific task entrusted to it, viz., to make suggestions "concerning the contribution which the I.L.O. could make to the complete elimination of apartheid" [2]. It is therefore not surprising that the Organisation, in examining the relevant South African legislation, did not approach the matter without bias, and did not attempt to make an objective evaluation against the background of all the relevant circumstances and considerations. Of major importance in this regard is the fact that, although the Organisation was fully aware of the basis upon which Respondent justified the existence of the measures examined by it, viz., separate development of the different population groups in South Africa, and, although mention thereof is made in the "Programme", this was not taken into account at all in the examination and condemnation of the legislative measures in question.

Thus, the "Programme" recited the following explanation furnished by Respondent in a report sent to it in 1962 relative to the legislation under consideration:

> "The population of the Republic of South Africa comprises four very distinct population groups of whom eleven million are Bantu, three million of European origin, 500,000 of Asian origin and one-and-a-half million of mixed origin. The problem of ensuring the economic advancement and peaceful co-existence of this heterogeneous society in different stages of social and industrial evolution, in a manner which will ensure justice and the furtherance of the welfare of all, has necessitated the pursuance in this country of a policy of separate development with

[1] *Vide* sec. C, paras. 34-39, *supra*.

[2] *Vide* para. 3, *supra*.

a view to securing for all groups the realisation of their highest ideals within their own communities. Socio-economic conditions in the sphere of employment and occupation have necessitated the enactment of legislative measures peculiar to the needs of the different population groups so that they may progress in the direction of self-determination. The introduction of an integrated labour system would inevitably lead to economic and social injustices, bearing in mind that there are distinct communities, which differ culturally, ethnically and socially. These differences can be minimised only by affording such legislative protection as circumstances warrant in order to ensure that no group is deprived of the benefits to which its energies, labours and initiatives entitle it.

In certain fields where the considerations outlined above do not apply, there is a prohibition against discrimination on the grounds of race or colour. Section 24 (2) of the Industrial Conciliation Act, 1956, and section 8 (4) of the Wage Act, 1957, for instance, provide specifically that wage-regulating measures under those enactments shall not differentiate or discriminate on the grounds of race or colour. These two measures cover practically the whole field of statutory wage regulation in industry and commerce. Similarly the Apprenticeship Act, 1944, which regulates the admission of persons to apprenticeship training does not permit of any discrimination of the nature referred to in the Convention. Generally speaking, however, the law and practice in South Africa, based as it is on the endeavours of the Government to ensure that each population group develops to the maximum of its economic potential with minimum impingement on the rights and aspirations of others, inevitably necessitates limitations on the rights of all [1]."

This explanation made clear, and stressed, the fundamental character and objective of Respondent's policies, viz., development towards separate nationhoods for the various peoples forming the total population of the Republic. There is, however, on the part of the Organisation, a significant absence of any attempt to examine and test the legislation concerned on this basis; in fact, no further reference thereto is made at all in the "Programme". Instead, the "Programme" simply proceeds to examine particular legislative measures as if they were enacted for a society which either was homogeneous or integrated in fact, or which the Government concerned was developing, or was obliged to develop, in the direction of becoming an integrated entity. It stands to reason that standards appropriate for an integrated nation, real or emergent, cannot without material adaptation be considered appropriate for a group of separate nations, real or emergent. For example, as far as Respondent is aware, nobody has ever suggested that the standard of "equal opportunity" is necessarily to be applied within a state as between nationals and non-nationals thereof. If the Republic of South Africa is not expected to apply such standards

[1] International Labour Office—International Labour Conference, Forty-Eighth Session, 1964, Tenth Item on the Agenda: *Proposed Declaration concerning the Policy of "Apartheid" of the Republic of South Africa* (Report X), p. 15.

as between her nationals and inhabitants of the Protectorate of Basutoland, it seems unrealistic to expect her to apply it as between her White citizens and inhabitants of the emergent independent Transkei territory. Yet the whole underlying approach of the Organisation is exactly such an unadapted application of standards appropriate for integration to a factual situation of emergent, separate nationhoods. In Respondent's submission this fallacious approach tends, *ab initio*, to render valueless the conclusions arrived at by the Organisation.

(b) The I.L.O. "Programme", moreover, in examining certain legislative measures in the Republic of South Africa, does so without consideration of the historical background and the socio-economic *conditions which in certain respects necessitate differential treatment* of the different groups in order to do justice to all. In the result the exposition in the "Programme" regarding the legislative measures in question is not complete, fair or accurate.

(c) In the premises Respondent submits that the findings in the so-called "judgment" of the Organisation can hardly be of assistance in evaluating policies and practices in South Africa: not only does this "judgment" proceed on the assumption that the policy of apartheid, which is allegedly implemented by the measures examined by the Organisation, is impermissible and must be eliminated, but it ignores the principles and basic objectives of Respondent's policy of separate development, and disregards socio-economic conditions in South Africa. And, inasmuch as the "Programme" is concerned only with legislation in South Africa, the relevance of the findings of the Organisation to the present proceedings, which are concerned with South West Africa, is even more questionable. Applicants contend in this connection that the "legal and administrative system" in South Africa which was examined by the Organisation "is analagous, in all relevant aspects, to that existing in the Territory" [1]. Respondent denies that there is such an analogy, save in broad respects, and says that its aforegoing remarks regarding the relevance of the said findings in the "Programme" apply with even greater force to Applicants' attempt to extend such findings to legislation in South West Africa.

5. In regard to the aforementioned "standards" Applicants also rely on the 1953 report of the United Nations-I.L.O. *Ad Hoc* Committee on Forced Labour for a contention that—

> "[t]he parallels between the Territory and the Republic were expressly recognised [by the Committee] in the second area (freedom from forced labour) . . . [1]".

In so far as the said report is concerned, the Committee concluded that the South African pass laws—

> ". . . *may* serve the purpose of directing a supply of ample, and consequently cheap, labour towards regions where it is required for economic reasons [2]" (italics added),

and that legislation in South Africa involving penal sanctions for breach

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[1] IV, p. 418.
[2] *Ibid.*, p. 432.

of contract "... *might* lead to a system of forced labour for economic purposes" [1]. (Italics added.)

With reference to similar legislation applicable to South West Africa, the Committee confirmed in the case of the Territory the conclusions it had reached with regard to South Africa itself [2].

The conclusions of the Committee regarding the aforementioned legislation will be dealt with elsewhere in this Rejoinder [3], save that its findings in regard to the master and servants laws will be discussed hereinafter relative to Applicants' charges in that connection [4]. As will be shown, there is no foundation for a finding that the laws in question involve, even in a remote sense, compulsion to labour.

6. Finally, Applicants rely on a passage from the 1957 report of the United Nations Committee on South West Africa [5] in which the Committee recommended that the "... labour laws of the Territory should *conform to the standards approved by the International Labour Organisation for non-metropolitan Territories* ..." [6]. Applicants allege that this recommendation "... accurately and expressly acknowledged the standards approved by the I.L.O. ..." [6].

In the report of the Committee no discussion of I.L.O. "standards" is to be found, and it is consequently difficult to understand how the Committee can be said to have "accurately" acknowledged such standards. It is in any event clear that if the I.L.O. "standards" do not assist Applicants' case—as is submitted above—then neither does the Committee's express approval thereof.

7. Respondent next deals with Applicants' allegations concerning the aforementioned three "areas of economic rights".

B. Admission to Employment and Access to Vocational Training

8. Applicants' main charge in relation to the subject-matter under consideration is that Respondent has closed a number of skilled trades to persons other than Europeans. They rely on the provisions of the Apprenticeship Ordinance (S.W.A.) [7], as amended [8], to substantiate their charge. This Ordinance was not referred to in the Memorials, but, subject to what has already been said [9] regarding the introduction of new material in the Reply, Respondent will deal with Applicants' allegations thereanent.

9. By alleging that only European minors may execute contracts of apprenticeship, and that a minor may be employed in designated industries only if he has executed a contract of apprenticeship with his

[1] **IV**, p. 434.

[2] *Ibid.*, p. 438 (paras. 385 and 386).

[3] *Vide* sec. I, *infra*.

[4] *Vide* paras. 23-33, *infra*.

[5] *G.A., O.R., Twelfth Sess., Suppl.* No. 12 (A/3626).

[6] **IV**, p. 418.

[7] *Ord.* No. 12 of 1938 in *The Laws of South West Africa 1938*, Vol. XVII, pp. 214-234.

[8] *Ord.* No. 15 of 1948 in *The Laws of South West Africa 1948*, Vol. XXVII, pp. 224-226; *Ord.* No. 25 of 1957 in *The Laws of South West Africa 1957*, Vol. XXXVI, pp. 252-254 and *Ord.* No. 20 of 1959 in *The Laws of South West Africa 1959*, Vol. XXXVIII, pp. 520-524.

[9] *Vide* sec. D, *supra*.

employer, Applicants create the impression that non-White minors may not be employed in such industries [1]. This impression is erroneous, as will be shown hereunder.

The Ordinance, as originally enacted, provided, *inter alia*, for the Administrator to designate trades for defined areas to which the provisions of the Ordinance would be applicable [2]; for the entering into and registration of apprenticeship contracts pertaining to designated trades [3]; and for the appointment of (i) an inspector of apprenticeship to carry out the powers conferred and duties imposed by the Ordinance, and (ii) an apprenticeship committee to make recommendations to the Administrator [4]. The Ordinance also provided that only European minors who had passed Standard VI or who had, after being employed for six months at any designated trade, passed an educational test to the satisfaction of the Apprenticeship Committee concerned, could bind themselves as apprentices in any designated trade [5], but did not contain a prohibition against employment in a designated trade in the absence of a contract of apprenticeship.

Such a prohibition was introduced in 1948 when section 4 of the Ordinance was amended by the insertion of a new sub-section (2) which, in so far as is relevant, reads:

> "... no person shall ... without the written consent of the inspector ... given after consultation with the apprenticeship committee concerned, employ a minor in any designated trade ... unless a contract of apprenticeship has been entered into in accordance with this Ordinance ...[6]".

This amendment was conceived to ensure that unscrupulous employers in designated trades would not take minors into their service and thereafter refuse to enter into contracts of apprenticeship with such minors, thus frustrating the very object of the Ordinance. In formulating the amendment the legislature had in mind only such minors as could in terms of the Ordinance enter into contracts of apprenticeship. The amendment does not affect the position of non-White minors, who may be freely employed in designated trades, whether in a skilled or unskilled capacity, but who may not enter into contracts of apprenticeship. The reasons for this differentiation are considered in the succeeding paragraphs.

10. As already mentioned, a European minor may enter into a contract of apprenticeship only if he has passed Standard VI or a comparable educational test. In 1938, when the Ordinance was originally enacted, very few non-Whites possessed this qualification, and those who did were absorbed by the teaching and other professions. In this regard it may be mentioned that, although the Ordinance had been in existence since 1938 it did not come into effective operation until 1957, when the first trade was designated by the Administrator. Consequently, prior to that date

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[1] IV, p. 419.

[2] *Ord.* No. 12 of 1938, sec. 1 in *The Laws of South West Africa 1938*, Vol. XVII, pp. 214-216.

[3] *Ibid.*, secs. 4 and 6, pp. 216-218 and 218-220.

[4] *Ord.* No. 12 of 1938, secs. 5 and 11, pp. 218 and 222-224.

[5] *Ibid.*, sec. 8, pp. 220-222.

[6] *Ord.* No. 15 of 1948, sec. 1 *(a)* in *The Laws of South West Africa 1948*, Vol. XXVII, p. 224.

minors, irrespective of race, could enter into contracts of apprenticeship relating to any trade whatsoever in terms of section 23 of the Master and Servants Proclamation (S.W.A.) [1], and the fact that not a single non-White ever entered into such a contract shows that non-White minors either were not interested in the skilled trades or were not considered by prospective employers to have the necessary qualifications to serve as apprentices.

11. Since 1956 provision has been made at the Augustineum, a government educational and technical school for Natives [2], for practical and theoretical courses in masonry, carpentry and tailoring. These courses run for three years. The qualification for entry has purposely been made low, viz., Standard IV, so as to enable as many Natives as possible to qualify. After successful completion of such a course the Native concerned is free to practise his trade in the Territory.

Since the number of candidates who have enrolled for the three courses in the past has been rather disappointing, provision for additional courses has not thus far been made. The following table reflects the number of students who successfully completed the existing courses during the period 1958 to 1963 [3]:

	1958	1959	1960	1961	1962	1963
Masonry	4	1	3	0	0	0
Carpentry	2	3	2	2	0	3
Tailoring	5	4	1	5	4	5

Although the total number of students at present enrolled in these courses is only 37, it has been decided, with a view to meeting new demands expected to accompany the increased development of the non-White areas proposed by the Odendaal Commission, to provide for additional courses also in welding, leatherwork and motor mechanics. For the same reason it is intended to make provision in the near future for courses in carpentry, masonry, tailoring, welding, leatherwork and motor mechanics also in the northern territories.

12. As regards the industries mentioned by the Applicants [4], it should be observed that conditions of apprenticeship have not as yet been prescribed in respect of certain designated trades, viz., the boot-making, clothing, carriage building, food (baking and butchery) and leather trades, which means that the Ordinance is not yet in effective operation in the case of these trades.

13. With reference to the South African Native Building Workers Act [5], Applicants allege—

> "[b]ecause of the restrictions imposed under the Apprenticeship Ordinance of 1938, it has not been necessary to promulgate legislation similar to the South African legislation which prevents 'Natives'

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[1] *Proc.* No. 34 of 1920, secs. 20-32 in *The Laws of South West Africa 1915-1922*, Vol. I, pp. 342-346.

[2] III, pp. 466-467.

[3] Departmental information.

[4] IV, p. 419.

[5] Act No. 27 of 1951 in *Statutes of the Union of South Africa 1951*, pp. 106-152 as amended by Act No. 60 of 1955 in *Statutes of the Union of South Africa, 1955*, Part II (Nos. 56-70), pp. 1508-1510.

from being employed 'on skilled work' in any urban area other than a 'Native' area [1]".

This allegation creates the impression—

(a) that Natives are, in effect, debarred from qualifying as skilled workers in South West Africa by virtue of the provisions of the Apprenticeship Ordinance; and

(b) that the said South African statute prevents Natives from performing *any* skilled labour in urban areas in South Africa other than Native areas.

As regard the first aspect, it has already been shown that Natives are in fact trained for skilled work in the Territory, and that a Native who has successfully completed a technical course may practise his trade anywhere in the Territory. Moreover, there is nothing to prevent a Native from being employed in a skilled trade in which he can gain practical experience, or from enrolling for one of the theoretical courses prescribed by a number of institutions, for example the Witwatersrand Technical College, which sets examinations for European apprentices in the Territory. Respondent stresses that no Native is debarred from practising a skilled trade in the Territory, and refers to what has already been stated regarding the extent to which Natives are already employed in skilled work [2]. Furthermore, it is government policy to employ as far as is practicable only Native workers, skilled and unskilled, on government projects in Native areas.

14. Applicants also create the impression that Natives are, in fact, prevented from being employed on skilled work in the Territory by referring to the following excerpt from the 1956 report of the Committee on South West Africa:

"The *Allgemeine Zeitung* of 8 November 1955 . . . reported that the Chief Native Commissioner, acting under the direction of the Minister for Native Affairs, had stated that the use of 'Natives' for qualitative jobs, as was under consideration in Northern Rhodesia, would not be permitted in South West Africa. The statement had been occasioned by information which had been circulated that 'Natives' in the Territory would perform work which had until then been reserved for 'Europeans' [3]."

The above quotation from the Committee's report follows on a paragraph with which it was intended to be read. Before referring to the report in the *Allgemeine Zeitung*, the Committee stated that, according to newspaper reports, the secretary of the South West Africa Mineworkers' Union had said during August 1955, that White employees on a mine at Tsumeb were concerned about losing their jobs to Natives. This was due to the fact that the Rhodesian Selection Trust was then in the process of negotiating with the Northern Rhodesian European Mineworkers' Union regarding the advancement of Natives on its mines in Northern Rhodesia to certain posts held by Europeans. It is clear, therefore, that the report in the *Allgemeine Zeitung* was concerned only with "qualitative jobs" *on mines*.

The statement which, according to the Committee, was reported in

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[1] IV, pp. 419-420.
[2] *Vide* Chap. II, para. 6, *supra*.
[3] IV, p. 420.

the *Allgemeine Zeitung*, was not made by the Chief Native Commissioner but could have been made by one of the officers in charge of the labour branch of the office of the Chief Native Commissioner at the time, since it correctly reflects Respondent's policy regarding higher skilled work on European mines in the Police Zone outside the reserves. Respondent has already explained the reasons why certain qualitative jobs in such mines are reserved for members of the White group [1], and it is unnecessary to repeat the reasons here. There is, in any event, no doubt that the statement reported in the *Allgemeine Zeitung*, if it was in fact made, did not apply to skilled work generally, as is suggested by Applicants.

15. As regards Applicants' reference to the South African Native Building Workers Act [2], it should be observed that while section 15 (1) of the Act provides in general terms that no Native may be employed on skilled work in any urban area other than a Native area, section 1 (xvi) defines "skilled work" as work performed in a number of trades pertaining *to the building industry*. In view of the fact that this Act only applies to the building industry, Applicants' reliance thereon for the broad allegation that Natives in South Africa are prevented "from being employed 'on skilled work' in any urban area other than a 'Native' area" [3], is unjustified.

16. Respondent does not propose to deal in detail with job reservation in South Africa, but in view of Applicants' reference to the Native Building Workers Act a brief elucidation of the principles underlying the Act will be given.

Neither the Applicants nor the I.L.O. "Programme" [4] mentions that the Act also makes provision for machinery to prevent persons other than Natives from performing skilled work in the building industry within a Native area, except with the written consent of the Minister of Labour [5]. It will thus be seen that job reservation in the building industry cuts both ways, protecting Native building workers in Native areas and European workers in European areas. The principles embodied in this Act are in accord with Respondent's general policy of conferring priority rights on the different population groups in their respective areas.

17. Opponents of job reservation tend to lose sight of its beneficial reciprocal effect from the point of view of the Native. Separate development, in the economic sphere, ensures for the Native the opportunity of establishing his own business in his own area, sheltered from the competition of European institutions with greater capital resources. In the words of a South African Bantu sociologist, D. E. Mabudafahasi:

> "The Policy of Separate Development, however, limits competition for work or for business within each group. The white man, e.g., may not run a business in a Bantu Area.
>
> In this area it is the right and privilege of the Bantu to run business.
>
> Even if he has a small capital he has a chance to make a start and

[1] *Vide* III, pp. 55-57 and *vide* also in this regard Chap. II, paras. 77-79.

[2] *Vide* para. 13, *supra*.

[3] IV, p. 420.

[4] *Vide* para. 3, *supra*.

[5] Act No. 27 of 1951, sec. 16 in *Statutes of the Union of South Africa 1951*, pp. 126-128.

build himself up—a thing which could not happen in an open situation under a common program of development [1]."

It is significant that even persons critical of Respondent's policy of separate development concede that job reservation as introduced by the Native Building Workers Act is justified. So, for instance, a former Chief Justice of the Supreme Court of South Africa, Dr. H. A. Fagan, who is quoted by Applicants in another context [2], wrote:

"If Bantu are trained to do skilled work in this line (i.e., the building industry) and are then allowed to compete freely with Whites, Coloureds and Asiatics, that would be the kind of unequal, and therefore unfair and harmful, competition to which I have referred. On the other hand, the provision of low-priced housing accommodation for the Bantu is one of the most pressing needs of the country. The solution which the Government has found, *and against which I can see no objection in principle,* is that provision should be made for the training of Bantu artisans in the building industry and that in their case a lower wage rate than the usual one should be allowed, but that they may be employed in their skilled capacity only in the Bantu Areas and in Bantu locations [3]." (Italics added.)

18. Applicants also allege in this regard that practices involving economic differentiation "are wasteful, in the extreme, of available human resources" [4], and they quote the following passage from a statement by Mr. S. G. Menell:

"I have heard the argument that the African is not yet ready to rise above foreman level. *However, there is little value in assessing people in groups.* In business, the employer seeks talented individuals —whose talents he tries to utilise to their own and the company's best advantage. It is for this reason that the laws restricting certain jobs to certain groups of the population seem illogical [5]."

From a purely short-term businessman's point of view, Mr. Menell's statement seems logical; but he appears to give no consideration to the fact that a government has to take a wider view of the community's interests. It is one of the primary functions of a government to ensure peace and orderliness, to promote the interests of all sections of the population for which it is responsible, and, therefore, *inter alia*, to avoid policies which are likely to lead to serious disruption and strife. The "restricting laws" to which Mr. Menell refers were designed to forestall the emergence of inter-racial competition with its inevitable consequences of social unrest and economic instability, and to serve the long-term interests of the community as a whole.

In this connection Dr. M. S. Louw and Professor J. L. Sadie, who are generally regarded as being, respectively, among South Africa's foremost financiers and economists, have replied as follows to arguments of the kind advanced by Mr. Menell:

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[1] *Dagbreek en Sondagnuus*, 20 Sep. 1964.

[2] IV, p. 285.

[3] Fagan, H. A., *Our Responsibility*: A Discussion of South Africa's Racial Problems (1960), pp. 75-76.

[4] IV, p. 420.

[5] *Ibid.*, italics added by Applicants.

"Very broadly, two main types of policies, or solutions to our economic problem, can be distinguished:

(a) the *laissez-faire* (or empiricist), and
(b) the separate development or positive *apartheid* (or fundamentalist) solution.

Elements of both solutions could, of course, be combined in one policy.

Although the alternative to separate development has not yet been unequivocally formulated, it appears to us to amount to some kind of *laissez-faire* policy according to which, in a vague sort of way, free or equal opportunities are promised for all in an integrated society. It would imply the abolition of influx control and of all legislation which accords White workers some preferential treatment or restricts the progress of non-Whites in the skilled grades . . .

The idea of opportunities for all has great appeal, but on closer examination may lose some of its attraction. The realizable goal would appear to be 'free' opportunities, in the sense that no specific economic barriers are put in the way of non-Whites by means of legislation. Those who are in the position to make use of, or create, opportunities are then free to do so. But under existing conditions not many non-Whites are in this position, so that the masses would not benefit under this scheme of things. Moreover, the conventional colour bar cannot be legislated away . . .

In fact, a full-blooded *laissez-faire* policy should abolish the Bantu Areas as land reserved for Bantu only. The effect of such a measure would be that within a decade the land would be in the hands of White farmers, the Areas would have become fully developed areas, at least agriculturally, the money paid for the land would have been squandered or spent on consumer goods, and most of the erstwhile peasants would be slum-dwellers.

A laissez-faire policy cannot be fair where there is inequality in degree of development, in talents, wealth and income [1]." (Italics added.)

19. Finally, Applicants allege that—

"[in] addition to the skilled trades which Respondent has closed to persons other than 'Europeans', the fields of mining, railways and harbours, and public transportation are subject to the effects of economic and social *apartheid* [2]".

Respondent has already dealt with Applicants' charges relating to railways and harbours [3] and the mining industry [4], and it therefore remains to consider their rather vague allegation regarding public transportation, a matter *which was not raised* in the Memorials.

Apart from the bare statement that the field of public transportation is subject "to the effects of economic and social *apartheid*", Applicants merely allege that the Motor Carrier Transportation Act (S.A.) [5], as

[1] Louw, M. S. and Sadie, J. L., "The Dynamics of Separate Development", *South Africa, The Road Ahead*, Spottiswoode, H. (Ed.) (Nov. 1960), pp. 95-107, at pp. 100-102.

[2] IV, p. 420.

[3] *Vide* **III**, pp. 64-69 and Chap. II, paras. 84-88, *supra*.

[4] *Ibid.*, pp. 47-63 and Chap. II, paras. 73-83, *supra*.

[5] Act No. 39 of 1930 in *Statutes of the Union of South Africa 1930*, pp. 460-483 and for amending Acts, *vide* **IV**, p. 420, footnote 5.

amended, which is applicable to the Territory, "... establishes separate transport services or, in certain cases, facilities for 'Natives', and discriminates by race in the use of public transportation" [1].

This allegation does not correctly reflect the effect of the relevant provisions of the Act. Far from directly establishing separate transport services or facilities for different groups, the Act merely empowers the National Transport Commission and local road transportation boards—which are independent administrative bodies—to issue motor carrier certificates or exemptions subject to the condition that the vehicles concerned be utilized only for the conveyance of a specific class of persons, or that portions of vehicles be set aside for the conveyance of such a class.

It is consequently the duty and prerogative of the Commission or a local board to decide in every case, in the light of surrounding circumstances, whether a certificate or exemption should be issued subject to the above conditions. The reasons why it was considered necessary to confer this power on the Commission and local boards, are set out below.

20. Firstly, experience has shown that tension is apt to occur when members of different groups are conveyed indiscriminately in the same vehicle, or when members of one group are conveyed in transport services operated by members of another group. As an example, it may be mentioned that the conveyance of Natives in Indian buses in Durban and the resultant friction between the two groups were contributory causes of the clashes as between Natives and Indians in that city in 1949, in the course of which scores of Indians and Natives were killed [2]. It was consequently deemed necessary to empower the administrative bodies concerned to stipulate for separate transport services or facilities should circumstances so require.

In the second place, it has been considered necessary to have separate services in order to assist the Natives, many of whom are not able to pay the same fares as members of other groups. Throughout South Africa the charges for public transport of Natives, on the one hand, and Europeans, Coloureds and Indians, on the other hand, differ substantially, the cheaper service to Natives being made possible by the grant of subsidies or loans from the Bantu Services Transport Account created under the Bantu Transport Services Act [3]. During the period 1957 to 1964 an amount of R9,829,174.40 was paid from this Account to local authorities operating transport services for Natives [4].

21. In South West Africa the only bus service for Europeans was operated in Windhoek by the municipality from 1953 to 1960, but it proved to be uneconomical and was terminated. In contrast, a municipal bus service for Natives between Windhoek and the Native township Katutura is still in operation although it runs at a loss. In 1963 alone the loss amounted to R8,882, which amount was recouped from the revenue account [4].

22. In view of the context in which Applicants refer to the Act, however, it would seem that their main objection is that the Commission or a local board may grant a certificate to a Native who operates a transport

[1] **IV**, p. 420, footnote 5.

[2] *U.G.* 36—1949, p. 15.

[3] Act No. 53 of 1957 in *Statutes of the Union of South Africa 1957*, Part II (Nos. 45-83), pp. 776-792.

[4] Departmental information.

service on condition that only Natives be conveyed by him. Respondent concedes that the imposition of such a condition could have the effect of limiting the sphere of operation of such a Native, but it is also true that the imposition of similar conditions on White, Coloured and Indian operators, would produce exactly the same effect. In fact, section 13 (2)*bis* of the Act provides specifically that in granting any application for a motor carrier certificate the Commission or a local board—

> "may give preference to an applicant who belongs to the same class as the majority of the persons to be served by the transportation service for which a certificate is sought [1]".

This provision is in keeping with Respondent's general policy, already outlined above [2], of according priority rights in the economic sphere to members of specific groups in relation to their own areas or groups. The sub-section enures for the benefit of Native applicants who, because of limited financial resources, would hardly be in a position to apply for the conveyance of Native passengers on the same footing as members of other groups, unless some preference was given to them.

23. The above exposition shows that Respondent does not discriminate unfairly against Natives in South West Africa as far as admission to employment and access to vocational training is concerned. It suffices to reiterate that Applicants' general allegation that Respondent has closed the skilled trades to persons other than Europeans, is unfounded.

24. In regard to Applicants' reference to the section of the Reply dealing with education in the Territory [3], Respondent refers to what has already been stated in this connection [4]. Applicants also refer to certain paragraphs of the aforementioned I.L.O. Proposed Declaration dealing with vocational training in the Republic of South Africa [5]. In this regard Respondent refers to what has been stated above [6], and, beyond saying that there are adequate facilities for vocational training for all population groups in South Africa, Respondent does not propose dealing with the allegations in the said Proposed Declaration.

C. Measures Allegedly Having the Effect of Compulsion to Labour

25. In this connection Applicants rely mainly on the provisions of the Master and Servants Proclamation (S.W.A.) [7] to substantiate their charge that there exist in the Territory "measures having the effect of compulsion to labour which involve racial discrimination" [8].

Applicants' basic contention regarding the Proclamation is formulated as follows: "Penal sanctions for breach of labour contracts illustrate the dominance and privilege afforded 'European' interests [9]."

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[1] This section was inserted by Act No. 44 of 1955, sec. 11 *(e)* in *Statutes of the Union of South Africa 1955*, Part I (Nos. 1-55), p. 454.

[2] *Vide* para. 16, *supra*.

[3] *Vide* **IV**, p. 421.

[4] *Vide* sec. G and para. 11, *supra*.

[5] *Vide* **IV**, p. 421, footnote 2.

[6] *Vide* paras. 3-4, *supra*.

[7] *Proc.* No. 34 of 1920 in *The Laws of South West Africa 1915-1923*, Vol. I, pp. 336-366.

[8] **IV**, p. 421. (Heading sec. (2).)

[9] *Ibid.*, p. 203.

It appears on analysis that Applicants charge Respondent with having subjected the interests of Native employees to those of their European employers by providing for penal sanctions for breach of contract by employees. This charge in its very nature imputes an improper motive to Respondent. In the succeeding paragraphs the supporting material offered by Applicants will be analysed with a view to showing that it falls very far short of establishing such a motive on Respondent's part.

26. In the Memorials [1] Applicants created the impression that the relevant provisions of the Proclamation apply only to Native servants. In the Counter-Memorial Respondent demonstrated that the Proclamation is basically applicable to all persons, irrespective of race, and that it is only in certain spheres of employment that the legislation applies to Natives only. An exposition was given covering, *inter alia*, the reasons for, and the background to, the Proclamation; the provisions enuring for the benefit of servants; and the existence of similar legislation in other countries [2].

In the Reply Applicants, while for the most part ignoring the exposition in the Counter-Memorial, concede that the Proclamation, as originally enacted, "did not define 'Servant' in terms of race" [3]. Applicants contend, however, that the discriminatory nature of the Proclamation is evidenced by the 1923 amendment which added to the definition of "servant" certain categories of Native employees, and say in this regard:

> "Apart from this instance of explicit discrimination, it is significant that those sectors of the economy in which the largest number of 'Europeans' are employed in manual work are precisely those which are *not* included in the original definition of 'Servant', but which *are* included in the amendment of 1923 (which is specifically confined to 'Natives' employed in those sectors) [3]."

In support of their contention that the largest number of Europeans who perform manual labour are employed in those sectors of the economy which are included in the definition contained in the 1923 amendment, Applicants rely on the 1961 *Survey of Race Relations in South Africa* [4]. This survey does not, however, bear out Applicants' contention. At the page quoted by Applicants, the *Survey* merely gives statistics of the total number of members of the White, Coloured, Asian and Native groups employed in certain economic sectors in South Africa [4].

It is not possible to establish from available statistics whether in South West Africa more Europeans are at present employed in manual labour in the said sectors of the economy than in others, or whether this was the case in 1923, when the said amendment came into force; but Respondent is prepared to accept that a relatively substantial number of Europeans have at all times been so employed. Respondent denies, however, that this fact entitles Applicants to draw the inference that the amendment was intended to subject the interests of Native employees to those of their European employers.

As explained in the Counter-Memorial [5], the main reason for the amend-

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[1] I, pp. 124-126.

[2] III, pp. 81-89.

[3] IV, p. 421.

[4] South African Institute of Race Relations, *A Survey of Race Relations in South Africa, 1961* (1962), compiled by Muriel Horrell, p. 219.

[5] III, p. 83.

ment was the serious difficulty which had been experienced with private contractors working for the Railway Administration, who failed to pay the wages due to their Native servants. Since the Proclamation did not apply, or at least was thought not to apply, to the relationship between such contractors and their Native servants, there was, in the opinion of the Secretary for South West Africa, "... no means of dealing with such cases except by Civil process which the native labourer is unable or unwilling to initiate" [1].

Since the unlawful withholding of wages from a servant constitutes a criminal offence in terms of section 65 of the Proclamation [1], the 1923 amendment ensured that adequate steps could be taken against contractors who failed to pay wages due to their Native servants.

27. It is true that, according to the explanation given by the Secretary for South West Africa, the amendment was also conceived as a deterrent against desertion by Natives employed on a railway, but this does not mean that the legislation was motivated by any intention to discriminate against Native employees. As is often the case with amending legislation, the 1923 amendment was introduced merely to meet the exigencies of an existing situation, and since no trouble was experienced with European and Coloured employees falling within the categories of servants added to the original definition, it was apparently not considered necessary to make the amendment applicable to them. It should be observed, however, that Europeans employed in manual work in the sectors of the economy mentioned in the 1923 amendment, are subject to stringent disciplinary measures as provided for in the Public Service Act (S.A.) [2], the Railways and Harbours Service Act (S.A.)[3] and the Municipal Ordinance (S.W.A.) [4]. In terms of these measures disciplinary punishment may be imposed on a European employee under a variety of circumstances, including cases which constitute criminal offences in terms of the Master and Servants Proclamation. So, for instance, an employee is guilty of misconduct in terms of section 17 of the Public Service Act if he "... disobeys, disregards, or makes wilful default in carrying out a lawful order... or by word or conduct displays insubordination..." [5], or if he "... is negligent or indolent in the discharge of his duties..." [6], or if he "... absents himself from his office or duty without leave or valid cause" [7]. Persons found guilty of a contravention of these provisions are liable to a fine, reduction of emoluments, or summary dismissal [8].

28. Applicants also allege that—

"... Respondent's explanation of the background to the legislation

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[1] **III**, p. 83.

[2] Act No. 54 of 1957 in *Statutes of the Union of South Africa 1957*, Part II (Nos. 45-83), pp. 794-859. This Act also applies to the Territory.

[3] Act No. 22 of 1960 in *Statutes of the Union of South Africa 1960*, pp. 151-213. This Act also applies to the Territory.

[4] *Ord.* No. 13 of 1963 in *The Laws of South West Africa 1963*, Vol. XLII (I), pp. 138-488.

[5] Act No. 54 of 1957, sec. 17 *(c)* in *Statutes of the Union of South Africa 1957*, Part II (Nos. 45-83), p. 838.

[6] *Ibid.*, sec. 17 *(d)*.

[7] *Ibid.*, sec. 17 *(q)*, p. 840.

[8] *Ibid.*, sec. 18 (21), p. 846.

conclusively shows that it was in fact aimed at the members of the 'Native' group [1]".

In the Counter-Memorial [2] Respondent stated that, in order to appreciate the necessity for the penal provisions of the Proclamation, regard should be had to the conditions which existed in the Territory at the inception of the Mandate and which, to a large extent, still exist today. On the whole the labour classes were poorly educated and had very little, if any, knowledge of legal principles governing contractual relationships, this being especially true of the indigenous labour class. In these circumstances it was imperative that workers should be impressed with the necessity of honouring their contractual obligations towards employers. Since the labour classes more often than not had very small means, an ordinary civil action for damages against a defaulting employee was generally an illusory remedy. On the other hand, few employees had the knowledge, or the funds, to institute legal proceedings against employers for the enforcement of conditions of employment. It was consequently considered to be in the interests of both masters and servants that penal sanctions should be provided for certain categories of breach of contract.

Respondent fails to see how it can be said that this explanation shows that the Proclamation "was in fact aimed at members of the Native group". It is conceded that the basic situation which the Proclamation was designed to remedy, was to a large extent caused by the fact that the majority of labourers were illiterate Natives with little or no conception of the nature of contractual relationships, but it surely does not follow that the legislation was "aimed at" the Native inhabitants of the Territory. The Proclamation was directed at breach of contract by master and servant alike, and not at any particular population group.

29. By stating that "... the *Ad Hoc* Committee on Forced Labour had no difficulty in weighing the effect and the character of such legislation ..." [1], immediately after having made the allegation dealt with above, Applicants create the impression that the Committee made a finding that the Proclamation is "aimed at" members of the Native group. No such finding was, in fact, made by the Committee.

In support of their statement Applicants refer [3] to paragraphs 352 to 360, and 372 to 375 of the Committee's report. In the first-mentioned paragraphs the Committee dealt with allegations regarding the compulsory nature of labour contracts for *non-Europeans*, and more specifically with allegations that under the South African Native Labour Regulation Act [4], which does not apply to South West Africa, a breach of a labour contract by a Native employed on any mine or work is a criminal offence [5]. For reasons which are not relevant this Act applies only to Native labourers. Because of the nature of the allegations examined by the Committee, no reference was made to the South African Master and Servants Acts, which apply to all servants irrespective of race. As regards the Native Labour Regulation Act, the Committee merely concluded

[1] IV, p. 421.

[2] III, pp. 82-83.

[3] IV, p. 421, footnote 10.

[4] Act No. 15 of 1911 in *Statutes of the Union of South Africa 1910-1911*, pp. 528-556.

[5] International Labour Office, *Report of the Ad Hoc Committee on Forced Labour*, E/2431 (1953), p. 76 (para. 352) read with p. 72 (para. 330).

that "... legislation of this kind, if abused or vigorously implemented, might lead to a system of forced labour for economic purposes" [1].

In paragraphs 372 to 375 of its report the Committee was obviously referring to South African pass legislation, and not to any legislation providing for penal sanctions for breach of contract [2].

As regards South West Africa, the Committee had to examine an allegation concerning "compulsory labour imposed on ***indigenous*** workers" [3]. The Committee's finding on this allegation was expressed to be the same as that reached in the case of South Africa [4], i.e., the conclusion quoted above.

It is clear, therefore, that the Committee did not find that the Master and Servants Proclamation "was in fact aimed at the members of the 'Native' group" [5].

30. Applicants also rely on the I.L.O. "Programme" in which it was found, with respect to the South African Master and Servants laws, that—

> "... provisions for penal sanctions for breaches of contract of employment, although not limited to 'native' workers, are in practice applied overwhelmingly to such workers [6]".

The compilers of the "Programme" presumably intended merely to convey that the great majority of servants found guilty under the provisions of the said laws, were Natives. The fact, however, that more Natives than members of other groups are convicted under any specific law, does not show that the legislation was "aimed at" Natives, in the sense that the legislature intended to discriminate against them.

31. In the Memorials Applicants did not in this regard refer to the Permanent Mandates Commission. In the Reply, however, they allege that the Commission, "was highly critical of the Master and Servants Proclamation" [7], and in support of this allegation they quote the remarks of a Mr. Grimshaw relative to the said Proclamation, whereby the impression is naturally conveyed that Mr. Grimshaw was a member of, or spoke on behalf of, the Commission. This was, of course, not the case: Mr. Grimshaw was not a member of the Commission, nor did he speak on its behalf. He attended the Fourteenth Session of the Commission as the representative of the International Labour Organisation [8]. The Commission itself did not express objection to the legislation in question.

32. In further support of their contention that the penal sanctions for breach of labour contracts provided for by the Proclamation "illustrate the dominance and privilege afforded 'European' interests" [9], Applicants quote the following extract from a report of the I.L.O. *Ad Hoc* Committee:

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[1] International Labour Office, *op. cit.*, p. 77 (para. 360). **IV**, pp. 433-434.

[2] *Ibid.*, pp. 79-80 (paras. 372-375). **IV**, p. 436 read with p. 294 (paras. 349-351). **IV**, pp. 432-433.

[3] *Ibid.*, p. 80 (para. 377). **IV**, p. 437. (Italics added.)

[4] *Ibid.*, para. 375. **IV**, p. 438.

[5] *Vide* para. 28, *supra*.

[6] **IV**, p. 421.

[7] *Ibid.*, p. 422.

[8] *P.M.C., Min.*, XIV, p. 11.

[9] *Vide* para. 25, *supra*.

"There can, however, be no doubt, in the Committee's view, that the fact that it is impossible for the worker to terminate his contract unilaterally before the expiration of its term, without running the risk of heavy penalties, constitutes a serious restriction of his personal liberty [1]."

In all civilized legal systems known to Respondent, an employee who has bound himself to perform services under a contract is obliged to honour that contract, and to that extent voluntarily imposes restrictions on his personal liberty. A breach of a contract of service may render the worker liable to civil sanctions, e.g., a claim for damages. Respondent has already explained why in the circumstances of the Territory it was considered advisable to introduce criminal sanctions to prevent breaches of contractual obligations of service [2]. Such sanctions serve as an additional deterrent to prevent an employee from doing what he is in any event not entitled to do in law, viz., to break his contract. In no way can such sanctions, in Respondent's submission, be regarded as illustrating any "dominance" or "privilege afforded 'European' interests" [3].

33. The Committee's further reasoning that the Master and Servants laws of South Africa and the Terriroty "... if abused or vigorously implemented, might lead to a system of forced labour for economic purposes" [1], is also somewhat difficult to understand. The enforcement of legal obligations voluntarily undertaken by employees cannot, in Respondent's submission, fairly be regarded as the implementation of a system of forced labour. It is pointed out furthermore that neither Applicants nor the Committee has furnished proof that the said laws are in fact "abused or vigorously implemented".

34. According to Applicants the following comment of a member of the South African Parliament with respect to proposed legislation to implement influx control, "is equally applicable to penal sanctions for breaches of contract": "It is a cardinal principle except in a slave country, that the labourer may go where the pay is highest [4]."

In the context in which this comment is quoted by Applicants, it is apparently offered as no more than a rendering of the same view as that of the I.L.O. *Ad Hoc* Committee, discussed above. It is of course true that, generally speaking, a labourer should be free to go where the pay is the highest, but this is the first time that Respondent has encountered a contention, seriously advanced in a court of law, that the labourer should, to this end, be permitted to break a contract of employment to which he has voluntarily bound himself.

35. Applicants' charge that the Proclamation subjects the interests of Native employees to those of their European employers, ignores the provisions of the legislation which enure for the benefit of the employee. In the Counter-Memorial Respondent enumerated the circumstances under which an employer commits an offence under the Proclamation,

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[1] International Labour Office, *Report of the Ad Hoc Committee on Forced Labour*, E/2431 (1953), p. 77 (para. 360).

[2] *Vide* para. 28, *supra*.

[3] It may be noted that of the 110 members of the I.L.O., only 14 have thus far ratified *The Abolition of Penal Sanctions Convention, 1955 (No. 104)*. *Vide International Labour Conventions:* Chart of Ratifications, 1 June 1964.

[4] **IV**, p. 423.

e.g., withholding of wages, failure to pay damages, etc. [1] Respondent also drew attention to some of the other sections of the Proclamation which were designed to protect the interests of servants, e.g., provision for gratuitous legal representation of a servant on appeal, for cancellation of contracts of employment by the court, etc. [2]

Applicants' only reference to Respondent's exposition of the abovementioned provisions of the Proclamation is to be found in a footnote where they state:

> "With respect to Respondent's contention that the Master and Servants Proclamation inures equally to the benefit of the master and the servant, it is noteworthy that an employee thereunder is guilty of an offence if he commits certain breaches of contract 'without *lawful cause*' ... whereas the employer must not commit certain acts 'without *reasonable and probable cause* for believing' that his action is justified. Thus, in certain instances an employer may have recourse to the criminal courts for enforcement of a labour contract, even in cases of misunderstanding or dispute as to the terms thereof; on the other hand, the employer may be convicted only if he acts 'unreasonably' [3]."

Applicants' inference from the difference in wording of the various provisions of the Proclamation is unjustified. In a decided case [4], the correctness of which has not been questioned by the Courts, it was held by a Division of the Supreme Court of South Africa in regard to legislation of the kind here in issue that the expression "lawful cause" covered a bona fide misunderstanding on the part of an employee as to the terms of his contract of employment.

36. In emphasizing the alleged "dominance and privilege afforded 'European' interests" by the Proclamation, Applicants seem to be under the impression that only White employers can avail themselves of the penal provisions relating to servants. This is a misconception. In terms of section 2 of the Proclamation "Master" means *any* person employing for remuneration a person falling withing the definition of "servant". It follows that Native and Coloured employers are accorded the same rights, and are subject to the same obligations, as European employers.

37. Apart from the Master and Servants Proclamation, Applicants in the present context also refer to the pass laws applicable to the Territory, and to section 14 of the Vagrancy Proclamation of 1920 [5], in terms of which a first offender may in lieu of the prescribed punishment be ordered to do service on public works, or to enter into employment with a municipality or a private person other than the complainant. The relevant statutory provisions are also referred to by Applicants in the part of the Reply headed *Security of the Person, Rights of Residence and Freedom* of *Movement* [6], and will be dealt with by Respondent in answer to the allegations made undei the said heading [7]. In particular as regards

[1] **III**, p. 83.

[2] *Ibid.*, pp. 83-84.

[3] **IV**, p. 421, footnote 11.

[4] *Rex* v. *Magosane and Others*, 1937 Griqualand West Local Division, p. 47. *Vide* also *R.* v. *Ramakau*, 1959 South African Law Reports, Part 4, p. 642.

[5] **IV**, p. 423.

[6] *Ibid.*, pp. 458 ff.

[7] *Vide* sec. I, *infra*.

section 14 of the Vagrancy Proclamation, it will be shown that, in deference to the views of the Permanent Mandates Commission, orders compelling offenders to take up employment with a private person have not been made for many years [1].

38. Finally, Applicants suggest that the practices relating to the recruiting of northern Natives have the effect of compulsion to labour. They allege in this regard that—

> "... a perusal of Respondent's description of the operation of the labour recruiting system ... reveals that the contract offered is a standard contract, that the prohibition on recruiting by individual employers eliminates all possibility of competition between employers in the labour market, that the restrictions on entry into the Police Zone make it virtually impossible for a labourer from outside the Zone to obtain employment through his own effort, or otherwise than through SWANLA, and that the choice is therefore between accepting the standard contract or remaining unemployed [2]."

It is obvious that Applicants have misread Respondent's exposition of the recruiting system [3]. The fact that only New S.W.A.N.L.A is entitled to recruit labourers in the northern territories, does not eliminate "all possibility of competition between employers in the labour market". Prospective employers inform New S.W.A.N.L.A of the wages they are willing to pay, and their offers are then transmitted by the organization to prospective employees. Although the contracts entered into by northern Natives are of standard form—as regards general conditions of employment—the wages to be paid by employers are not standardized, save that a *minimum* wage is prescribed [4]. It follows that the existing system does allow for competition between prospective employers.

Respondent fails to understand how it can be said that the pass system applicable to northern Natives "make[s] it virtually impossible for a labourer from outside the [Police] Zone to obtain employment through his own effort". There is nothing to prevent a Native from applying to the Bantu Affairs Commissioner for an identification pass to enable him to proceed to the Police Zone to take up employment. It is true that very few Natives apply for such passes, but this is due to the decided advantages of the present recruiting system for the northern Natives who seek to take up employment in the Police Zone. As was pointed out in the Counter-Memorial [5], the recruiting system provides northern Natives, free of charge, with an avenue through which they can find employment, which, if left to their own resources, comparatively few would be able to obtain.

With a view to assisting northern labourers further, Respondent is at present contemplating the establishment of a labour office at Ondangua in Ovamboland. This office will initially concentrate on assisting Natives who wish to proceed on their own to the Police Zone in order to take up employment there.

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[1] *Vide* sec. I, *infra*.
[2] IV, p. 423, footnote 1.
[3] III, pp. 72-73.
[4] *Vide* in this regard Chap. II, paras. 44-46.
[5] III, p. 73.

D. Freedom of Association and the Right to Organize

39. In the Memorials reference was made by Applicants to some of the provisions of the Wage and Industrial Conciliation Ordinance of 1952 (S.W.A.) concerning the registration of trade unions and conciliation of industrial disputes. Applicants drew attention to the fact that the Ordinance does not provide for the registration of Native trade unions or for conciliation of disputes in terms of Chapter II of the Ordinance in so far as Native employees are concerned [1].

Respondent in the Counter-Memorial [2] pointed out that prior to 1 August 1953, when the Ordinance came into force, there were no trade unions whatsoever in the Territory, and that at present there are no Native trade unions, although there is no statutory provision which prevents the formation of such unions. Respondent explained that Native trade unions are not recognized by the Ordinance for the purposes of Chapter II thereof, because of a danger that the interests of Native workers, if left to the protection of trade unions, could be neglected, and that such workers could be exploited by unscrupulous individuals. Since a large proportion of all Native employees are illiterate or semi-literate, they have little or no understanding of trade unionism and have consequently not yet reached a stage where they can partake in collective bargaining on an equal footing with their employers. For this reason the Ordinance provides that an inspector may attend any meeting of a Conciliation Board and take part in its proceedings whenever the interests of employees who are not represented on the Board, are under discussion.

40. In the Reply [3] Applicants refer to views expressed by the Committee on Freedom of Association of the Governing Body of the I.L.O. to the following effect:

> "... discrimination against African workers (with respect to the right to organize) is ... inconsistent with the principles that workers without distinction whatsoever should have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation and that all workers' organisations should enjoy the right of collective bargaining [3]".

Applicants also say that the I.L.O. "Programme" supports this view [4].

It is clear that the said Committee, like the compilers of the said "Programme", started from the premise that any differentiation on a group basis was impermissible as being in conflict with generally accepted principles or standards. In this connection Respondent repeats what has already been stated in regard to the relevance of such principles or standards, and to the fallacy of seeking to apply them to all conditions irrespective of the special circumstances of a particular country or area.

41. As indicated above [5], Respondent dealt in the Counter-Memorial, with the reasons why no official recognition is as yet given to Native trade unions. Applicants' response thereto is as follows:

> "... the reasons advanced by Respondent for its restrictive policy

[1] **I**, pp. 129-130.
[2] **III**, pp. 92-93.
[3] **IV**, p. 423.
[4] *Ibid.*, p. 424.
[5] Para. 39, *supra*.

should call for encouragement, training, and fostering of participation by 'Natives' as representatives of 'Native' workers, rather than the converse [1]".

Respondent submits that Applicants do not squarely face the reality of the situation, viz., that the Native inhabitants of the Territory have, as a whole, not yet reached a sufficiently high level of development to appreciate the true meaning and purpose of trade unionism, and that the introduction of trade unions at too early a stage might harm, rather than advance, the interests of Native workers. In this regard Respondent draws attention to developments in other African territories where it has been sought to introduce trade unionism among people not sufficiently mature to ensure its proper operation. Thus it was stated in 1964 of trade unions in Zambia (formerly Northern Rhodesia):

"Trade Unionism in Northern Rhodesia is reaching farcical proportions. Almost every day there are reports of a new trade union which has just been formed with 15, 20 or 25 members. It takes a few weeks, and these unions are dead, but there are always others to replace them.

The majority of industries have two or even three splinter unions, constantly at loggerheads.

At present, registered organizations include a Charcoal Burners' Union, a Fishermen's Union, Hunters' Union, two Farming Unions and two Mineworkers' Unions, constantly at each other's throats.

There was even a short-lived Loafers' Association—a union for the unemployed.

Official parent body of trade unions in Northern Rhodesia is the United Trades Union Congress, which claims 15 affiliated and more than 100,000 members. But the UTUC, as it is known, certainly does not present a united front for affiliate members to follow.

Since 1961, this Congress has been split into a number of factions, each claiming the right to lead the trade union movement in Northern Rhodesia. These arguments reached such ridiculous proportions that at the end of May this year, the executive leaders fired each other and claimed leadership . . .[2]"

The same source quotes a Kitwe newspaper to the following effect in regard to conditions in the same country:

"There is hardly one trade union that has any sense of direction. Nearly all of them are going round in little circles with their eyes fixed firmly on the ground.

There is hardly a trade union that is working for the workers. Much more time is spent in jockeying for top position.

Leaders of rival unions spend most of their time condemning each other. As a result they cannot show a united front. Yet, they want respect from their members and expect employers to agree to their claims.

The trade unions have been and are being led largely by a bunch of disorganised leaders, some of them self-styled. This cannot continue [2]."

Dr. V. L. Allen, who was commissioned by the International Labour

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[1] IV, p. 424.
[2] *The Natal Mercury*, 20 Aug. 1964.

Organisation to make an intensive study of trade unionism in East Africa in 1959, made the following observations after he had completed his investigations:

"They [the trade unions] are trying to practise internal democracy—which requires an informed as well as literate membership—with workers who are illiterate. Little wonder that so many of the East African unions have large paper memberships and few regular dues-payers; that the officials are often overwhelmed by the size of their tasks and are preoccupied with the task of balancing accounts which will not balance; and that the financial position of so many unions is so precarious that they cannot themselves afford to pay the salaries of fulltime officials or even the costs of simple administration, and are incapable of withstanding the shock of strikes or lesser strains [1]."

42. It may be significant, also, that in the Applicant States trade unionism does not seem to have advanced beyond the infancy stage—no doubt not because of any disinclination to promote the welfare of workers, but probably because of prevailing standards and levels of development. Thus it has been said in regard to Liberia:

"... Liberia cannot yet be said to have a genuine trade union movement ... In general, the workers of the country—particularly those from the tribal areas—are neither interested in trade unions nor do they possess the skill and experience needed for organizing them [2]."

And:

"No active trade unions are in existence in Liberia ... In the past, the two principal labor union movements in Liberia were initiated by the Labour Union of Liberia, founded in 1949, and the Labor Congress of Liberia, founded in 1954. The two movements had, successively, the endorsement of President Tubman, but neither had the personnel or financial resources to organize Liberian workers effectively. The President General of the Labor Congress of Liberia left the country early in 1958, leaving the labor movement dormant [3]."

In regard to Ethiopia the position has been stated as follows:

"Labor unions as such do not exist in Ethiopia proper with the exception of an organization of workers of the Franco-Ethiopian Railway which has an estimated membership of 2,500, mostly in and around Diredawa [4]."

And:

"Actually, however, the government has discouraged labor organization and generally has been prompt in subduing strikes by military or police force. The only formal labor organization in Ethiopia proper is the Ethiopian Railroad Workers' Syndicate, whose limited goals are confined mainly to welfare matters [5]."

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[1] Allen, V. L., "Trade Unionism in East Africa", in *Free Labour World*, May 1962, pp. 164-166, at p. 165.

[2] Taylor, W. C., *The Firestone Operations in Liberia* (1956), pp. 35-36.

[3] U.S. Department of Labor. *Labor in Liberia* (May 1960), pp. 15-16.

[4] United States Department of Commerce, "Establishing a Business in Ethiopia", *World Trade Information Service—Economic Reports*, Part I, No. 59-16, p. 7.

[5] Lipsky, G. A., *Ethiopia:* Its People, Its Society, Its Culture (1962), p. 280.

43. Applicants also charge Respondent with having left "[t]he conditions of the employment of 'Natives' . . . entirely to the judgment and management of members of the 'European' group . . ." [1]. This charge is presumably based on the factual situation that a European inspector represents the interests of Native employees in proceedings of Conciliation Boards, the members of which can be only European or Coloured persons. This would explain Applicants' allegation that—

> "[t]he terms and conditions of work of 'Natives' are left to the discretion of officials of a government in which such workers have no *representation, and to conciliation by Conciliation Boards* composed of persons drawn entirely from 'groups' which Respondent's basic policy distinguishes and separates from 'groups' of which 'Native' workers are members [1]".

Respondent has already explained [2] why the present system is considered more beneficial to Native workers than a system of trade-unionism would be at present, and it is not necessary to repeat what has been said in this regard.

Respondent is, however, not opposed to allowing Native employees a greater degree of participation in proceedings of Conciliation Boards, should it be in their interests to do so. In South Africa legislation introduced in 1953 ensures that the interests of Native workers are adequately represented in proceedings of Industrial Councils. The Native Labour (Settlement of Disputes) Act [3] of that year made provision for the creation of a Central Native Labour Board, Regional Native Labour Committees and Native Works Committees. The latter Committees are elected by Native employees, and whenever a labour dispute arises in an area where a Works Committee has been established, the Regional Committee for the areas must consult such Works Committee in regard to the dispute. If the Regional Committee, with the assistance of a Native Labour Officer, cannot effect a settlement of the dispute, the matter is referred to the Central Native Labour Board. If the Board also fails to settle the dispute the matter is reported to the Minister of Labour, who may refer it to the Wage Board for recommendation.

It is also pointed out that, whenever an Industrial Council proposes to determine conditions of employment to be incorporated in an agreement under the Industrial Conciliation Act [4] in respect of an industry, trade or occupation in an area where Natives are employed, a representative of the Native Labour Board and the chairman of the Regional Committee of the area concerned are entitled to attend the meeting of the Council and to take part in the proceedings.

Respondent is at present giving consideration to the question of enacting for the Territory legislation similar to the South African Native Labour (Settlement of Disputes) Act. In Respondent's view such legisla-

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[1] **IV**, p. 424.

[2] **III**, pp. 91-98 and *vide* para. 39, *supra*.

[3] Act No. 48 of 1953 in *Statutes of the Union of South Africa 1953*, pp. 276-326, as amended by Act No. 59 of 1955 in *Statutes of the Union of South Africa 1955*, Part II (Nos. 56-70) and Act No. 28 of 1956 in *Statutes of the Union of South Africa 1956*, Part I (Nos. 1-47), pp. 519-753.

[4] Act No. 28 of 1956 in *Statutes of the Union of South Africa 1956*, Part I (Nos. 1-47), pp. 519-753.

tion will at present serve the interests of Native labourers far better than would the formal recognition of Native trade unions.

44. Applicants have proceeded from the premise that the Native workers of the Territory have reached such a degree of development that they can to advantage take part in organized trade unionism. Applicants have, however, not furnished proof to substantiate their premise, or to show that, in the present circumstances, "[a]dministrative action by government officials can be no substitute for collective bargaining . . ." [1].

45. In view of what has been stated, Respondent submits that Applicants have failed to show that the policy underlying the Wage and Industrial Conciliation Ordinance "is repugnant to the positive obligations contained in Article 2 of the Mandate" [1]. On the contrary, this policy was conceived and in fact serves to promote the interests and progress of all the inhabitants of the Territory.

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[1] IV, p. 424.

CHAPTER V

CONCLUSION

1. In concluding the section of the Reply dealing with the economic aspect, Applicants say that they have demonstrated that—

> "... Respondent's policy of economic *apartheid* is inconsistent with the Mandate in that it *degrades and frustrates what Respondent is obliged to promote* [1]". (Italics added save for the word "apartheid".)

And they say that such a policy is—

> "... inherently inconsistent by creating an endless series of circularities, which, interwoven with the educational, political, and civil policies of *apartheid*, aggravate the conditions asserted as justifying the policies themselves [1]".

In effect, therefore, Applicants claim to have established the charge which they originally made in the Memorials and repeat in their introduction to the economic aspect in the Reply, viz., that Respondent's economic policies and practices are inspired by improper motives [2]. Respondent's reply to this contention is that the expositions furnished by it in the Counter-Memorial and in this Rejoinder with regard to its policy in general, and with regard to the specific practices and measures which form the subject-matter of Applicants' charge, effectively dispel any suggestion that in its administration of the Territory it is actuated by improper motives with respect to the Native inhabitants—the section of the population to which Applicants refer in particularizing the substance of their charge [3]—or with respect to any other population group.

The high-water mark of the factual averments established by Applicants is that implementation of the policy of separate development has the practical effect that in certain respects members of the different population groups are subject to particular disabilities and disadvantages. This, however, cannot lead to the inference that Respondent's policies and practices are inspired by improper motives. Respondent has not contended that the system of separate development operates without disadvantages. Indeed, Respondent has itself drawn attention to certain disadvantages [4]. But, at the same time, Respondent has advanced the contention, which is repeated here, that the issue is not whether, disabilities and disadvantages exist, but whether from the factual situation as a whole, seen in the light of Respondent's declared policy and the steps which have been taken in effectuation thereof, the conclusion can be drawn that Respondent's conduct is tainted with *mala fides*. It is submitted that, far from that being the case, the record indeed establishes the very opposite. Respondent has demonstrated, not only by reference

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[1] IV, p. 424.
[2] *Vide* Chap. I, paras. 1-5, *supra*.
[3] *Ibid.*, paras. 1 and 5, *supra*.
[4] *Vide* sec. E, *supra*.

to its declared intention, but also by an exposition of the factual situation, that its policy of separate development is directed at the advancement and ultimate self-realization of each of the population groups of the Territory in all spheres—political, economic and social—on a basis of territorial separation. It is Respondent's bona fide belief that such a policy offers the only practical and permanent solution to the problem which arises from the fact that there are in the Territory various population groups of different ethnic origin, with different cultures, languages, levels of development and habits of thought. It is this basic situation which makes it inevitable that some disadvantages must attach to *any* policy directed at promotion to the utmost of the well-being and progress of *all* concerned. The alternative course suggested by Applicants, viz., the total integration of the different groups in all spheres, as if they constituted a homogeneous society, is in Respondent's opinion wholly unrealistic: it would not only lead to endless animosity and strife, but must eventually result in the dominance of majority groups over others, and probably also in the withdrawal of the more advanced group, the European group, from the Territory.

In Respondent's submission nothing has been advanced by Applicants which could persuade any person, viewing the situation objectively and without bias, that, on the whole, the course advocated by Applicants is preferable to the course followed by Respondent. Indeed, the very evidence tendered by Applicants in concluding their treatment of the economic aspect—which evidence will be dealt with in the succeeding paragraphs—reflects the type of proof furnished by them throughout the piece, viz., expressions of opinion by persons who do not have a proper understanding or appreciation of Respondent's policies, or who, in their evaluation thereof, approach the subject with predetermined bias, or who are prepared to express condemnation merely by looking at particular, and sometimes minor, aspects of apparent disadvantage without regard to all facets of administration and without regard to the broad objectives involved.

2. As critical comment on Respondent's economic policy Applicants cite a passage from a speech made in 1963 by Mr. S. G. Menell, Chairman of the Anglo-Transvaal Consolidated Investment Company Limited, in reviewing the said company's activities over the previous financial year in which he dealt, *inter alia*, with the problem of meeting a shortage of skilled labour in industry in South Africa. For present purposes it is unnecessary to enter into a detailed discussion of everything said by Mr. Menell on the subject. Apart from what is cited in the Reply, he, *inter alia*, drew attention to the Government's policies of encouraging immigration of skilled workers from other countries and training of semi-skilled South African workers, which he described as "desirable policies being energetically pursued by the Government" [1], and he considered that "industrialists, must find a solution by applying fresh and energetic thinking to this problem" [1]. What is important for present purposes is that Mr. Menell immediately thereafter proceeded, in the part of his statement quoted by Applicants, to criticize present economic policies in South Africa on the ground that an abundance of unskilled labour and the limited application of methods of collective bargaining in South Africa "work against changes in present employment policies" and

[1] *Financial Mail*, 13 Dec. 1963, p. 887.

"tends to restrict the wage-earning and spending power of the community and thus its economic growth" [1].

This criticism is voiced by Mr. Menell without apparently giving thought to the considerations which gave rise to such policies. Evidence of this nature tendered by Applicants can, in Respondent's submission, have no value in the present enquiry.

3. Another "noted authority" cited by Applicants is Professor de Kiewiet, whose views are also referred to elsewhere in the section of the Reply dealing with the economic aspect [2].

Respondent has already demonstrated [3] that Professor de Kiewiet's condemnatory statements regarding all aspects of policy in South Africa do not arise from objective thought but are based on a misconception of Respondent's policies, and are clearly inspired by predetermined bias. No purpose would therefore be served by giving consideration to his sweeping and emotionally charged statement cited by Applicants in the present context save to say that it has no factual basis.

4. In view of what has been stated in this and the aforegoing chapters, Respondent denies Applicants' charge that "*[apartheid]* reflects and assures domination of the many by the few, of the underprivileged by the privileged, of the ward by the guardian" [4]. Upon an objective appraisal it will be clear that Respondent's policies are indeed aimed at the very opposite end, viz., that no section of the community, be it the majority or the minority, should stand in a position of dominance over the others, but that each section or group should develop on a basis of territorial separation to ultimate self-realization.

It suffices to say that Respondent denies Applicants' concluding charge that "*[a]partheid* is based upon a fundamentally unacceptable series of major premises, which are wholly incompatible with the spirit and the letter of Article 22 of the Covenant and Article 2 of the Mandate" [4], and denies that it has in any way violated its obligations under the said Articles.

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[1] *Financial Mail*, 13 Dec. 1963, p. 887, and *vide* also **IV**, p. 425.

[2] **IV**, pp. 406 and 413.

[3] *Vide* Chap. II, paras. 9 and 93-94, *supra*.

[4] **IV**, p. 425.

Section I

Security of the Person, Rights of Residence and Freedom of Movement

CHAPTER I

INTRODUCTION

1. This section of the Rejoinder deals with Applicants' charges in part 4 of Chapter IV B.3.c of the Reply concerning *Security of the Person, Rights of Residence* and *Freedom of Movement.*

2. In the Memorials Applicants purported to demonstrate that certain statutory provisions and administrative policies and practices relative to the said matters create "... a pattern of comprehensive, pervasive and tight control over the lives of the 'Native' population of the Territory" [1]. After dealing separately with each of the said three subjects, Applicants advanced the general conclusion that the measures concerned were ***arbitrary*** and ***deliberately oppressive*** of the Native inhabitants of the Territory [2]. In summarizing the factual situation as described by them Applicants stated that Respondent—

> "... ha[d] given consideration solely to the convenience or advantage of the Mandatory government and of the 'European' citizens and residents of the Territory [3]",

and

> "... ha[d] followed a systematic course of positive action which thwart[ed] the well-being, inhibit[ed] the social progress and frustrate[d] the development of the great majority of the population of the Territory in vital and fundamental aspects of their lives [4]".

3. In the Counter-Memorial Respondent devoted a separate chapter to each of the subjects here under consideration [5], and dealt systematically with each measure mentioned by Applicants, with reference to its content and the historical, ethnological and socio-economic factors that gave rise to it. Respondent thus demonstrated, in its submission conclusively, that the measures concerned were neither arbitrary nor oppressive, as alleged by Applicants, but, on the contrary, were aimed at the promotion of the well-being and progress of all the inhabitants of the Territory, including the Natives, and indeed have had that effect.

4. In the Reply Applicants do not rest their case solely on the charge advanced in the Memorials, but, in conformity with the attitude adopted by them relative to other aspects of government [6], they now seek to rely

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[1] I, p. 134.
[2] *Ibid.*, pp. 151-152.
[3] *Ibid.*, p. 151.
[4] *Ibid.*, p. 152.
[5] As to Security of the Person, *vide* III, pp. 197-230; as to Rights of Residence, *ibid.*, pp. 231-297; as to Freedom of Movement, *ibid.*, pp. 298-338.
[6] *Vide* sec. B, paras. 7-10. *supra.*

also on a new cause of action. The legal basis of their case as now presented appears clearly from their "Legal Conclusions" [1] read with their preceding "Statement of Law" [2].

In the first place, Applicants "reaffirm the Legal Conclusions set forth in the Memorials" [1]. In effect, therefore, Applicants repeat their charge of unfair discrimination against, and oppressive treatment of, a particular population group in the Territory, viz., the Native inhabitants [3].

Secondly, Applicants now contend that Respondent's policies and practices "in respect of security, equal rights and opportunities in respect of home and residence and protection of basic human rights"—

> "... constitute measures of implementation of the policy of *apartheid*, which *in itself violates* Article 2, paragraph 2 of the Mandate, *by reason of the fact that it allots the status, rights, duties, opportunities and burdens of the population on the basis of membership in a 'group', or colour*, rather than on the basis of individual quality, capacity or potential [1]." (Italics added.)

Thus Applicants apply also to this aspect of the case their newly formulated legal norm of "non-discrimination or non-separation", in accordance with which it is contended that any differentiation on the basis of membership in a group, class or race is in itself a violation of Respondent's obligations to promote the well-being and progress of the inhabitants of the Territory [4].

5. Respondent has already demonstrated, conclusively it is submitted, that no such legal norm is embodied in the Mandate, or is otherwise binding on Respondent [5]. And inasmuch as Applicants do not in the present context advance any independent or further argument in support of the existence of the alleged norm, it is unnecessary to add anything to what Respondent has already stated. It may, however, be convenient at this stage to refer to certain statements made by Applicants in applying the said norm to the factual situation regarding the aspects of the case now under consideration. This is done in the following paragraphs.

6. In the first paragraph of the section of the Reply under consideration Applicants say that in the Memorials they—

> "... summarize[d] the interlocking statutes, regulations, decrees, orders and administrative policies and practices by which inhabitants of the Territory, solely on the basis of their 'group', tribe or color, are subject to restrictions on their security, rights of residence and freedom of movement [6]".

And they say further that—

> "Respondent admits the decisively relevant fact that such legislative and administrative policies and practices are based upon the pervasive premise of differentiation according to 'group' [6]."

While it is true that many of the measures referred to by Applicants in the Memorials with regard to *Security of the Person, Rights of Residence*

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[1] IV, p. 475.
[2] *Ibid.*, pp. 473-475.
[3] *Vide* para. 2, *supra*.
[4] *Ibid.*, and sec. A, paras. 7-10, *supra*.
[5] *Vide* sec. B, *supra*.
[6] IV, p. 458.

and *Freedom of Movement*, differentiate on the basis of membership in a group, this, as has been shown in the Counter-Memorial [1], and as will again be pointed out in the next succeeding chapter [2], is not true of all such measures.

7. Another statement repeatedly made in the section of the Reply under consideration is that Respondent's measures and policies in question involve that "... all 'Natives' are to be treated alike, *whatever their individual merit, capacity or potential*" [3] (italics added); that all inhabitants are classified "... on the basis of 'group' or tribe, *ignoring individual merit or need* [4]" (italics added); and that "... individuals are categorized and *treated solely as members of a 'group', not as persons*" [5]. (Italics added.)

The italicized words in the above passages misrepresent the purpose and effect of Respondent's policies and measures under discussion, even in so far as such policies and measures do differentiate on a basis of group or colour. The exposition in the Counter-Memorial has already indicated the large measure of differentiation as between individuals of the same group or colour actually provided for and practised in pursuance of the said policies and measures—exactly by reason of differences in individual "merit", "capacity", "potential", "need" or circumstances [6]. Applicants have chosen to ignore this aspect which is again adverted to in the succeeding chapters [7]. In this connection it is also apposite to refer to what has already been stated relative to the objectives of Respondent's policy of separate development, viz., that the very separation of the different population groups on a territorial basis provides for opportunities which will enable the members of each group to progress in their own areas without restriction and in accordance with individual merit, capacity and potential [8].

It follows that Respondent's policy, viewed in its entirety, is actually directed at the very result desired by Applicants.

8. In addition to their legal norm of "non-discrimination or non-separation" [9], Applicants also rely on—

> "... a generally accepted current international norm or standard, according to which Respondent's obligations should be measured and, as thus measured, should be adjudged by this honourable Court to be incompatible with Respondent's obligations under the Mandate [10]".

As already indicated elsewhere in this Rejoinder [11], the subject-matter discussed in the section of the Reply at present under consideration is a particular sphere in which Applicants seek to apply further undefined

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[1] *Vide*, e.g., III, pp. 197-198, regarding the Vagrancy Proclamation; *ibid.*, p. 225, regarding the Undesirables Removal Proclamation.

[2] *Vide* Chap. II, para. 6, *infra*.

[3] IV, p. 468.

[4] *Ibid.*, p. 469.

[5] *Ibid.*, p. 470.

[6] *Vide*, e.g., III, pp. 315, 319-320 and 325.

[7] *Vide* Chap. IV, paras. 19-20 and 30, and Chap. V, para. 3, *infra*.

[8] *Vide* sec. E, *supra*.

[9] *Vide* para. 4, *supra*.

[10] IV, p. 475.

[11] *Vide* sec. C, para. 32, *supra*.

"norms and standards" according to which, in their submission, Respondent's obligations should be measured.

For their contention that such alleged "norms and standards" exist in relation to the aspects of government under discussion, Applicants rely on "[t]he findings and conclusions of the Committee on South West Africa and of the I.L.O. *Ad Hoc* Committee on Forced Labour" [1]. In this regard Applicants make the following averments in their Statement of Law:

> "Periodic condemnation by the Committee of the limitations on security, rights of residence, and freedom of movement in the Territory delineates the *standard* established by the United Nations with regard thereto [2]" (italics added),

and

> "[c]urrent *standards* in this area have similarly been established by the International Labour Organisation [3]". (Italics added.)

9. Respondent has already demonstrated that the views of persons and bodies such as the Committee on South West Africa and the I.L.O. *Ad Hoc* Committee on Forced Labour cannot serve to introduce into the Mandate objective "norms" governing the exercise of Respondent's powers or defining Respondent's obligations under Article 2 of the Mandate [4], but can at most be relevant considerations in an enquiry whether Respondent's policies and measures are motivated by good or bad faith [5]. Respondent will in the succeeding paragraphs deal briefly with the findings and conclusions of the said Committees.

10. The Committee on South West Africa essayed a purported evaluation of facts and conditions, including laws and their effects, in South West Africa, and applied to its "findings" in this regard what it termed "principles and purposes of the mandates system" [6]. It should be observed, however, that the Committee did not base its findings on an objective evaluation of Respondent's approach, policy or conduct. In fact, whilst referring to a number of laws, the Committee made no attempt to ascertain or examine the historical and socio-economic circumstances which gave rise to their enactment. Moreover, the Committee's conclusions were based in part on information contained in petitions—the unreliability of which has been demonstrated in the Counter-Memorial [7]—without it being in possession of information, argument or the like furnished by Respondent.

11. It may also be pointed out that the Committee's exposition of the relevant legislation is far from accurate. It suffices to refer in this regard to the following examples of statements contained in the 1958 report of the Committee [8]:

(a) The Committee states in the report that in urban areas any Native

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[1] **IV**, p. 475.

[2] *Ibid.*, p. 473.

[3] *Ibid.*, p. 474.

[4] *Vide* sec. C, paras. 33-37, *supra*.

[5] *Ibid.*, paras. 38-39.

[6] *G.A., O.R., Ninth Sess., Suppl.* No. 14 (A/2666), p. 25, as quoted at **IV**, p. 473. *Vide* also *G.A., O.R., Thirteenth Sess., Suppl.* No. 12 (A/3906), p. 23.

[7] **IV**, pp. 1-46.

[8] *G.A., O.R., Thirteenth Sess., Suppl.* No. 12 (A/3906).

who has insufficient honest means of support *or* is leading an idle existence may be forced to take up employment on essential public works or services either inside or outside the urban areas [1]. As has been pointed out [2], however, a Native may be declared an idle person only if he is habitually unemployed *and* has no sufficient honest means of support. Furthermore, no idle Native may be *forced* to take up employment [3].

(*b*) The Committee states that Native men living in an urban area are subject to ejection from such an area if unemployed for one month [1]. This statement is completely unfounded.

(*c*) According to the Committee a Native entering an urban area requires a permit to seek work, valid for a limited period, during which he must either find work or leave the area [1]. As will be pointed out [4], there is no limit to the number of consecutive permits that may be issued to any particular Native, and if there is a reasonable chance that a Native will find employment, a new permit will be issued as a matter of course.

12. Since the Committee did not have the opportunity, as this honourable Court has, of full and unbiassed investigation of the issues in question, upon the basis of information and argument supplied by both sides, Respondent cannot understand of what assistance the Committee's findings and conclusions could be to this Court. Yet Applicants suggest that the conclusions of the Committee, based as they are on an entirely one-sided and inaccurate appraisal of facts, are to be regarded as confirming "a generally accepted current international norm or standard, according to which Respondent's obligations should be measured" [5]. This is but another example of Applicants' attempt, already referred to [6], to persuade this honourable Court to abrogate its judicial function and to act as a rubber stamp to decisions, views and desires of political bodies. Surely, it is peculiarly the function of this Court to form its own opinion as to whether Respondent has complied with the obligations created by the Mandate.

13. The I.L.O. *Ad Hoc* Committee on Forced Labour was concerned with legislative measures operating in, *inter alia*, South West Africa. It did not, however, attempt an investigation into factual circumstances in the Territory, but contented itself with saying that certain measures "may" or "might" result in indirect economic compulsion, if abused [7]. The Committee did not find that such measures are *in fact* used to exert economic pressure upon the Native population or to create conditions of indirect compulsion for economic purposes. In brief, neither the Committee nor Applicants have attempted to show that such measures are abused in practice.

14. In the result Respondent submits that no significance can be attached to, and no reliance placed on, the findings and conclusions referred to by Applicants, and that the suggestion that they are to be

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[1] *G.A., O.R., Thirteenth Sess., Suppl.* No. 12. (A/3906), p. 22.
[2] **III**, pp. 215-216 and *vide* Chap. V, para. 8, *infra*.
[3] *Ibid.*, p. 23.
[4] *Vide* Chap. IV, para. 19, *infra*.
[5] **IV**, p. 475.
[6] *Vide* sec. A, para. 25, *supra*.
[7] *Vide* **IV**, pp. 432 and 434.

regarded as constituting or confirming any "norms" or "standards" according to which Respondent's obligations can be measured, is entirely without substance.

15. There remains to be considered Applicants' allegations regarding arbitrary and deliberately oppressive conduct on the part of Respondent relative to the Native inhabitants of the Territory [1]. Before proceeding to do so, Respondent makes certain general observations in the following paragraphs.

16. In the part of the Reply under consideration Applicants include what they term a "Relevant Historical Resumé". Inasmuch as the subject-matter thereof, and the conclusions sought to be drawn by Applicants from their version of historical events, are concerned not only with security of the person, rights of residence and freedom of movement, but have a bearing on *all* their charges relative to alleged violations of Article 2 of the Mandate, the said "historical resumé" is dealt with in an earlier section of this Part of the Rejoinder which is devoted to a general treatment of Respondent's policies [2].

17. In the treatment of the factual situation by Applicants in the Reply the three subjects under discussion, viz., security of the person, rights of residence and freedom of movement, are not kept apart, as was the case in the Memorials [3], but are linked up with one another, though some points made by Applicants pertain more specifically to one subject or the other. In the process no systematic reply is given to the subject-matter of the Counter-Memorial, but a somewhat haphazard collection of assertions, inferences, reasoning and suggestions is offered, whereby Applicants' original lines of attack are in some instances abandoned, and in other instances altered or replaced by others. By reason of this state of affairs it will not be convenient to adhere in this section of the Rejoinder strictly to the order in which Applicants adduce their arguments in the Reply. Respondent will in the next succeeding chapter deal with the general nature and effect of the allegations made by Applicants in the Reply. Thereafter Chapters III-V will respectively be devoted to a treatment of the following subjects:

Respondent's basic reserve policy;
Provisions implementing and supplementing the reserve policy;
Measures not related to the reserve policy.

In this treatment an indication will be given of the extent to which the case, as now adduced, differs from that originally advanced in the Memorials or seeks to avoid Respondent's case as set out in the Counter-Memorial. Respondent will endeavour to show that the supporting material offered by Applicants largely rests on false premises, wrong facts, wrong rendering of the purport and effect of legislation, distortion or quotation of statements out of context, and the like, and that such material falls far short of establishing Applicants' contentions.

A final chapter, Chapter VI, will contain Respondent's conclusion on this part of the case.

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[1] *Vide* para. 2, *supra*.
[2] *Vide* sec. E, Chap. V, *supra*, and Annex A, Vol. I, *supra*.
[3] I, pp. 144-151.

CHAPTER II

GENERAL NATURE AND EFFECT OF APPLICANTS' ALLEGATIONS

A. Introductory

1. In the preceding chapter reference was made to the manner in which Applicants present their case in the Reply relative to the subjects under consideration [1]. In order to facilitate Respondent's treatment of these subjects in the Rejoinder this chapter is devoted to an analysis of the nature and effect of the allegations made by Applicants regarding measures which affect security of the person, rights of residence and freedom of movement. This will be done by summarizing the case sought to be made in the Memorials, Respondent's answer thereto in the Counter-Memorial and Applicants' reaction thereto in the Reply.

B. The Memorials

2. In the Memorials Applicants did no more than refer to certain legislative measures concerning:

As regards Rights of Residence

(a) The establishment and development of Native reserves and urban residential areas [2],

(b) Restrictions upon the residence of

(i) northern Natives in the Police Zone [3];

(ii) Natives generally in and around certain urban areas [4].

As regards Freedom of Movement

(a) The control of the movement of Natives

(i) in areas occupied by the White group [5];

(ii) into urban and proclaimed areas [6];

(iii) into the Police Zone from the northern territories [6];

(b) Egress from and entry into the Territory [6];

(c) Curfew restrictions in some urban areas [6].

As regards Security of the Person

Powers of arrest and of making certain corrective or restrictive orders relevant to problems of—

(a) Vagrancy and idleness [7],

(b) Undesirable conduct in certain Native reserves [8];

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[1] Chap. I, para. 4, *supra*.
[2] **I**, pp. 146-147.
[3] *Ibid.*, p. 147.
[4] *Ibid.*, pp. 147-148.
[5] *Ibid.*, p. 148.
[6] *Ibid.*, p. 149.
[7] **I**, pp. 144 and 145.
[8] *Ibid.*, p. 145.

(c) Undesirable conduct by foreigners in the Territory [1];
(d) Infringements of the pass laws [2].

As has already been pointed out [3], Applicants in the Memorials complained that the restrictions affecting Natives were ***arbitrary*** and ***discriminatory***. As regards the latter aspect Applicants, from the mere existence of the restrictive legislative provisions concerned, and without any inquiry into the full context of the legislation or the practical and circumstantial background thereto, sought to draw the inference that in enacting the said legislation Respondent gave consideration "solely to the convenience or advantage of the Mandatory government and of the 'European' citizens" [4], and deliberately and systematically oppressed the Natives [5].

C. The Counter-Memorial

3. Respondent, in the Counter-Memorial, apart from correcting inaccuracies in Applicants' presentation of the facts, dealt with the context, background, practical circumstances and objectives of the legislation in question, thereby demonstrating that Applicants' charges regarding ***arbitrary*** and ***deliberately oppressive*** conduct relative to the Natives were unfounded. In particular, Respondent indicated that the laws on which Applicants relied regarding *Rights of Residence* all fell—

> "... within the framework of Respondent's policy of making provision for the separate development of the various population groups, conceived by Respondent as the best and probably the only effective method of achieving the ideals of the Mandate in the peculiar circumstances of South West Africa [6]".

Accordingly, under that head a full exposition was given of Respondent's reserve policy whereby, in various parts of the Territory, preference and protection are given to different groups [7]. Respondent demonstrated that the measures complained of by Applicants as restricting the rights of residence of Natives in certain parts of the Territory were a natural corollary of the basic reserve policy, more particularly operating as a counterpart to reciprocal restrictions upon Europeans and other non-Natives as regards residence in Native reserves and urban residential areas. In so far as the restrictions on the residence of northern Natives in the Police Zone were concerned, these were demonstrated to accord with the wishes of the tribal authorities in the northern territories [8]. And as regards control of the influx of Natives into urban areas, Respondent fully explained the need for and advantages of the system [9].

4. In regard to *Freedom of Movement* a full exposition was given covering all aspects of Respondent's pass or permit system. Respondent demonstrated that, as in the case of *Rights of Residence*, a system of

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[1] **I**, pp. 145-146.
[2] *Ibid.*, p. 145.
[3] *Vide* Chap. I, para. 2, *supra*.
[4] **I**, p. 151.
[5] *Ibid.*, pp. 151-152.
[6] **III**, p. 232 (para. 4).
[7] *Ibid.*, pp. 232-266.
[8] *Ibid.*, pp. 276-277.
[9] *Ibid.*, pp. 277-287.

reciprocal restriction and control was found to be necessary in order to give effect to its basic reserve policy, and that the position was not as represented in the Memorials, viz., a system of restrictions affecting only Natives. Accordingly, Europeans and other non-Natives need permits to enter Native reserves and urban residential areas, while, on the other hand, Natives need passes to travel away from their ordinary places of residence or employment in the Police Zone, or to enter the Police Zone from the northern territories [1].

5. Applicants had, in respect of *Freedom of Movement*, also complained regarding the control of entry of Natives into urban and proclaimed areas, a matter which Respondent dealt with under *Rights of Residence* [2]. Applicants had further objected to curfew restrictions upon Natives in certain White urban areas. Respondent demonstrated in the Counter-Memorial that reciprocal, and even more restrictive, provisions apply to non-Natives in Native urban residential areas. Respondent also showed that the curfew regulations applicable to Natives were exceptional measures, destined to fall away with rising standards of education and development on the part of the Native groups [3].

6. In regard to *Security of the Person* only some of the provisions complained of by Applicants were directly concerned with the basic policy of providing separate areas for the various population groups. One of these was the provision for arrest and attendant action in cases of infringements of the pass laws. Respondent demonstrated that such a provision was necessary to prevent the pass system from being rendered nugatory, and that there was ample provision to prevent hardship and abuse [4]. Respondent further pointed out that the deportation law referred to by Applicants applied only to foreigners [5], and that provisions for the removal of undesirable persons from the reserves applied only to certain reserves in the Police Zone and were conceived primarily to safeguard the interests of the inhabitants of those reserves [6].

As regards legislation pertaining to vagrancy and idleness, Respondent demonstrated that the Vagrancy Proclamation does not distinguish on the basis of race, colour or group at all, but applies to members of *all* the population groups [7]. An exposition was given of the historical background to, and the need for, the Proclamation; of similar legislation in a large number of other countries, and of the necessity for powers of arrest, entry and search to render the legislation effective. Reference was also made to the fact that there had been relatively few prosecutions in recent years, and to the fact that the Permanent Mandates Commission was fully aware of the provisions of the Proclamation and never objected thereto [8]. Respondent further demonstrated that the special provisions pertaining to idle persons in reserves and urban areas supplement the Vagrancy Proclamation by dealing specially with the problems of idle

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[1] III, pp. 306-319 and 322-323.
[2] *Ibid.*, pp. 277-292 and 323-327.
[3] *Ibid.*, pp. 327-329.
[4] *Ibid.*, p. 317.
[5] *Ibid.*, p. 226.
[6] *Ibid.*, pp. 222-224.
[7] *Ibid.*, p. 198.
[8] *Ibid.*, pp. 199-214.

Natives in such areas, and that the said provisions also render it unnecessary for idle Natives to be dealt with as criminal offenders [1].

D. The Reply

7. In the Reply Applicants for the most part completely ignore the aforementioned expositions and explanations given in the Counter-Memorial.

In regard to *Rights of Residence*, no further reference is made in the Reply to the powers to set aside and develop Native reserves and areas [2]. In fact, save for attempting to show that the Permanent Mandates Commission did not approve of Respondent's basic reserve policy [3], Applicants' only answer to Respondent's full exposition in the Counter-Memorial regarding the need for and advantages of the said policy, is the allegation that this policy confines Natives "to the poorest areas of the Territory" [4].

As regards restrictions on the residence of northern Natives in the Police Zone and of Natives generally in and around urban areas, as well as the measures relating to *Freedom of Movement*, Applicants, while virtually ignoring Respondent's relevant expositions, persist in contending, purely by way of inference from the mere existence of the provisions in question, that such provisions serve to keep Natives and Europeans apart "except for purposes of migratory labour on behalf of 'European' employers" [4].

8. Applicants' main charges in the Memorials relative to *Security of the Person* were that the measures concerned subject Natives "to arbitrary arrest, often without any warrant" [5], and that powers to make arrests "may be exercised by designated persons at their largely uncontrolled discretion"[5]. In the Reply Applicants do not even attempt to deal with Respondent's answer in the Counter-Memorial [6], and in fact make no further reference to the above charges save for a statement in a footnote that—

> "[d]iscretion in the exercise of immensely important powers concerning the welfare of the indigenous inhabitants is also the essence of Applicants' complaint concerning Section 1 of Proclamation No. 15 of 1928 (S.W.A.) . . . , and the essence of the complaint regarding the power of arrest under the vagrancy and pass laws [7]".

This statement, of course, does not take the matter any further and it is consequently unnecessary to add anything to what was stated in the Counter-Memorial regarding the said charges [8]. It may be pointed out, however, that in the Reply no reliance is placed on, and no further reference is made to, the legislation in terms of which undesirable persons may be removed from the Territory [9]. It would therefore appear that

[1] **III**, pp. 214-221.
[2] *Ibid.*, pp. 266-275.
[3] **IV**, p. 466.
[4] *Ibid.*, p. 245.
[5] **I**, p. 151.
[6] *Vide* para. 6, *supra*.
[7] **IV**, p. 472, footnote 5.
[8] **III**, pp. 195-230.
[9] *Vide* **I**, p. 146; **IV**, pp. 225-228.

Applicants no longer rely on the said measure as supporting their charges.

9. Although the measures referred to by Applicants in the Memorials under the head *Security of the Person* [1] are not discussed in the Reply with a view to substantiating their original charges, Applicants now contend that the provisions relating to vagrancy and idleness and undesirable persons in reserves were also designed to keep Natives and Europeans apart save for the purposes of migratory labour. Applicants have thus shifted their line of attack in this regard: whereas they do not repeat their charge that the measures in question are arbitrary, Applicants now place emphasis on their alleged *discriminatory* effect, and assign to them the design on Respondent's part to which reference is made hereunder [2].

10. On analysis, the basic contentions advanced by Applicants in the Reply relative to their charge of discriminatory treatment of the Native population of the Territory [3] appear to be the following:

> "Restrictions imposed by Respondent on the rights of residence, freedom of movement, and security of the person of the indigenous inhabitants of South West Africa, comprise a *mechanism* whereby the policy of *apartheid* is implemented and *'non-White' inhabitants are confined to the poorest areas of the Territory, except for purposes of migratory labour on behalf of* 'European' employers [4]." (Italics added.)
>
> "... the entire complex of legislative and administrative restrictions implementing *apartheid* by restricting freedom of movement, residence, and security of the person is *designed for the convenience of the 'European' inhabitants of the Territory*. Almost without exception, the provisions complained of by Applicants in part 5 of Chapter V of the *Memorials keep 'non-Whites' and 'Whites' apart, except for labour demanded of the former* [5]." (Italics added.)
>
> "In sum, Respondent's measures restricting rights of residence, freedom of movement, and security of the inhabitants are based upon membership in a 'group' and are *designed to effectuate the policy of apartheid, or separate development. A key feature of that policy, as has been shown, is the tolerance of presence of 'Natives' in the highly developed areas of the Territory only as migrant and temporary labourers* [6]." (Italics added.)

In its factual aspects Applicants' charge, as now made in the Reply, is therefore to the effect that by means of the measures under consideration the Native [7] and White inhabitants of the Territory are designed to be, and are in fact, kept apart—

(a) in such a manner as to confine the Natives to "*the poorest areas* of the Territory", in contrast with "*the highly developed areas* of the Territory" where the White community lives,

[1] I, pp. 144-146.

[2] *Vide* para. 10, *infra*.

[3] *Vide* Chap. I, para. 4, *supra*.

[4] IV, p. 464.

[5] *Ibid.*, p. 469.

[6] *Ibid.*, pp. 472-473.

[7] Although Applicants use the expressions "Non-White inhabitants" and "Non-Whites" in the first two passages cited above, the expression "Native" is used in the third passage quoted above, which contains a summary of Applicants' charge.

(*b*) the *only* exception made being to tolerate "the presence of 'Natives' " in the latter areas "as *migrant or temporary labourers*" for " 'European' employers". (Italics added.)

The aforementioned allegations are compatible only with a charge of improper motives, viz., the subjugation of the Natives to the interests of a privileged minority of White persons [1]. Despite their disclaimer in this regard [2], Applicants' charge, therefore, still remains one of bad faith on Respondent's part.

11. It is, of course, immaterial how often the above charge is repeated in slightly differing but equally sweeping language. The crucial question remains whether the evidence adduced by Applicants establishes the factual elements of the charge. In demonstrating in the following chapters that Applicants have not succeeded in establishing their charge, it will be convenient to deal first with Respondent's basic reserve policy, then with the provisions supplementing such policy and rendering it effective, and finally with the measures which, in Respondent's submission, are unrelated to the reserve policy or the general policy of separate development.

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[1] *Vide* also **IV**, p. 274, for similar allegations made by Applicants, and *vide* sec. E, Chap. V, *supra*.

[2] *Vide* **IV**, pp. 255-257 and sec. A, paras. 2-7, *supra*.

CHAPTER III

RESPONDENT'S BASIC RESERVE POLICY

1. Reference has been made to the full exposition given in the Counter Memorial of Respondent's reserve policy whereby preference and protection are afforded to various groups in different parts of the Territory [1]. This exposition covered the historical circumstances which gave rise to such policy [2]; the underlying considerations for the well-being of *all* the inhabitants as stressed, *inter alia*, in reports of Commissions of Enquiry [3]; the process of extension and development of the Native reserves in the Territory from 1920 up to the present [4]; the prospect of substantial further extension and development pursuant to the report of the Odendaal Commission [5]; the fact that the Permanent Mandates Commission was fully aware of, and approved of the policy [6]; and also the consideration that similar policies were at various times applied in other parts of the world with a view to protection of underdeveloped communities or peoples against encroachment by others [7].

2. As has been pointed out [8] Applicants in their Reply for the most part ignore this exposition. With reference, however, to the historical background to the reserve policy furnished by Respondent, Applicants allege that "... Respondent relies upon its version of history as justifying pre-emption of 70 per cent. of the Territory for a small minority of the population" [9].

While it is true that Respondent relies partly on historical events in South West Africa as justification for its policy of differentiation applied in the Territory, Applicants confuse the issue by suggesting that Respondent relies on *South African* history. With respect to rights of residence Respondent in the Counter-Memorial [10] referred briefly to the development of the reserve policy in South Africa, but at the same time made it quite clear that its policies in South West Africa were conceived and applied with reference to circumstances prevailing in the Territory [11].

3. Applicants set themselves the task of correcting what they term "the fundamentally false impression Respondent creates of a kind of historic 'separateness' "[12]. Although this matter is dealt with in another Part of this Rejoinder [13], it is important to note for present purposes

[1] *Vide* Chap. II, para. 3, *supra*.
[2] **III**, pp. 234-236 and 238-240.
[3] *Ibid.*, pp. 241-246.
[4] *Ibid.*, pp. 246-253.
[5] *Ibid.*, p. 253.
[6] *Ibid.*, pp. 254-257.
[7] *Ibid.*, pp. 257-265.
[8] *Vide* Chap. II, para. 7, *supra*.
[9] **IV**, p. 458.
[10] **III**, pp. 234-238.
[11] *Ibid.*, p. 234.
[12] **IV**, pp. 458-459.
[13] *Vide* sec. E, Chap. V and Annex A, Vol. I, *supra* and also Chap. I, para. 16, *supra*.

that Applicants do not attempt to contradict Respondent's exposition of historical events in South West Africa which influenced Respondent in adopting a policy of differentiation in respect of the Territory. In fact, in another section of the Reply Applicants admit that "[t]he lengthy history and ethnology of the Territory may be taken as substantially accurate for the present purpose" [1]. Under the heading "Relevant Historical Resumé" [2] Applicants deal almost exclusively with historical events and political developments in South Africa. With regard to the Territory, Applicants merely quote some of the 1960 census figures contained in the report of the Odendaal Commission, and then proceed to make the sweeping and unsubstantiated statement that in South West Africa ". . . a plural or multi-racial society is a fact" [3]. Respondent has dealt with this and other similar statements in another Part of this Rejoinder [4] and it is unnecessary to add anything to what has already been stated. It suffices to reiterate that the said statement is without substance.

4. As already indicated [5], Applicants' basic charge relative to Respondent's reserve policy is that restrictions on, *inter alia*, rights of residence ". . . *comprise a mechanism whereby . . . 'non-White' inhabitants* are confined to the poorest areas of the Territory . . ." [6]. Apart from the bare statement that the "reserves provide no more than a subsistence economy" [7], the *only* evidence adduced by Applicants in support of their charge, is the following observation of Lord Hailey:

> ". . . it is when one contemplates the poverty of soil and low agricultural possibilities of these Reserves that one realizes the difficulty of assuming that the Native can ever achieve a really adequate standard of living in the areas set aside for his occupation [8]."

Even a superficial perusal of Lord Hailey's work makes it clear, however, that the quoted passage has no bearing on the northern territories. Lord Hailey first refers to these territories and then deals with the reserves in the Police Zone. It is only when discussing the latter that he makes the observation quoted by the Applicants.

5. By alleging that "reserves provide no more than a subsistence economy, whereas the 70 per cent. of the Territory set aside as the 'real home' of the 'European' inhabitants, contains most of the wealth of the Territory" [9], and then quoting the above passage, Applicants create the impression that the Native reserves—whether in the north or in the Police Zone—are very much inferior to the areas inhabited by the White group. This is not true even of the reserves in the Police Zone. As was pointed out in the Counter-Memorial, the northern territories are in fact the most favourably endowed by nature in so far as climatic conditions, e.g., rainfall, evaporation, etc., are concerned [10]. And as regards the re-

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[1] IV, p. 261.
[2] *Ibid.*, pp. 459-464.
[3] *Ibid.*, p. 460.
[4] *Vide* sec. E, Chap. V, *supra*.
[5] *Vide* Chap. II, para. 7, *supra*.
[6] IV, p. 464.
[7] *Ibid.*, p. 466.
[8] *Ibid.*, p. 467.
[9] *Ibid.*, pp. 466-467.
[10] *Ibid.*, p. 308.

serves in the Police Zone, Applicants conveniently ignore another observation of Lord Hailey—to be found on the same page as the passage quoted by them—which also applies to the reserves in the Police Zone. The author states:

> "Observation shows that on the whole the conditions of soil and grazing in the Reserves are not inferior to those in the farming areas of the Police Zone [1]."

It is consequently clear that in the passage quoted by Applicants Lord Hailey was merely making the point that, considering the size and agricultural possibilities of the reserves in the Police Zone, all the Natives in the said Zone could not reside and achieve a really adequate standard of living in the areas which were then set aside as reserves for their groups.

6. Respondent has never contended that the reserves in the Police Zone, as constituted at present, are to be viewed as adequate homelands for all the members of the groups involved. As stated in the Counter-Memorial [2], there have through the years been several difficulties militating against the enlargement of existing reserves or the creation of new ones. Apart from the difficulties with regard to water supplies, it would certainly not have been wise to proclaim large tracts of land as reserves without at the same time being in the position to develop the same. Partly due to the development of farms by individual White farmers, however, and especially as a result of the progress which has been made in developing the Territory's economy, rendering more funds available for intensive advancement projects, coupled with the gradual rise in the standard of development of the Native groups [3], the stage has now been reached where enlargement, consolidation and development of reserves into proper homelands for the groups concerned, have become practicable.

7. As stated in the Counter-Memorial, the total area at present set aside for the sole use and occupation of Natives is approximately 20,617,651 hectares [4]. According to the proposals of the Odendaal Commission—which have been accepted in principle by Respondent—the suggested homelands will comprise a total area of 31,243,335 hectares [5], representing a gain of more than 50 per cent. The percentage gain for the groups in the Police Zone will be even more spectacular, viz., more than 110: for the Nama approximately 94, for the Herero approximately 35 [6] and for the Dama nearly 700 [7]. It is also important to observe that much of the land to be incorporated in the proposed homelands will be highly developed farms at present owned or leased by White farmers [8].

[1] Lord Hailey, *An African Survey*: Revised 1956 (1957), p. 764.

[2] III, pp. 248 and 251.

[3] *Vide* IV, p. 202.

[4] III, p. 251 (para. 62).

[5] *R.P.* No. 12/1964, p. 111—i.e., excluding the Rehoboth *Gebiet*.

[6] The relatively small gain for the Herero is due to the fact that this group has at present much more land than the other groups in the Police Zone. If the proposals of the Commission are implemented, the availability of land for the Herero *per capita* will still be more than that for the other groups; viz., 167 hectares, compared to 108 hectares *per capita* in the case of the Dama, and 62 hectares *per capita* in the case of the Nama. *Vide R.P.* No. 12/1964, pp. 93, 95 and 105.

[7] *R.P.* No. 12/1964, p. 111.

[8] *Vide* para. 8, *infra*.

The areas of the various homelands, according to the Commission's proposals, will be as follows [1]:

	Hectares [2]
Ovamboland	5,607,200
Okavangoland	4,170,050
Kaokoveld	4,898,219
Damaraland	4,799,021
Hereroland	5,899,680
Eastern Caprivi	1,153,387
Tswanaland	155,400
Bushmanland	2,392,671
Namaland	2,167,707
	31,243,335

8. As regards Applicants' assertion that 70 per cent. of the Territory is set side as "the 'real home' of the 'European' inhabitants" [3], Respondent has already shown [4] that only 47.3 per cent. of the land in the Territory is at present owned or leased by members of the White group. Should the aforementioned recommendations of the Odendaal Commission be given effect to, the extent of the White area will comprise only 43.8 per cent. of the Territory, since a total of 3,406,181 hectares of land at present owned or leased by members of the White group is to be included in the proposed non-White homelands [5].

9. In connection with their assertion that the Natives "are confined to the poorest areas of the Territory", Applicants also allege that—

> "[t]he unjustifiable nature of the discrimination practiced against indigenous inhabitants is compounded by the fact that the reserves within the Police Zone are not, in fact, tribal [6]".

It is not clear what Applicants intend to signify by this allegation relative to the charge under consideration. Respondent can only surmise that Applicants intend to suggest that Respondent is not bona fide in saying that its aim is the creation of separate homelands for the various ethnic groups. If so, the suggestion is unfounded, as will be shown hereunder.

Of the 17 reserves in the Police Zone there are eight "mixed" reserves in the sense that the admixture of non-members of the predominant group is not negligible. As was pointed out in the Counter-Memorial [7], it has not always been possible to accommodate all the members of one tribe in the same reserve. It must be kept in mind that when Respondent took over the administration of the Territory members of Native families, tribes and groups which had been broken up under the German regime were scattered all over the Police Zone. When Native reserves were proclaimed, disrupted members of various groups consequently flocked

[1] *R.P.* No. 12/1964, p. 111.
[2] 1 Hectare=2.47 acres=± 0.00386 *square miles*.
[3] **IV**, pp. 466-467.
[4] *Vide* sec. E, Chap. V, *supra*.
[5] *R.P.* No. 12/1964, p. 109.
[6] **IV**, p. 467, footnote 2.
[7] **III**, p. 268.

to one and the same reserve—usually the nearest one. Although care was taken to ensure that members of different tribes—and even sections within tribes—were grouped together, at the same time, in order to cause a minimum of inconvenience, removals from one part of the Territory to another were not insisted upon. In consequence members of more than one tribe or group were admitted to some reserves; e.g., in the case of the Tses Reserve, Nama-speaking Herero were admitted with other Nama-speaking people, viz., Nama and Dama. Thus "mixed" reserves came into being, and although Respondent has always considered the existence of such reserves to be unsatisfactory, full rectification of the position has up to the present time not been practicable.

Although the reserves in the Police Zone "have not been proclaimed in the name of particular tribes or sections of tribes" [1], Respondent has encouraged members of the different groups to reside in reserves in which their groups preponderate, and has by means of administrative policy endeavoured to obtain homogeneity in the few reserves that are "mixed". For example, some years ago Herero living in the Kranzplatz Reserve were persuaded and assisted to move to the Otjituo Reserve which is considered to be a Herero reserve.

In any event, the number of Natives in "mixed" reserves is negligible in comparison with the total number of Natives living in reserves in the Territory. Of the latter number 95 per cent. are to be found in one or other reserve with a predominantly homogeneous Native group exceeding 80 per cent. of the particular reserve's population. So, for instance, the homogeneity of the groups in the northern territories is 96 per cent. and 99 per cent., respectively, in Ovamboland and the Okavango Native territory, and 100 per cent. in the case of the Eastern Caprivi and the Kaokoveld, while the group predominance in eight reserves in the Police Zone is as follows [2]:

Waterberg-East	98 per cent. Herero
Otjohorongo	96 per cent. Herero
Okombahe	96 per cent. Dama
Soromas	95 per cent. Nama
Epukiro	91 per cent. Herero
Ovitoto	84 per cent. Herero
Aminuis	81 per cent. Herero
Warmbad	80 per cent. Nama

Even in the case of the remaining 5 per cent. of Natives living in the reserves more that half (7,752) live in reserves where a particular Native group predominates to the extent of between 57 per cent. and 75 per cent. Only 2 per cent. of all reserve Natives are to be found living in reserves where one or other Native group does not predominate to an extent of more that 57 per cent., and even in the two reserves in question the majority group account for more than 50 per cent. of the population.

The clear aim, however, is that in consequence of the establishment of enlarged homelands, "mixed" reserves should cease to exist. In this regard reference may be made to the following extract from the report of the Odendaal Commission:

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[1] Lord Hailey, *An African Survey:* Revised 1956 (1957), p. 764, as quoted at **IV**, p. 467, footnote 2.

[2] Departmental information.

"Some of the present areas in the Southern Sector, which have hitherto been known as reserves, as well as their populations, are so small that they cannot possibly continue to exist as separate self-governing homelands, and it is therefore the opinion of the Commission that these small areas should, if at all possible, be integrated with the nearest homeland of their own population group. Where this is not possible, the populations concerned should be persuaded, in their own interests and against compensation for their areas, to move to the enlarged homelands of their own population group where they can share in all the residential, political and language rights of their group [1]".

10. In the Counter-Memorial Respondent pointed out that while the rights of residence of Natives in the areas inhabited by the White group are to a certain extent limited, "the exclusion of residence by White persons in the Native reserves is absolute" [2]. Applicants allege that the equivalence is false since—

". . . reserves provide no more than a subsistence economy, whereas the 70 per cent. of the Territory set aside as the 'real home' of the 'European' inhabitants, contains most of the wealth of the Territory and a highly developed economy [3]".

In so far as Applicants draw a comparison between the "wealth" of the areas inhabited by the White group and the "poverty" of the Native reserves, this has already been dealt with [4]. Respondent has likewise refuted the suggestion that "70 per cent. of the Territory [has been] set aside as the 'real home' of the 'European' inhabitants" [5]. It remains to consider the contention that, by reason of the antithesis between "subsistence economy" and "highly developed economy", restrictions on the residence of Natives have no real counterpart in the restrictions on the residence of the White group.

It is in the first place not true that the reserves *provide* no more than a subsistence economy. Respondent has already pointed out that the conditions of soil and grazing in the reserves in the Police Zone—not to mention the northern territories—are not inferior to those in the farming areas of the White group [6]. If it is true, then, that the reserves *provide* no more than a subsistence economy, the same must be true of the said farming areas which, together with the urban areas, contain, according to Applicants, "most of the wealth of the Territory". On the contrary, the true position is that whilst a subsistence economy is still to a large extent *practised* in the reserves, the rural areas of the Police Zone have been improved and developed by the enterprise and capital of individual members of the White group.

11. It must be self-evident that no government would embark upon the enormous expenditure involved in the schemes for economic development of the reserves and contemplated homelands, as proposed by the Odendaal Commission, and accepted by Respondent, if it were true that the reserves could *provide* no more than a subsistence economy. A mere

[1] *R.P.* No. 12/1964, p. 79 (para. 294).
[2] III, p. 267 (para. 119).
[3] IV, pp. 466-467.
[4] *Vide* paras. 4-5, *supra*, and sec. E, Chap. V, *supra*.
[5] *Vide* para. 8, *supra*.
[6] *Vide* sec. H, Chap. III, paras. 18-21, *supra*, and also para. 5, *supra*.

glance at what is said in this regard in the Counter-Memorial [1], read with the report of the Odendaal Commission, will make it clear that the prospects and the targets involve much more than mere subsistence. As has been pointed out [2]; it is expected that in the course of time a modern economy will be built up in the Native homelands. It is consequently important to realize that the existing subsistence economy in the reserves is expected to be of a temporary nature only. In this regard reference should be made to the Counter-Memorial [3] where details are given of what has been done up to the present to foster increased participation of the Natives in a modern economy.

It is precisely because Applicants fail to appreciate, or refuse to recognize, the distinction between what has been practised and what can be achieved in the reserves, that they also deny the significance of the restrictions imposed on the residence of members of the White group. If these restrictions were to be abolished, large tracts of land at present reserved exclusively for the occupation of Natives would, in Respondent's submission, within a very short time pass into the hands of members of the White group. Respondent reiterates, therefore, that one of the basic considerations of its reserve policy—in terms of which the rights of residence of *all* the groups are to a certain extent restricted—is the need to prevent alienation of non-White land [4], and thus to lay the basis for providing a protected sphere in which non-White groups can develop to self-determination and self-realization.

12. Finally, Applicants endeavour to refute Respondent's demonstration that the Permanent Mandates Commission was aware of, and approved, its reserve policy [5]. They allege that the Commission—

> "... did not approve a policy of *confining* inhabitants to reserves and forbidding them to take up permanent residence in the Police Zone generally, or in urban areas within the Police Zone [6]",

and they quote three extracts from the Minutes of the Commission in support of their allegation.

Before dealing with these quotations, Respondent wishes to make it clear that there does not exist in the Territory any statutory provision in terms of which Natives residing in the reserves in the Police Zone are *confined* to such reserves, or are forbidden to take up permanent residence in the urban areas within the Police Zone. It is true that certain provisions *control* the influx of Natives into urban areas, and the movement of Natives generally, but this does not detract from the factual position that a large number of Natives are permitted to reside permanently in the urban areas in the Police Zone. It is also true that Natives from the northern territories are not entitled to take up permanent residence in the Police Zone. The reasons for this restriction were set out in the Counter-Memorial [7], and will again be discussed hereinafter [8].

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[1] IV, pp. 204, 207 and 208.
[2] *Vide* sec. E, Chap. V, *supra*.
[3] III, pp. 13, 17, 18, 19 and 101-103.
[4] *Ibid.*, p. 245.
[5] *Ibid.*, pp. 254-257.
[6] IV, p. 466.
[7] III, pp. 276-277.
[8] *Vide* Chap. IV, paras. 4 and 6, *infra*.

13. As regards the questions put at the Third Session of the Permanent Mandates Commission by its Chairman to Sir E. Walton [1], it is to be observed that the Commission was at that stage (1923) not fully acquainted with the circumstances in South West Africa, and its members were therefore attempting to establish what policies Respondent proposed to adopt in respect of the Territory. After Respondent's representative had, in reply to the said questions, given certain explanations, the Chairman remarked that:

> "He understood that the reserve was his [the Native's] home, which was inviolable by the white man, but that the native might, subject to certain rules, circulate freely [2]."

During the same Session M. d'Andrade pointed out that—

> "... if there were no reserves, there would be no place for the Natives, as outside the reserves the territory was divided into farms which were sold to the white people. If there were no reserves for the natives, they would be unable to exist, or would be reduced to complete subjugation to the white population [2]."

14. Applicants also refer [1] to a statement of M. Beau during the Commission's Fourth Session that he—

> "... wanted to draw attention to the difficulties which resulted from the system of reserves, as at present practiced, in connection with the development of the natives, confined as they were in a sort of 'watertight compartment'[3]".

Applicants fail to point out, however, that at the same Session M. Beau was reported to have stated further that—

> "[t]he Government of the Union had assigned vast territories to the natives. [He] thought that it was very praiseworthy that not only the reserves promised by the Germans had been given to the natives, but new and much more important ones. It appeared also that the system in force in all the reserves was comparatively liberal, the natives having the right to leave them and the whites not being allowed to enter them nor to acquire land there [4]."

M. Beau thereafter proceeded to enquire whether provision was made for the education of Natives in the reserves.

It seems clear, therefore, that he had no objection to Respondent's reserve policy and merely wished to be satisfied that steps were being taken for the development of Natives in the reserves, particularly as regards their education.

It is also significant that at the end of the same Session the Commission, in its special observations on the administration of South West Africa, commented on "... the soundness of the views which had prompted the Administration to adopt a system of segregation of natives in reserves ..." [5].

15. During later sessions the members of the Commission, who had

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[1] **IV**, p. 466.
[2] *P.M.C., Min.*, III, p. 105.
[3] *P.M.C., Min.*, IV, p. 63.
[4] *Ibid.*, p. 62.
[5] *Ibid.*, p. 154.

by then become acquainted with the reasons which had induced Respondent to adopt its reserve policy, never commented adversely on the said policy. Respondent consequently reiterates that the Commission was fully aware of, and approved of Respondent's reserve policy.

16. In view of what has been stated above, it is clear that Applicants have offered no proof of their sweeping charge that Respondent's reserve policy is part of "a mechanism whereby . . . 'non-White' inhabitants are confined to the poorest areas of the Territory" [1]. It suffices to reiterate that the said charge is unfounded.

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[1] **IV**, p. 464.

CHAPTER IV

PROVISIONS SUPPLEMENTING AND RENDERING EFFECTIVE THE RESERVE POLICY

A. General

1. In this Chapter Respondent deals with statutory provisions relating to—

(a) Rights of residence in the Police Zone generally [1];
(b) Rights of residence in urban areas [2]; and
(c) Passes and permits [3].

2. In the Counter-Memorial Respondent pointed out that these measures, although also serving other immediate purposes aimed, *inter alia*, at the well-being of the Natives, are reasonably required to effectuate the basic policy of providing and developing separate areas for the various population groups of the Territory [4]. Applicants' reaction in the Reply is to be found in the charge that these measures form part of a scheme whereby the Natives are confined "to the poorest areas of the Territory", and Europeans and Natives are being kept apart "except for purposes of migratory labour on behalf of 'European' employers" [5].

Respondent has already dealt with Applicants' averments relating to the alleged poverty of the Native reserves [6], and it therefore remains to consider whether the second aspect of Applicants' charge is substantiated by any evidence adduced by them. This will be done in the following paragraphs.

B. Rights of Residence in the Police Zone Generally

3. Applicants correctly allege that labourers recruited from the northern territories for the purpose of employment within the Police Zone must return to their reserves after two-and-a-half years at most [7]. As a result northern Natives may not effect a change of residence so as to settle permanently in the Police Zone. Applicants, however, fail to mention and fail to controvert the important facts clearly stated in this regard in the Counter-Memorial, viz., that northern Natives have full and exclusive rights of residence in their reserves, which have since time immemorial been their undisturbed homelands; that neither Native nor White inhabitants of the Police Zone are permitted to reside permanently in the northern territories, and that in the result, although northern

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[1] *Vide* paras. 3-8, *infra*.
[2] *Vide* paras. 9-24, *infra*.
[3] *Vide* paras. 25-36, *infra*.
[4] **III**, pp. 253, 276, 277, 287 and 308.
[5] **IV**, p. 464.
[6] *Vide* Chap. III, paras. 4-5, *supra*.
[7] **IV**, pp. 464-465.

Natives are restricted as regards residence in the Police Zone, they are on the other hand protected in their full and exclusive rights of residence in their homelands.

4. As was pointed out in the Counter-Memorial, section 6 (4) of Proclamation No. 29 of 1935 (S.W.A.) was enacted at the specific request of the tribal authorities in the northern areas who wish to protect their peoples from disintegration and to maintain sound relations within and amongst them [1].

Whilst not denying or attempting to controvert these facts in any way, Applicants complain that the Proclamation does not take into account "... the wishes or needs of the *individual* who has come from the reserves to work as a labourer in the Police Zone" [2]. Applicants' reasoning is difficult to follow, especially since the central theme of their complaints regarding Respondent's general policies and practices is that no regard is had to the wishes of the majority of the inhabitants of the Territory. Surely, then, it cannot be expected of Respondent to give effect to the wishes of individual northern Natives and to ignore those of the majority as represented by their tribal authorities.

Applicants actually suggest that effect should be given to the wishes of the majority of the population of the whole of South West Africa "within the framework of a single territorial unit" [3]. That this could lead to the swamping of the wishes of entire smaller groups as a result of the preferences of larger groups, is apparently regarded as of no account. Applicants also suggest that integration ought to be thrust upon unwilling individuals by enforced legislation [4]. The aforementioned suggestions are dealt with elsewhere in this Rejoinder [5]. For the present Respondent merely draws attention to Applicants' inconsistent attitude in deprecating the fact that Respondent gives consideration to the wishes of duly constituted tribal authorities, aimed at the good of their peoples as a whole, in contrast with the possible preferences of certain individuals.

5. It should be observed that on the various occasions on which the groups in the northern territories have been consulted as to the length of time the members of their groups should be permitted to remain under contract in the Police Zone, the meetings have been fully representative of the groups. Besides the tribal authorities, viz., the chiefs and their councils, or the councils of headmen, the ordinary members of the groups have attended in large numbers. At these meetings anyone present is permitted to voice his opinion and many of the tribesmen have taken advantage of the opportunity to do so. Parents especially have on many occasions pleaded that their sons should be made to return after a limited period in order to spend the money they have earned in their home areas, renew associations with their families and to contract marriages with members of their group. It is, therefore, wrong to suggest that the tribal leaders were not speaking on behalf of their people or that they were acting against the interests of the individuals.

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[1] **III**, pp. 276-277.
[2] **IV**, p. 469.
[3] *Ibid.*, p. 441.
[4] *Ibid.*, p. 309.
[5] *Vide* sec. E, Chap. III, and sec. F, *supra*.

6. Applicants also fail to refer to the other reasons advanced by Respondent for the enactment of the Proclamation. It was pointed out in the Counter-Memorial [1] that the Proclamation was conceived also for the protection of the Native residents of the Police Zone against an influx of Natives from the north, which would create conditions of unemployment in the Police Zone.

There can be no doubt that the northern Natives, or in any event the vast majority of them, would object most vehemently if it were proposed to allow inhabitants of the Police Zone to settle in the northern territories. Respondent has no intention of acting contrary to the wishes of the northern Natives in that regard, but by the same token it also has a duty to protect the Native inhabitants of the Police Zone, many of whom are dependent entirely upon what they earn from employment.

7. It is clear, therefore, that there is no substance in the suggestion that the Proclamation was designed to serve the interests of White employers. Although it is conceded that such employers benefit from the employment of northern Natives, the converse is also true. That the employment and conditions offered in the Police Zone are attractive and rewarding to employees, is borne out by the fact that also Natives from beyond the borders of the Territory flock to this area in such numbers that it is imperative to control their entry [2]. Far from the benefits of employment of northern Natives in the Police Zone accruing only to members of the White group, the advantages gained by such Natives in remuneration, experience, practical education, etc., counterbalance such benefits.

It should also be observed that neither the Proclamation nor any other measure provides that northern Natives may be employed only by members of the *White* group. On the contrary, Coloured and Native employers in the Police Zone have the same opportunities as White employers to recruit northern Natives through the recruiting organization, New S.W.A.N.L.A.

8. Regard being had to what is stated in the foregoing paragraphs, Respondent submits that Applicants have failed to show how the Proclamation can in any way be relied on as proof of their charge that Europeans and Natives are being kept apart "except for purposes of migratory labour on behalf of 'European' employers", or of the statement immediately following reference to the Proclamation in the Reply, viz.:

> "The inescapable fact is that the entire complex of legislative and administrative restrictions implementing *apartheid* by restricting freedom of movement, residence, and security of the person is designed for the convenience of the 'European' inhabitants of the Territory [3]."

C. Rights of Residence in Urban Areas

9. Legislative measures providing for the establishment of separate urban residential areas for Natives in the Police Zone, and for machinery to control the influx of Natives into urban areas, are again referred to by Applicants in the Reply relative to the aspects of their charge at present

[1] **III**, p. 277.
[2] *Vide* sec. H, Chap. II, para. 28, *supra*.
[3] **IV**, p. 469.

under consideration. In the succeeding paragraphs Respondent will deal separately with these measures with a view to determining whether the material advanced by Applicants supports their charge.

10. It is common cause that separate residential areas may be, and have in fact been, set aside for Natives in terms of Proclamation No. 56 of 1951 (S.W.A.) [1]. The crucial question is whether the purpose or effect of the legislation points to a design on the part of Respondent such as is alleged by Applicants.

In the Counter-Memorial Respondent explained that at the inception of the Mandate Natives were of their own accord living apart from the European inhabitants of the towns in separate residential areas adjacent to the European areas [2]. Because of the largely unorganized and haphazard manner in which the Native settlements had occurred on the outskirts of the White towns, a primary concern of Respondent was to see to it that the White municipal authorities and the employers of Native labour in the towns played their part in providing these peri-urban communities with proper housing and attendant facilities such as roads, water, lighting, sanitation, etc.—facilities which the Natives concerned could hardly have established if left to fend for themselves [3].

Because of the preference shown by the various Native groups to live apart from other groups, it was also incumbent upon Respondent to endeavour to give effect to such preference and to provide, as far as practicable, separate residential areas and other facilities for the various groups living in urban areas [4].

In the light, therefore, of the state of affairs prevailing when the Mandate was assumed, and of the clear preferences of the Native groups themselves, it was natural for Respondent to act in accordance with this tendency when making provision for proper housing and other facilities for the various Native groups. In Respondent's view it appeared to be in the general interest of the population that this tendency should be respected and given effect to, as was done by means of Proclamation No. 34 of 1924 (S.W.A.), later superseded by Proclamation No. 56 of 1951 [5].

11. The provision of separate residential areas for the different groups also served to facilitate the administration of Native urban communities. Not only did it afford a familiar community life to those Natives who had come into the generally unfamiliar White urban areas, but it also made it easier for Respondent to provide educational facilities for the different Native groups. Moreover, a homogeneous community with its own artisans, tradesmen and government servants, could be encouraged to develop in a particular area [6]. Respondent also pointed out in the Counter-Memorial [7] that other countries in which conditions basically similar to those in South West Africa prevailed had in the past also established separate Native townships and residential areas.

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[1] *Proc.* No. 56 of 1951, sec. 2 (1) in *The Laws of South West Africa 1951*, Vol. XXX, p. 94.

[2] **III**, pp. 168-169.

[3] *Ibid.*, p. 170.

[4] *Ibid.*, p. 179.

[5] **III**, pp. 176 and 180.

[6] *Ibid.*, p. 180.

[7] *Ibid.*, pp. 294-296.

12. *No attempt is made by Applicants in the* Reply to controvert the above explanation of the aim and effect of the measure in question, and no evidence whatsoever is adduced by them in support of their charge pertaining to this legislation [1]. Indeed, Applicants' charge rests solely on an unsubstantiated inference drawn from the very existence of the measure under consideration. It is consequently unnecessary to add anything to what has already been stated in the Counter-Memorial regarding the establishment of separate Native residential areas [2], save to say that the very fact that provision has been made for the residence of Natives in urban areas on a settled basis, refutes Applicants' charge that the legislation in question serves to keep Natives and Europeans apart save for "purposes of *migratory* labour" [3] for the benefit of White employers.

It may also be pointed out that, contrary to what Applicants suggest [4], the Proclamation does not absolutely forbid Natives to reside in an urban area outside a Native residential area established in terms of section 2 (1). Section 9 (2) of the Proclamation makes provision for exempted Natives to reside outside such areas, and in fact a large number do so [5]. Thus, for example, hundreds of Native employees reside on the premises of their employers in the White residential areas.

13. As already stated [6], Applicants' charge under consideration also pertains to the machinery created by Respondent to ensure efficient control over the influx of Natives into urban areas. In the Counter-Memorial Respondent gave a full exposition of the need for, and the advantages of, the system of influx control, including historical background; experience in South Africa and elsewhere in Africa of the tendency for urban areas to become overcrowded with unemployed Natives; the socio-economic evils resulting from such a position as stressed by Commissions of Enquiry and other students of the problem throughout Africa, including U.N. committees and surveys and the African Labour Conference of 1950; the existence of similar systems in other African territories; the exemptions provided for in the South West African legislation, and the fact that the policy and provisions in question were known to the Permanent Mandates Commission and that no objection was raised thereto [7]. Save in the few respects indicated hereunder, this exposition is ignored by Applicants.

14. As regards the basic considerations of the influx control policy set out in the Counter-Memorial [8], Applicants deal only with the social evils against which this policy is in part directed. They allege that—

> "[t]he true cause of the social evils to which Respondent refers, however, is not to be found in the fact that 'Natives' congregate in urban and proclaimed areas; it is in fact found in the discriminatory system of migratory labour itself. Splitting of families, an evil

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[1] *Vide* para. 2, *supra*.

[2] III, pp. 169-171, 179-180 and 292-297.

[3] IV, p. 464. (Italics added.)

[4] *Ibid.*, p. 465.

[5] *Proc.* No. 56 of 1951, sec. 9 (2) in *The Laws of South West Africa 1951*, Vol. XXX, pp. 104-106.

[6] *Vide* para. 9, *supra*.

[7] III, pp. 279-292.

[8] *Ibid.*, pp. 279-287.

attribute of the system Respondent nowhere seeks to justify, generates many of the evils the influx control policy is designed to meet [1]."

It is true that Respondent did not deal with the system of migratory labour in the Counter-Memorial, but neither did Applicants in the Memorials. The subject is discussed fully in another part of this Rejoinder, where the advantages of the system to the individual migrant labourer, to the group to which he belongs, and to the economy of the Territory as a whole, are set out [2]. As has been stated, the system admittedly gives rise to social problems in South West Africa—as it does all over Africa—but it is Respondent's contention that, on objective appraisal, the adverse effects of the system are far outweighed by its advantages in the development of a modern economy in an under-developed country such as South West Africa [3].

In support of their allegations quoted above, Applicants rely on extracts from a report of the United Nations Economic Commission for Africa and from a work of Lord Hailey, both of which extracts apply to Africa generally and not specifically to South West Africa. Applicants fail to mention that Lord Hailey makes it clear that a system of migratory labour is, despite the disadvantages mentioned by him, inevitable in Africa, and that it is in fact economically desirable. As Lord Hailey puts it:

> "It seems inevitable that in the existing circumstances of Africa, the labour market should be in large measure dependent on floating or migrant labour. It is, as the East Africa Royal Commission of 1953-5 has observed, the only system through which a considerable section of the African population can now meet its needs. For many Africans it is not possible to gain a higher income level for the support of their families without wage-earning, and the migrant labour system appears as the most economic choice which they can make, however socially undesirable it may be [4]."

15. Respondent has shown that migratory labour occurs wherever there are developed areas in juxtaposition to relatively under-developed areas, resulting in labour flowing to the more developed areas, and that South West Africa is no exception [5]. Attention was, however, drawn to the fact that, as a result of future developments pursuant to the recommendations of the Odendaal Commission, it is expected that the extent of migratory labour will gradually diminish in the Territory [6].

16. Respondent denies, however, that the social evils referred to in the Counter-Memorial [7] are caused solely—or for that matter mainly—by the system of migratory labour itself. The primary cause of these evils is the uncontrolled congregation of unemployed Natives in urban areas and the resultant creation of overcrowded slum areas. It follows that even in the absence of a system of migratory labour, these evils would still exist if no control were exercised over the influx of Natives

[1] IV, p. 467.

[2] *Vide* sec. H, Chap. II, paras. 18-19, *supra*.

[3] *Ibid*., para. 21.

[4] Lord Hailey, *An African Survey*: Revised 1956 (1957), p. 1387.

[5] *Vide* sec. H, Chap. II, paras. 23-26, *supra*.

[6] *Ibid*., paras. 17 and 23-26.

[7] III, pp. 279-285.

into urban areas [1]. On the other hand, those social problems of which a system of migratory labour is a contributory cause, would grow to enormous proportions in the absence of influx control.

In the Counter-Memorial Respondent pointed to the serious housing problems and the development of slum conditions arising from the uncontrolled influx of Natives into urban areas, and quoted from various sources to substantiate its observation [2]. Surely these problems—which are completely ignored by Applicants—are not caused by a system of migratory labour.

17. Applicants do not deny that influx control eliminates unemployment, but they allege that—

> "... the central point again in this context is that Respondent's failure to develop in any meaningful sense the economies of the reserves, results in pressures upon 'Natives' to come to urban areas seeking employment [3]".

In the Counter-Memorial Respondent explained that its policy relative to the Native reserves was "to guide the population in the direction of greater productivity by means of a gradual adaptation of their traditional economic and social institutions, rather than by means of revolutionary changes" [4]. A description was given of what had already been done in that regard by way of, *inter alia*, the development of water resources, the improvement of livestock, the introduction of selected seeds, veterinary services, the encouragement of dairy industries, and concessions to Native traders [5]. Respondent therefore denies that it has failed "to develop in any meaningful sense the economies of the reserves". Elsewhere in this Rejoinder [6] Respondent gives the reason why the Natives in the reserves generally still practise a system of subsistence economy.

That some of the inhabitants of the reserves are at times compelled by circumstances—especially conditions of drought—to resort to wage employment in order to make a living, may be admitted. It would nevertheless be wrong to assume that economic "pressures" in the reserves are the only, or indeed the main, cause of Natives venturing to urban areas to seek employment. Many Natives flock to such areas in search of adventure or experience without having any desire to stay there permanently. Furthermore, since the towns and cities are the focal point of economic and industrial development, administrative authorities do their utmost to improve the levels of the urban poor. This tends "to increase the attractive power of cities and encourage[s] more rapid migration" [7] to urban areas.

18. In the Counter-Memorial Respondent referred to the application

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[1] *Vide* sec. H, Chap. II, para. 20, *supra*, where it is shown that any economic development brings in its wake certain social evils resulting from, *inter alia*, urbanization, the loosening of traditional and family ties, and problems of adaptation to new circumstances.

[2] **III**, pp. 279-285.

[3] **IV**, p. 468.

[4] **III**, p. 6.

[5] *Ibid.*, pp. 6-9, 17-21 and 101-103.

[6] Sec. H, Chap. III, paras. 5-9, *supra*.

[7] *U.N. Doc.* E/CN. 5/332, ST/SOA/39, *International Survey of Programmes of Social Development* (1959), p. 170.

of influx control policies in other countries [1]. With reference to these policies Applicants allege that—

> "[i]n no case, however, are the policy considerations underlying limitations on urban immigration based upon total and permanent separation of 'Whites' and 'non-Whites' in the highly developed sections [2]".

It is not correct to say that Respondent's influx control policy is *based upon* a general policy of separation of Natives and members of the White group. While it is true that according to Respondent's general policy of providing for separate development of the various groups, members of a particular group may, when in the area of another group, be subjected to certain restrictions for the mutual benefit of themselves and such other groups, control of influx to urban areas would be necessary quite independently of such policy. In South West Africa—as in most of the other countries referred to in the Counter-Memorial—influx control legislation is applicable only to Natives for the reason that the circumstances which gave rise to the legislation apply peculiarly to Natives. There has never been any undue influx into urban areas by White or Coloured persons.

Respondent fails to see why influx control measures, required for sound reasons in the interests of all sections of the population, should be regarded as objectionable merely because, by reason of practical circumstances and needs, such measures apply to Natives only. This fact in itself certainly does not afford any proof of Applicants' contention that the measures in question were designed to serve the interests of White employers only.

It is expected that influx control measures will largely become unnecessary when the Native areas have reached the same stage of development as the White area. As has already been stated [3], active steps are being taken by Respondent to develop the Native areas and to create economic growth points there. It is therefore hoped that in the course of time the necessity for these control measures will disappear.

19. With reference to particular legislative machinery created to control the influx of Natives into urban areas, Applicants aver that Respondent admits that—

> ". . . if an indigenous inhabitant is seeking work in an urban area, he has three days in which to get permission to remain a further two weeks—and if employment cannot be found within that period, he must leave [4]".

Respondent has never admitted that a Native workseeker must leave an urban area if he fails to find employment within the period stated by Applicants. In terms of section 10 of Proclamation No. 56 of 1951 (S.W.A.)[5] the designated officer may on the expiration of the said period grant permission to a Native to remain in the urban area for another period of 14 days. In fact, there is no limit to the number of consecutive permits that may be issued to any Native who seeks employment in an

[1] **III**, pp. 285-287.
[2] **IV**, p. 469.
[3] *Vide* sec. H, Chap. III, para. 13.
[4] **IV**, p. 465.
[5] *Proc.* No. 56 of 1951, sec. 10 in *The Laws of South West Africa 1951*, Vol. XXX, pp. 108-110.

urban area. If there is a reasonable prospect of the Native concerned finding employment, further permits are granted as a matter of course.

Applicants also take no notice of the fact that section 10 of the Proclamation applies only to *unexempted* Natives. The section specifically mentions certain classes of Natives who are exempt from its provisions and thus do not need permission to seek employment in urban areas [1].

20. Applicants further allege that Native workseekers must register with designated officers upon entering urban and proclaimed areas [2]. The true position, however, is that the relevant legislation—Regulation 2 of the Regulations for Proclaimed Areas [3]—applies only to proclaimed areas and then only to *unexempted* male Natives entering such areas [4]. In view of Applicants' often recurring complaint that Respondent classifies all inhabitants on the basis of group and ignores individual merit [5], it is perhaps not surprising that Applicants prefer to ignore the exemptions—so inconsistent with their complaint—provided for in the above as well as in other legislation.

21. Applicants also allege that under influx control Natives who do not succeed in finding employment within a period of two weeks "are sent back to the very areas they had tried to escape" [6], i.e., the reserves. Respondent has already pointed out [7] that in effect a Native may be permitted to remain in an urban area for an indefinite period for the purpose of finding employment, and that further permission will be refused only if there is no reasonable prospect of his finding employment. Even then there would be no question of such a Native being sent back to a reserve. He would be perfectly free to proceed to another urban area or to the rural areas of the Police Zone in order to find employment.

Surely, Applicants cannot seriously suggest that a Native should be allowed to loiter in a town if there is no prospect of his finding employment. Under such circumstances it would undoubtedly be in the interest of the Native concerned, as well as that of the community as a whole, that he should proceed to another place where employment can be obtained, or to his reserve where invariably some means of subsistence or organized relief are available to him.

22. Applicants conclude by saying that " '[i]nflux control' cannot justify the *total* ban on residence by 'Natives' in the urban areas of the Territory" [8], and that "[h]ousing problems, no matter how serious, cannot rightly be the basis for 'Native' urban residence limited to 'European' labour requirements" [8]. Respondent fails to understand what is meant by "the *total* ban on residence by 'Natives' in the urban areas". Whilst it is true that the influx of Natives into urban areas is *controlled*, neither the relevant legislation nor any other statutory provision absolutely *prohibits* Natives from residing in such areas, whether on a temporary or a permanent basis.

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[1] III, p. 289.
[2] IV, p. 465.
[3] *G.N.* No. 65 of 1955 in *The Laws of South West Africa 1955*, Vol. XXXIV, pp. 750-788.
[4] III, p. 290.
[5] IV, pp. 468, 469, 470, 473 and 475.
[6] *Ibid.*, p. 468.
[7] *Vide* para. 19, *supra*.
[8] IV, p. 469.

The second allegation shows a complete lack of appreciation on the part of Applicants of the aims and effect of the influx control legislation. The emphasis does not fall on the "labour requirements" of any specific group, but on the possibility of the would-be Native immigrant making a living in the urban area. Many Natives are to be found in urban areas who are not employed by Europeans, such as teachers, professional men, administrative officials, etc. Moreover, Native labourers in such areas are also employed by Coloured persons and other Natives, and no Native will be refused permission to remain in an urban area if he can find employment, be it with a European, Coloured or Native employer. In this regard it may be mentioned that there are in fact over 300 Native independent contractors in the urban areas of the Police Zone [1].

23. In conclusion, attention is drawn to the fact that Applicants do not dispute, or attempt to controvert, Respondent's demonstration that the Permanent Mandates Commission was aware of, and approved, Respondent's influx control policy [2].

24. In view of what has been stated above, it is clear that Applicants have failed to show that the restrictions on the rights of residence of Natives in urban areas were conceived to keep Europeans and Natives apart "except for purposes of migratory labour" for the benefit of White employers.

D. Passes and Permits

25. Applicants allege that the "complex of laws and regulations" restricting the rights of residence of the Native groups "... is supplemented and complemented by what have become generally known as the 'pass laws' " [3].

This allegation is in broad substance true, but Applicants again fail to mention that the restrictions on the rights of residence of members of the White and the Baster groups are also implemented by enactments similar in effect to "pass laws" [4].

26. As has been pointed out [5], Respondent gave a full exposition in the Counter-Memorial of its pass or permit system, covering the practical need therefor; historical origins and development thereof, both in South Africa and South West Africa; underlying considerations as found by Commissions of Enquiry and other qualified observers; steps taken to minimize inconvenience by providing for exemptions, and also through modernization and simplification; and the fact that the Permanent Mandates Commission was aware of the system and never commented adversely thereon [6]. Save for disputing the latter fact, Applicants do not attempt to controvert Respondent's exposition, and, in fact, ignore it. Yet Applicants bluntly allege that "... the pass system is the mechanism enabling Respondent to keep 'Natives' and 'Europeans' apart, except for purposes of migratory labour" [7]. It should be observed that Applicants furnish no proof of this sweeping assertion. Their approach seems to be

[1] Departmental information.
[2] III, p. 326.
[3] IV, p. 465.
[4] *Vide* III, pp. 308-312.
[5] *Vide* Chap. II, para. 4, *supra*.
[6] III, pp. 299-313.
[7] IV, p. 470.

that since the restrictions on the rights of residence of the Natives were conceived to keep the groups apart save for the purposes of migratory labour, the same must *a fortiori* be true of the pass legislation, which was admittedly designed to give effect to, *inter alia*, Respondent's reserve policy. Respondent has already refuted Applicants' charge pertaining to restrictions on residence, and it is consequently unnecessary to dwell at any length on their identical charge relative to the pass laws. Respondent's answer to this charge is contained in the following paragraphs.

27. Any policy in terms of which certain areas are reserved for specific population groups will obviously be rendered nugatory in the absence of some system controlling the movement of members of one group into, and within, the area of another. Respondent believes that the only system by means of which efficient control can be exercised, is a pass or permit system. For this reason members of the White group need a permit to enter a Native reserve or urban Native residential area. For the same reason a pass is required by northern Natives to enter the Police Zone, and by Natives living in the reserves in the Police Zone to travel in the areas inhabited by the White group. It follows that the reasons—sound in Respondent's view—which gave rise to the reserve policy, likewise render desirable a pass or permit system.

In addition to the above, Natives living in the Police Zone but outside the reserves need a pass when travelling in the Zone. The reasons for this requirement were explained in the Counter-Memorial [1]. The areas occupied by the White group have, since the assumption of the Mandate, offered such extensive opportunities of employment to members of other groups that large numbers of Natives, some from other parts of the Territory, and some even extra-territorial, have been attracted to these areas. This has made it necessary to create machinery for the control of entry into, and movement within these areas, in order to protect the interests of the settled White and non-White communities. In the absence of such machinery it would obviously be impossible to establish whether any particular Native travelling in the said areas is an extra-territorial Native, an inhabitant of the northern territories, an inhabitant of a reserve in the Police Zone, or a Native living in the areas inhabited by the White group; in other words, to establish whether such a Native is entitled to be in the Police Zone.

28. In alleging that the laws "implementing *apartheid* by restricting freedom of residence of the indigenous inhabitants of South West Africa" [2] are supplemented by the pass laws, Applicants also rely on legislation in terms of which a Native "must have a written permit enabling him to remain in an urban or proclaimed area" [2]. Apart from the fact that the relevant legislation does not apply to exempted Natives [3], it is, as already stated, not primarily based on a policy of separate development or differentiation [4]. It is unnecessary to repeat here the reasons why Respondent deems the uncontrolled congregation of Natives in urban areas socially and economically undesirable [5], reasons which, as

[1] **IV**, p. 299.
[2] *Ibid.*, p. 465.
[3] *Vide* **III**, p. 289 (paras. 189 and 190).
[4] *Vide* para. 18, *supra*.
[5] *Vide* **III**, pp. 279-287.

pointed out above [1], are in no way controverted by Applicants and are in important aspects not even discussed by them in their Reply. It will be evident that if influx control is necessary, then a permit system to ensure efficient control is also necessary.

29. Although Respondent believes that a pass or permit system is indispensable, it also believes in revising and adapting the detailed provisions and application thereof from time to time in order to cause as little inconvenience as possible, consonant with effective achievement of the salutary objectives of the system. For this reason the Natives (Abolition of Passes and Co-ordination of Documents) Act of 1952 (S.A.) [2] abolished the old pass laws in South Africa and introduced a new system in terms of which the possession of a reference book incorporating an identity card relieves the holder of carrying other documents, including passes, as provided for in the earlier laws [3]. As indicated in the Counter-Memorial [4], Respondent intends also to revise and simplify the system in South West Africa, but has met with practical difficulties which require to be overcome. The Department of Bantu Administration and Development is at present considering the revision and simplification of the existing system in a manner best suited to the circumstances of South West Africa, and practical developments in that regard can therefore be expected in the near future.

30. With reference to steps taken by Respondent to ensure that the application of its pass or permit system causes the minimum of inconvenience, Applicants allege that—

> "[t]he essence of the evil is not that passes are difficult to obtain, but that a system is enforced in which individuals are categorized and treated solely as members of a 'group', not as persons [5]".

This allegation pertains to the newly formulated aspect of Applicants' case and has already been dealt with in general [6]. The factual aspect of the allegation is, however, also not correct. As has been pointed out, provision for exempting particular individuals is made in, *inter alia*, the general pass law [7], in the legislation implementing Respondent's influx control policy [8], and in the Proclamation providing for the issue of curfew restrictions [9]. It is consequently untrue that Natives are treated "solely as members of a 'group' ".

Applicants' said allegation is rather surprising in view of the fact that they state, in connection with their assertion that the pass laws supplement the restrictions on the "freedom of residence of the indigenous inhabitants", that "Applicants concede the existence of class exemptions ... *but these cannot change the essence of the complaint*" [10] (italics added.)

Yet, when expounding the "essence of the evil" of the pass system, Applicants conveniently ignore the existence of exemptions "which cannot change the essence of the complaint".

[1] *Vide* para. 13, *supra*.
[2] Act No. 67 of 1952 in *Statutes of the Union of South Africa 1952*, pp. 1013-1031.
[3] **III**, pp. 304-305.
[4] *Ibid.*, p. 319.
[5] **IV**, p. 470.
[6] *Vide* Chap. I, paras. 4-5, *supra*.
[7] *Vide* **III**, p. 315.
[8] *Ibid.*, pp. 289 and 290.
[9] *Ibid.*, p. 328.
[10] **IV**, p. 465, footnote 7.

31. In support of their general allegation that the pass or permit system is "evil", Applicants rely on a newspaper report of a statement by Mr. H. F. Oppenheimer, and on an excerpt from a study of the International Commission of Jurists [1].

With reference to conditions in South Africa, Mr. Oppenheimer is reported to have said that the pass laws and other legislation operate to prevent Natives from obtaining the right of permanent occupation in urban areas. He sought to support this general statement by alleging that if a Native in an urban area loses his job and does not find another within a short period, "he may be uprooted and forced to go to quite a different part of the country". In Respondent's view Mr. Oppenheimer was giving an exaggerated and distorted description of the situation in South Africa. In so far as he was relying on the possibility of orders of removal for vagrancy and idleness, there is no question of their operation in the case of Natives who "lose their jobs and do not find another one *within a short period*" [2]. South West African legislation similar to South African legislation pertaining to idle Natives in urban areas was dealt with in the Counter-Memorial, and it was shown that the said legislation affects a Native only if he is *habitually* unemployed *and* has no sufficient honest means of livelihood [3].

In so far as Mr. Oppenheimer was relying on South African influx control measures, in that respect also there can be no question of the summary removal of a Native who has been living in an urban area and then has the misfortune to lose his job [4]. Furthermore such a Native cannot be "forced to go to quite a different part of the country" [1]. If it is clear that he cannot possibly find another job, he can at most be forced to leave the particular urban area [5].

It is particularly difficult to understand how "the growing number of intelligent and educated men who hold responsible positions", referred to by Mr. Oppenheimer, should have special concern in the above respects, for there is usually an abundance of opportunities for such men to make a living in South African urban areas. In the White part of the economy skilled and semi-skilled Native employees are at a premium, and in the Native urban areas there is no ceiling to the economic, professional and administrative positions which they can achieve. Consequently there is no reason why such "intelligent and educated" men should find themselves without remunerative employment for a period of time which cannot be covered by temporary permits, or *a fortiori* why they should be habitually idle and without honest means of livelihood.

It should also be mentioned in this connection that Mr. Oppenheimer is not only an industrialist, but also a politician. He was for some years a member of the South African Parliament, in opposition to the present Government, and though his parliamentary career has ended he is still regarded as one of the leading figures in an opposition group known as the "Progressive Party". The members of this party commendably concern themselves with questions of according human rights and dignity to all persons, but proceed in this regard (as Applicants do) from the basic

[1] IV, p. 470.
[2] *Ibid.* (Italics added.)
[3] III, p. 215 and *vide* Cha . V, para. 8, *infra.*
[4] *Vide* para. 19, *supra.*
[5] *Vide* para. 21, *supra.*

political premise that the objective is to be sought through a particular means only, viz., by moving in the direction of an integrated, multi-racial society. Criticism of the kind cited by Applicants is usually intended to advance the cause of this political movement, and is not unnaturally inclined to exaggerate hardships and inconveniences said to be involved in Respondent's policy of attempting to find, through separate development, a solution which will be fair and just for all in terms of human rights and dignity. Mr. Oppenheimer's quoted comment appears to be no exception.

32. As regards the so-called study of the International Commission of Jurists—which also deals with conditions in South Africa—it is apparent that the Commission merely summarized the provisions of certain laws without paying any attention whatsoever to the socio-economic conditions which gave rise to their enactment. So, for instance, the Commission summarizes—not entirely correctly—the statutory provisions implementing Respondent's influx control policy in South Africa, and eventually concludes that—

> "... the presently existing restrictions of movement can only bring forth the conclusion that the Government has for the purpose of allocation of labour between industry and agriculture erected a careful system of discriminatory legislation [1]".

No attempt is made to examine the reasons for the enactment of the legislation in question, and not a word is said about the social and economic evils flowing from the uncontrolled congregation of Natives in urban areas.

As has been pointed out [2], the Commission's conclusion—in the passage quoted by Applicants—that the movement of Natives is regulated to meet the industrial and agricultural requirements of the European, is without substance. Indeed, if that were its intention, Respondent would not allow Natives to carry on business or to practise trades in urban as well as in rural areas. It is true that a Native seeking employment may be refused permission to settle in an urban area if there is a surplus of labour available in such an area, but then regard is had to the requirements of White as well as Native employers [2]. Moreover, permission is normally granted when the purpose of the applicant is not to obtain employment, but to engage in some other useful occupation for which there is scope within the urban area concerned. Surely, if Respondent were concerned only about the requirements and convenience of White employers, it would not control the influx of Natives into urban areas, since the bigger the surplus of labour, the less the wages that White employers would have to pay.

33. It should also be observed that the Commission made no mention of the system of labour bureaux in South Africa, the existence of which is inconsistent with the finding of the Commission. The major function of these bureaux is to provide an employment agency whereby Bantu work-seekers are assisted, free of charge, in securing employment, and at the same time to canalise, without compulsion, available labour in accordance with the demand therefor. This can, however, not be accomplished with-

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[1] International Commission of Jurists, *South Africa and the Rule of Law* (1960), p. 31.

[2] *Vide* para. 22, *supra*.

out also conducting a system of personal identification. Without these two systems, identification and labour bureaux, the Native labour market would soon revert to the chaotic employment and living conditions which prevailed prior to the inauguration of the labour bureaux system, i.e., squatting, overcrowding, vagrancy, crime, low wages and poor working conditions. It is therefore clear that the pass system—which ensures the necessary personal identification—far from operating to the detriment of the Native labour force, serves to protect the interests and welfare of Native labourers.

34. In connection with their assertion that the pass laws supplement and complement the restrictions on the rights of residence of Natives, Applicants also refer to legislation in terms of which a Native "must have a written permit to avoid possible curfew restrictions in 'White' urban areas" [1]. Although it is true that curfew notices have been issued in respect of 14 urban areas in the Territory—the usual curfew hours being between 9 p.m. and 4 a.m. [2]—Applicants again ignore the fact that these notices do not apply to exempted Natives [3]. Such Natives consequently do not need a permit to be in a White urban area during curfew hours.

In the Counter-Memorial Respondent pointed out that the curfew restrictions were conceived to prevent disturbances and crime, and stated that with further advancement in the general educational level of the Native populations in the cities and the towns it was hoped that such restrictions would ultimately become unnecessary [2]. In this regard Applicants allege:

> "Similarly, curfew restrictions on 'Natives' are said to protect against 'disturbances' and 'crime'. Yet such curfew restrictions apply only in 'White' areas, and only to 'non-White' peoples [4]."

This allegation is unfounded. As was pointed out in the Counter-Memorial, the type of restrictions involved in a curfew is entirely reciprocal. The location regulations control the movement of members of the White group in Native urban residential areas at least as stringently in that White persons may enter such areas only on the authority of the responsible superintendents, whether by day or by night [2]. Moreover, curfew restrictions are in their very nature appropriate only to circumstances of a special nature, viz., to combat the threat which an *accumulation* of relatively under-developed persons could constitute to more developed communities and their possessions in towns built on the European model. They were for that reason not appropriate for Natives in Native areas or even in rural parts of the White area.

35. Finally Applicants allege that Respondent's exposition [5] of the attitude of the Permanent Mandates Commission toward the pass system is not correct [6]. In this regard Applicants rely on observations of Lord Lugard at the Third and Fourth Sessions of the Commission.

It is true that at the Third Session, during the preliminary examination of Respondent's annual report, Lord Lugard called attention to the pass system and that the Chairman of the Commission then commented

[1] **IV**, p. 465.
[2] *Vide* **III**, p. 328.
[3] *Ibid.*, p. 328.
[4] **IV**, p. 471.
[5] **III**, pp. 312-314.
[6] **IV**, p. 471, footnote 7.

that it would be well to ask the reasons for the restrictions imposed by the system. At that stage (1923) the members of the Commission were not fully acquainted with conditions in South West Africa and were obviously anxious to establish whether valid reasons existed for the enactment of the pass laws. It is therefore highly significant that after Respondent's representative had explained the background to, and the reasons for, Respondent's pass policy, M. d'Andrade during the same Session observed that—

> "... the pass system was used in many of the colonies of South Africa and the territories of the Union. It was analogous to the passport system in Europe. The passes indicated the origin of the Native, who was his chief, etc. It was no burden on the Native [1]."

During the Commission's Fourth Session, after Respondent's representative had, in reply to Lord Lugard's question referred to by Applicants, explained that the pass system was absolutely necessary under existing conditions, the Chairman remarked that the presence of the said representative and his very clear replies to questions "... had been very useful in clearing up the various doubts" [2].

During later sessions the members of the Commission never commented adversely on Respondent's pass or permit policy, in spite of repeated references thereto in annual reports—as summarized in the Counter-Memorial [3] and not controverted by Applicants—and it is therefore obvious that the Commission did not regard the system as being objectionable.

36. In Respondent's submission the above analysis of Applicants' charges relative to the pass laws, and of the supporting material offered by them, shows conclusively that the said charges are unfounded and without substance.

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[1] *P.M.C., Min.*, III, p. 106.

[2] *P.M.C., Min.*, IV, p. 64 and *vide* **III**, p. 313.

[3] **III**, pp. 312-313.

CHAPTER V

MEASURES NOT RELATED TO THE RESERVE POLICY

A. General

1. It will be recalled that although the measures referred to by Applicants in the Memorials under the heading *Security of the Person* are not discussed in the Reply with a view to substantiating their original charges, Applicants now contend that the provisions relating to vagrancy and idleness and undesirable persons in reserves were also designed to keep Natives and Europeans apart save for the purposes of migratory labour [1]. The same charge is made in respect of the measures controlling egress from and entry into the Territory.

These measures, which are basically unrelated to Respondent's reserve policy or the general policy of differentiation [2], will be dealt with hereinafter with a view to analysing the material on which Applicants rely in support of their charge.

B. Egress from and Entry into the Territory

2. As regards entry into the Territory, Respondent stated in the Counter-Memorial [3] that section 4 of Proclamation No. 11 of 1922 [4]—which requires a Native to obtain a permit for the purpose of entering the Territory—does not apply to inhabitants of South West Africa. Respondent also explained that the purpose of the section is to protect the non-White employees of the Territory, by ensuring that they are not displaced by foreign non-Whites from the Republic and other countries [3]. All this is in no way controverted, or even dealt with, by Applicants in their Reply. It is consequently clear that there can be no substance in Applicants' assertion—not supported by any evidence whatsoever—that this measure was conceived to keep Natives and Europeans apart save for the purposes of migratory labour [5].

3. In respect of egress from the Territory, Respondent pointed out in the Counter-Memorial [6] that section 11 of the aforementioned Proclamation, which provides that Natives may not leave the Territory without a pass, does not apply to:

(a) Native females;
(b) Native males of the age of 14 years and under;
(c) exempted Natives.

Respondent explained that the required pass is in the nature of a passport,

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[1] *Vide* Chap II, para. 7, *supra*.
[2] *Ibid.*, para. 9, *supra*.
[3] III, p. 321.
[4] *Proc.* No. 11 of 1922, sec. 4 in *The Laws of South West Africa 1915-1922*, Vol. I, p. 750; as amended by *Proc.* No. 24 of 1935, sec. 1 in *The Laws of South West Africa 1935*, Vol. XIV, p. 140.
[5] IV, p. 471, read with p. 470.
[6] III, p. 319.

and that the provision was designed to ensure that Natives in the Territory who are inexperienced, illiterate, or in poor financial circumstances, do not in ignorance embark upon trips to South Africa without realizing the implications of such a venture [1]. With reference to this explanation, Applicants allege:

> "Exempted from the requirement, however, are 'Native' females and 'Native' males 14 years of age and under, thus confirming that the legislation in fact is designed to serve the labour requirements of the 'Europeans' in the Territory and the Republic [2]."

Applicants' inference is entirely unjustified; indeed, it involves a complete *non sequitur*. It will be recalled that the Proclamation was enacted after a Commission had been appointed to enquire into Native Affairs in the Territory [3]. The Commission recommended that provision be made for four types of passes, but specifically stated that the proposed pass law should not be applicable to youths at all "... as it is undesirable to expose children to a position of having to undergo imprisonment for contravention of the pass laws" [4]. It was for this reason, and also for the reason that according to Native law and custom both females and male youths are regarded as minors who almost invariably travel in the company of an adult male, that none of the provisions of the Proclamation relating to passes was made applicable to Native females and youths.

It follows that there is no justification for the assertion that provisions regarding egress from the Territory were conceived "to serve the labour requirements" of members of the White group.

C. Vagrancy and Idleness

4. In the Counter-Memorial [5] Respondent dealt fully with the legislation in the Territory pertaining to vagrancy and idleness with a view to refuting Applicants' charges that such legislation subjects Natives to *arbitrary* arrests and administrative orders. As already indicated [6], Applicants, in the Reply, seem to abandon their former line of attack, and now rest their case on the suggestion that this legislation is part of—

> "... a mechanism whereby the policy of *apartheid* is implemented and 'non-White' inhabitants are confined to the poorest areas of the Territory, except for purposes of migratory labour on behalf of 'European' employers [7]".

It should be observed that Applicants do not attempt to controvert, and in fact do not even refer to, the full exposition in the Counter-Memorial covering, *inter alia*, the historical background to and need for the measures in question; similar legislation in a large number of other countries; and the need for powers of arrest and administrative action to render the legislation effective. In demonstrating that Applicants in fact do no more than draw unsubstantiated and completely incorrect inferences

[1] **III**, p. 320.
[2] **IV**, p. 471.
[3] **III**, p. 310.
[4] *Report of the Native Reserves Commission (S.W.A.)*, 8 June 1921 (unpublished), p. 17.
[5] **III**, pp. 197-221.
[6] *Vide* Chap. II, para. 9, *supra*.
[7] **IV**, p. 464 and *vide* also pp. 471-472.

from the very existence of the measures concerned, Respondent will, in the succeeding paragraphs, deal separately with statutory provisions relating to:

(a) vagrancy;
(b) idle persons in urban areas;
(c) idle and undesirable persons in Native reserves.

5. In the Counter-Memorial [1] Respondent corrected the erroneous impression created in the Memorials [2] that the Vagrancy Proclamation applies only to Natives. Applicants apparently now accept that the Proclamation applies to all persons—irrespective of race—but allege that "... it cannot be denied that it is much easier for a 'Native' to be found a vagrant, than it is for a 'White' man" [3].

Respondent denies that it is easier for a Native than for a White man to be declared a vagrant. The same provisions of law apply, and the same degree of proof is required for a conviction, irrespective of the race of an accused. It is true that more Natives than White or Coloured persons are found guilty under the provisions of the Proclamation, but this is due to socio-economic conditions and not to any objectionable feature or design of the legislation itself, or of the application thereof in practice. More Natives than White persons are no doubt found guilty of theft, assault and other offences all over Africa, but nobody has suggested that the laws concerned are for that reason to be regarded as aimed at the oppression of Natives for the benefit of White persons.

6. With reference to the fact that the Proclamation is *in practice* only applied to the Police Zone, exclusive of the Native reserves, Applicants allege:

> "It is applied precisely where the 'Native' most needs his pass—in the 'White' urban areas. The lack of a pass might well result in a 'Native' being declared a vagrant [3]."

This statement is wrong in several respects. Apart from the fact that the Proclamation is also applied to the rural areas of the Police Zone, it is not true that a Native may be declared a vagrant merely because he lacks a pass. Whilst the possession of a pass will almost invariably and conclusively show that the Native concerned is not a vagrant, the opposite does not hold good. In the event of a charge of vagrancy the prosecution must prove that the Native concerned falls within the ambit of the definition of "an idle and disorderly person", and this definition contains no reference to passes [4]. Indeed, the Vagrancy Proclamation was enacted two years before the general pass law.

What is even more serious, is that the above allegation seeks to create the impression that the Proclamation was conceived to punish vagrancy only in so far as it affects the interests of the White inhabitants of the Territory.

In the Counter-Memorial [5] Respondent explained the circumstances prevailing in South West Africa in 1920, which made it imperative to

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[1] **III**, p. 198.
[2] **I**, p. 144.
[3] **IV**, p. 471.
[4] *Vide* **III**, p. 197.
[5] *Ibid.*, pp. 199-200.

ensure some degree of social and economic stability in the Territory. Respondent also pointed out that the Proclamation is in practice not applied to the northern areas or to the Native reserves in the Police Zone [1]. In the former areas tribal authority and discipline were still intact when the Mandate was assumed, and the problem of vagrancy has never presented itself there to any appreciable extent. In the case of the reserves in the Police Zone, vagrants can be dealt with under the provisions pertaining to idle persons in Native reserves, to which reference is made hereunder [2], in lieu of being sentenced as criminals under the Vagrancy Proclamation. Applicants do not controvert, or even discuss, these facts, but merely make the unsupported suggestion that the Vagrancy Proclamation was intended to serve only the interests of the White group. This suggestion entirely ignores the fact that in addition to Europeans there are the Natives themselves whose interests require protection from vagrants.

7. Applicants also allege [3] that Respondent has not correctly stated the attitude of the Permanent Mandates Commission with regard to the Vagrancy Proclamation [4]. They refer in this regard to criticism expressed by the Commission relative to only one aspect of one particular provision of the Proclamation (section 14) (which empowers a magistrate to order an accused to a term of service on public works, or to employment under a municipality or a private person other than the complainant, in lieu of the prescribed punishment [5]. It will be observed that the Commission's objection was confined to what it termed the power "of imposing forced labour *for the benefit of private individuals*" [6], and did not concern the aspects of service on public works or employment under a municipality, or, indeed, any other aspect of the Proclamation. This criticism by the Commission, therefore, concerned a minor and incidental aspect of the Proclamation which was not complained of, or even mentioned at all, in the Memorials. Applicants' complaints in the Memorials concerned only sections 1 and 3 of the Vagrancy Proclamation [7], and it was with specific reference to these provisions that Respondent stated in the Counter-Memorial [4] that the Permanent Mandates Commission never raised any objections. The weight of this consideration is, indeed, enhanced by the fact that the Commission had scrutinized the Proclamation with sufficient care to be able to criticize only a minor aspect of a particular provision thereof. In view of the absence of any complaint by Applicants regarding section 14 of the Proclamation, Respondent did not consider it relevant to refer to the above-mentioned criticism of the Commission. Had that topic been under discussion, Respondent would have pointed out that in deference to the views of the Commission persons dealt with under the Proclamation are not ordered to take up employment with a private person [8].

In the circumstances there is no justification for Applicants' statement

[1] **III**, p. 201.
[2] *Vide* para. 16, *infra*.
[3] **IV**, p. 471, footnote 7.
[4] *Vide* **III**, pp. 213-214.
[5] *Proc.* No. 25 of 1920, sec. 14 in *The Laws of South West Africa 1915-1922* Vol. I, p. 284.
[6] *P.M.C., Min.*, III, p. 293. (Italics added.)
[7] **I**, p. 144.
[8] Departmental information.

that "Respondent's version of the attitude of the Permanent Mandates Commission toward . . . the Vagrancy Proclamation is not correct" [1]. On the contrary, Applicants have in no way controverted the fact, mentioned in the Counter-Memorial [2], that individual members of the Commission spoke out strongly in favour of the vagrancy legislation in its general purport.

8. In the Counter-Memorial [3] Respondent pointed out that the provisions of section 26 of the Natives (Urban Areas) Proclamation [4], which apply only to idle Natives in urban and proclaimed areas, cover for such Natives largely the same ground as the Vagrancy Proclamation, which applies to persons of all groups, irrespective of race. The difference in substance between the two Proclamations lies in the treatment of the vagrant or the idle person. Under the Vagrancy Proclamation an offender is dealt with as a criminal, whereas section 26 of the Natives (Urban Areas) Proclamation merely provides for administrative action against idle Natives [5].

With reference to the legislation pertaining to idleness in urban and proclaimed areas, Applicants allege that—

> "[i]nsofar as 'Natives' are to be found in urban or proclaimed areas, but are not in the employ of the government or of 'White' employers, removal or work is certain" [6],

and that—

> "[t]he presence in the 'White' zone, of a 'Native', regardless of his personal skill or attributes, 'serves no purpose in the absence of willingness to work' . . . [7]".

These allegations are nothing short of preposterous. Section 26 of the Natives (Urban Areas) Proclamation certainly does not provide, and does not have the effect, that a Native may be declared an idle person because he is not employed by the government or a White person. According to sub-section 1 *(a)* of the Proclamation a Native is an idle person only if he is habitually unemployed *and* has no sufficient honest means of livelihood, or if because of misconduct or addiction he fails to provide for his own support or for that of a dependant.

It will therefore be seen that the section does not affect:

(a) a Native who carries on his own business, or practises an independent profession, trade, art or craft;

(b) a Native employed by another person—European, Coloured or Native;

(c) a Native who does not perform any regular work but may have honest means of livelihood by reason of accumulated possessions, maintenance by members of his family, or the like;

(d) an unemployed Native who honestly seeks employment.

In this regard it may be pointed out that of the approximately 70,000

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[1] IV, p. 471, footnote 7.

[2] *Vide* III, pp. 213-214.

[3] *Ibid.*, p. 216.

[4] *Proc.* No. 56 of 1951, sec. 26 in *The Laws of South West Africa 1951*, Vol. XXX, pp. 144-146.

[5] III, p. 216.

[6] IV, p. 465.

[7] *Ibid.*, p. 468.

Natives in the urban areas of the Police Zone, approximately 40,000 are women and children, the vast majority of whom are not in employment at all. Moreover, as already stated [1], there are over 300 Native independent contractors in these areas, many of whom employ other Natives.

9. Applicants further allege that should a Native be declared an idle person, he will be removed from the urban or proclaimed area,

> "... or if he had previously agreed to a contract of employment, *[he] may be ordered to carry out the employment, regardless of his wishes* ... [2]". (Italics added.)

This statement completely misrepresents the true position which was set out very clearly in the Counter-Memorial [3]. If the words italicized above are to make any sense, in conjunction with "previously agreed", it can only be on the basis that the Native must have entered into the contract some time previously and may at the time of being ordered to do so no longer wish to carry it out. Exactly the opposite is true. The Native Commissioner or Magistrate concerned may order a Native to enter into employment only if, *subsequent* to his being declared an idle person, and therefore *immediately before* a consequential order is made, such a Native *agrees* to enter into a contract of employment which is approved of by that Native Commissioner or Magistrate. There is consequently no question whatever of compulsion "regardless of his wishes". This position is so clear from the wording of section 26 itself and from the discussion thereof in the Counter-Memorial, that it is rather surprising to find a persistent misrepresentation thereof in the Reply [4], especially after the original misrepresentation in the Memorials [5], where no reference was made at all to the requirement of agreement on the idle Native's part—was exposed in the Counter-Memorial [3].

10. In the Counter-Memorial Respondent further explained that, as regards underlying policy, the provision in question should not be considered *in vacuo*, as it were, but should be read together with the other sections of the Proclamation relating to influx control [6]. The main consideration underlying Respondent's influx control policy has been the necessity to prevent urban and proclaimed areas from being overcrowded with unemployed Natives. It would consequently be most unfair to the law-abiding Native inhabitants of such areas, and to Natives who wish to enter such areas for the purpose of procuring employment, to allow "idle" Natives to remain in these areas unless they are prepared to mend their ways.

11. It should also be observed that section 26 does not provide that an idle Native must be removed unless he consents to enter "the employ of the government or of 'White' employers", as is suggested by Applicants [7]. The Proclamation contains no provision regarding the race of the employer. While it may be true that in earlier times few, if any, non-Whites would have been able to qualify as suitable employers, the situa-

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[1] *Vide* Chap. IV, para. 22, *supra*.
[2] IV, p. 472.
[3] III, p. 215.
[4] IV, p. 472, and *vide* also the ambiguous earlier rendering at p. 466.
[5] I, pp. 127 and 145.
[6] III, pp. 217-218.
[7] IV, p. 465.

tion has changed in that respect, and an ever-increasing scope for such contracts is emerging [1].

12. With reference to the fact that section 26 does not apply to idle White persons, Applicants observe that—

"[t]he presence in the 'White' zone, of a 'Native' ... 'serves no purpose in the absence of willingness to work' ...".

"A 'European', on the other hand, is in his 'real home' in the Police Zone; 'absence of willingness to work on his part' is not relevant [2]."

And they say that "so double a standard" is "unconscionable" [2].

It will be obvious that this rendering of the situation, particularly the suggestion of a double standard, makes nonsense. In the Counter-Memorial Respondent went to some length to explain that section 26 covers for idle Natives largely the same ground as the Vagrancy Proclamation, which applies to persons of all groups throughout the Police Zone [3]. Applicants completely ignore this factor, and consequently leave out of account the fact that an idle White person is dealt with as a criminal offender under the Vagrancy Proclamation, being liable, on conviction, to a sentence of imprisonment with or without attendant punishment. Save for the above absurd assertion, Applicants have not attempted to controvert that, as pointed out in the Counter-Memorial [3], the only differentiation involved really operates in favour of the idle Native, in that he need not necessarily be treated as a criminal offender [4].

13. In explaining why the special treatment of idle Natives by the provisions of section 26 of the said Proclamation was appropriate to Natives only, Respondent pointed out that such treatment of Natives falling within the ambit of the definition of "idle persons" might involve "removal from an area in which their presence serves no purpose in the absence of willingness to work, to a place which is their real home" [5]. This followed on a passage indicating the premise that "particular offenders" in fact had "rural homes" where the discipline of reserve regulations and/or traditional tribal systems could minimize the harmful effect which their tendency to idleness could occasion to others [4].

Fastening on to the expression "absence of willingness to work", Applicants state:

"With respect particularly to rights of residence and movement, Respondent relies heavily upon the premise that restrictions upon the presence in the Police Zone of 'Natives' defined as 'idle persons', hence considered 'redundant' to the economy—

'... involves removal from an area in which *their presence serves no purpose in the absence of willingness to work*, to a place which is their *real home*. These considerations do not apply to White or Coloured persons whose only *real home* may be in urban or proclaimed areas.' (Italics added by Applicants.)

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[1] *Vide* Chap. IV, para. 22, *supra*.
[2] **IV**, p. 468.
[3] **III**, pp. 216-217.
[4] *Ibid*., pp. 217-218.
[5] *Ibid*., p. 218.

Among the purported justifications for thus consigning some 170,000 inhabitants who spend most of their working lives in the Police Zone away from their 'real home' without normal family life, to reserves far from their places of livelihood, Respondent relies upon its version of history as justifying pre-emption of 70 per cent. of the Territory for a small minority of the population [1]." (Footnotes ommitted.)

It will be observed that in this manner Applicants, with reference to "rights of residence and movement" generally, and as an introduction to their treatment of those subjects, seek to apply completely out of context a statement made by Respondent with reference only to one particular measure complained of by Applicants in regard to *Security of the Person*. The result is that something said by Respondent in regard only to the question of the most effective and most humane method of dealing with the problem of idleness and vagrancy in urban areas is distorted as if it were offered as an explanation and justification for the whole of the general policy regarding control of labour, residence and movement of Natives. The statement was not intended to have such application, and cannot in the context in which it appears be read as so intended. From what has been said above and also in the Counter-Memorial, it is clear that outside of the context of habitual idleness, the statement quoted by Applicants does not apply. Applicants have thus again commenced their reply to a portion of Respondent's case, as set out in the Counter-Memorial, with a distortion of what Respondent in fact said [2].

14. Applicants' aforementioned allegations are moreover, in their factual aspects, incorrect and misleading in several respects. In the first place, section 26 of the Proclamation does not apply to the rural areas of the Police Zone. Secondly, the section applies only to Natives who fall within the ambit of "idle persons", and therefore does not affect the vast majority of Natives living in urban and proclaimed areas. Thirdly, the section does not—even indirectly—affect "some 170,000 inhabitants". The total Native population, inclusive of women and children, of urban and proclaimed areas at present is 70,459 [3]. And as already pointed out, only five Natives have been removed from these areas under the provisions of the section during the last five years [3]. Fourthly, the total area in respect of which the section applies, comprises only 0.48 per cent. of the whole of the Territory, and there is consequently no question of "pre-emption of 70 per cent. of the Territory for a small minority of the population" [3].

15. It is also not correct that Respondent considers "idle" Natives to be " 'redundant' to the economy" of the Territory. While it is true that in Respondent's view the presence of "idle" Natives—as defined in section 26—in urban and proclaimed areas serves no purpose, the said section was in fact designed to encourage Natives, wherever possible, to take a constructive part in the economic development of the Territory. As has been explained, "idle" Natives, instead of being treated as criminals under the Vagrancy Proclamation, are either given the opportunity to enter into suitable employment or removed from urban or pro-

[1] IV, p. 458.
[2] *Vide* also sec. H, Chap. I, par . 5-6, *supra*.
[3] *Ibid.*, para. 6, *supra*

claimed areas to their rural homes. If in the latter case such a Native is removed to a reserve within the Police Zone and remains idle there, he can be forced to take up employment on essential public works. If his home is situated in the northern territories, he can be dealt with by the tribal authorities under Native law and custom. In both instances the authorities concerned are in a position to ensure that the "idle" Native does not remain " 'redundant' to the economy" of the Territory.

16. With reference to the legislative measures pertaining to idle and undesirable persons in Native reserves, Applicants allege that—

> "[t]he policy of *apartheid* is similarly effectuated by legislation authorizing a superintendent of a reserve *within the Police Zone* (*i.e.*, within the highly developed area of the Territory) to order idle 'Natives' to take up employment on essential public works and permitting the Administrator to remove 'undesirable' 'Natives' from certain reserves within the Police Zone [1]".

By saying that "the policy of *apartheid*" is effectuated by these measures, and by emphasizing the fact that the legislation applies only in reserves "within the highly developed area of the Territory", Applicants apparently seek support for their theme that the measures concerned are part of "the mechanism enabling Respondent to keep 'Natives' and 'Europeans' apart, except for purposes of migratory labour" [2]. It should be observed that Applicants do not even attempt to controvert Respondent's explanation of the aims and effects of the measures in question as set out in the Counter-Memorial [3]. In fact, as in so many other instances, Applicants merely draw unwarranted inferences from the existence of the legislation without adducing any proof in support of their charge.

The true position is that neither regulation 27*bis* [4]—pertaining to idle persons—nor regulation 27 [5]—pertaining to undesirable persons—of the regulations issued under Proclamation No. 11 of 1922 [6]—has any bearing on Respondent's policy of differentiation or on the convenience of members of the White group, and certainly does not have the effect of ensuring migratory labour for the requirements of European employers.

17. In the Counter-Memorial Respondent submitted that no objection can be raised against the practice of ordering habitually idle and unemployed residents of a Native reserve within the Police Zone to take up employment on essential public works in lieu of being sentenced as a criminal offender under the Vagrancy Proclamation. This is as much in the interest of the idle persons themselves as in the interest of their community, which require the construction of essential public works such as the building of dams and roads, etc. [7] Respondent also pointed out [8] that work to be done in terms of an order issued under regulation 27 *bis*, is work primarily in the reserve itself—and not for the benefit of

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[1] IV, p. 472.

[2] *Ibid.*, p. 470.

[3] *Vide* III, pp. 220-224.

[4] *G.N.* No. 121 of 1952 in *The Laws of South West Africa 1952*, Vol. XXXI, pp. 834-836.

[5] *G.N.* No. 68 of 1924 in *The Laws of South West Africa 1924*, pp. 57-63.

[6] *Proc.* No. 11 of 1922, sec. 20 in *The Laws of South West Africa 1915-1922*, Vol. I, p. 754.

[7] III, p. 220.

[8] *Ibid.*, p. 221.

any White person or White community. And it was stated that it has for some time not been found necessary to make use of the provision.

The reason why the regulation was not made applicable to the northern territories, is that in these areas tribal life and authority were still largely intact. Habitually idle Natives could therefore be dealt with by tribal authorities according to Native law and custom.

It follows that there is no substance in the suggestion that the Regulation subjects the interests of Natives in the reserves to the requirements of White employers.

18. As regards the fact that idle Natives in reserves may be compelled to perform forced labour on essential public works, Applicants refer to the views of the International Labour Organisation "regarding such practices" [1]. The relevance of the views of this organization in these proceedings are discussed in another part of this Rejoinder [2]. In the present context it may, however, be relevant to point out that idle White and Coloured persons may also be adjudged to a term of service on public works in terms of the Vagrancy Proclamation [3]. It should also be observed in this regard that Article 3 of the Mandate permits forced labour for essential public works and services. Furthermore, the provisions in question conform to the terms of Convention 29 of the International Labour Conference [4] in that—

(a) the labour does not enure for the benefit of private persons, and
(b) a sufficient wage has to be paid.

19. As regards regulation 27, it is true that provision is made for the removal of undesirable Natives from *certain* reserves in the Police Zone. As pointed out in the Counter-Memorial [5], the regulation was introduced to promote order and good government in those reserves in which there would initially be little social cohesion and discipline by reason of the fact that scattered remnants of various tribes settled in such reserves. It is consequently clear that the regulation serves no economic purpose whatever, and that it is aimed at the general benefit of the communities resident in the reserves concerned. And, as was also pointed out [6], as a result of the better group relations and tribal discipline which have come into being under Respondent's administration, it has not been found necessary to make use of the regulation for a considerable period.

20. In view of what is stated above, Respondent submits that it is abundantly clear that none of the provisions pertaining to vagrancy or idle and undesirable persons supports Applicants' charge of a design to keep Natives and members of the White group apart "except for purposes of migratory labour" [7].

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[1] **IV**, p. 472, footnote 4.
[2] *Vide* sec. H, Chap. IV, paras. 29 and 32, *supra*.
[3] *Vide* para. 7, *supra*.
[4] *Vide Convention concerning Forced or Compulsory Labour* of 28th June 1930, International Labour Office, *Report of the Ad Hoc Committee on Forced Labour*, E/2431 (1953), pp. 140-143.
[5] **III**, p. 222.
[6] *Ibid.*, p. 224.
[7] **IV**, p. 470.

CHAPTER VI

CONCLUSION

1. It will be recalled that, apart from the alleged applicability of their newly formulated legal norm of "non-discrimination or non-separation", the existence of which Respondent has denied [1], Applicants' case as formulated in the Reply, relevant to the aspects of government here in issue, rests solely on the charge that Respondent by design keeps Natives and Europeans apart in such a manner as to confine the Natives "to the poorest areas of the Territory"; the only exception made being to tolerate "the presence of 'Natives' " in the White areas "as migrant or temporary labourers for 'European' employers" [2].

2. In dealing in the foregoing chapters with the measures relied upon by Applicants, Respondent has demonstrated that Applicants do not afford any proof to substantiate their charge, and that the inferences drawn by them from the mere existence of the measures in question are entirely unjustified. It suffices, therefore, to reiterate that Applicants' charge is unfounded and without substance.

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[1] *Vide* Chap. I, paras. 4-5, *supra*.
[2] *Vide* Chap. II, para. 10, *supra*.

PART IV

Alleged violations by Respondent of Article 4 of the Mandate

CHAPTER I

INTRODUCTION

1. In this Part of the Rejoinder Respondent deals with section A of Chapter VII of Applicants' Reply [1] and Annex 9 thereto [2], concerning alleged violations by Respondent of the "military clause", Article 4 of the Mandate.

2. It may be convenient to draw attention at the outset to certain basic features of Applicants' case on this subject, as it now stands. These are the following:

(a) The case now formulated in the Reply exhibits a major shifting of ground as compared with the case first presented in Chapter VII of the Memorials. The changes relate to the legal as well as to the factual aspects of the case presented, and manifest themselves both in the general approach and in the particular charges made. In the process the case originally made has in some respects been abandoned entirely, and in others almost entirely. To a greater or lesser extent each of the original charges is now sought to be founded on new grounds, legal or factual or both; and a completely new charge of a dragnet nature has been added.

(b) On analysis, stripped of their verbiage, and correlated to true facts which are in no way controverted by Applicants, the four charges now sought to be presented will be found to rest fundamentally on the following propositions:

(i) *As regards the Regiment Windhoek:* that although an institution established, equipped and maintained solely for the training of *Native* inhabitants of South West Africa for purposes of internal police and the local defence of the Territory, would *not* be considered to be a "military base or fortification" within the meaning and intent of Article 4 of the Mandate, and would not be prohibited by that clause, an identical institution, except for the training being of European inhabitants of South West Africa, *is to be* considered such a "military base" and therefore prohibited.

(ii) *As regards the alleged military landing ground in the Walvis Bay area:* that an installation admittedly situated outside the boundaries of "the territory over which a Mandate [was] conferred", as described in Article 1 of the Mandate, is never-

[1] IV, pp. 553-564.
[2] *Ibid.*, pp. 565-571.

theless to be considered to be "in the territory" within the meaning and intent of Article 4 of the Mandate [1].

(iii) *As regards various landing strips:* that a few landing strips at various places in South West Africa, which are in fact isolated, unfortified and unmanned, and predominantly serving ordinary administrative and civil purposes, are to be considered "military bases" within the meaning and intent of Article 4 of the Mandate, and that their maintenance is therefore forbidden *in toto*, merely because they are occasionally and intermittently used by aircraft of the South African Air Force in the course of training pilots for purposes of possible rescue operations, internal security and the defence of the Territory, and "may at any time be utilized for the purposes of a campaign" [2].

(iv) *As regards military activity in general:* that maintenance of the above landing strips, coupled with alleged "build-up of military strength in Walvis Bay" (i.e., outside the Territory), taken together with alleged "great expansion in the *school cadet corps* of the Territory" [3] and the activity of "*Commando Units*", and finally "joined with Regiment Windhoek" [4] (which is upon the facts purely a training institution for purposes of internal police and the local defence of the Territory), have created a situation—

> "... where there is *the equivalent* of a series of military bases or *potential* military bases in the Territory ... [5]" (italics added),

or alternatively,

> "... where ... the Territory has been transformed into a 'military base' within the meaning and intent of the Covenant and the Mandate [5]".

3. In Respondent's respectful submission, each of the above propositions is so palpably absurd that Applicants' case regarding the military clause, being entirely dependent on these propositions, hardly merits further detailed attention. However, for the sake of completeness, Respondent does give detailed attention thereto in the succeeding chapters, the length of the treatment being occasioned mainly by the demonstration of the fallacies, of the shifting of ground, and of the novelty, which mark the Applicants' case as now presented.

4. Attached to Chapter VII of the Reply there is an Annex 9 which purports to contain "Supplementary Material with respect to Respondent's violations of Article 4 of the Mandate" [6].

To a large extent the material in the said Annex consists of a mere repetition or extension of arguments propounded by Applicants in Chapter VII of the Reply, or of an addition of particulars to the matters

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[1] **IV**, p. 560.

[2] Although Applicants further state that they "do not quarrel with 'internal security and rescue operations in the Territory' ". *Ibid.*, p. 562, footnote 1.

[3] Italics added.

[4] All quotations from **IV**, p. 563.

[5] **IV**, p. 564.

[6] *Ibid.*, p. 565.

dealt with in the said Chapter. To avoid repetition Respondent will, therefore, in its treatment of the law and facts in answer to Chapter VII of the Reply [1], deal also with such of the material in the Annex as can conveniently be dealt with at the same time, leaving the remainder of the material in the Annex to be considered in a final chapter [2].

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[1] Chaps. II and III, *infra*.
[2] Chap. IV, *infra*.

CHAPTER II

STATEMENT OF THE LAW

A. Introductory

1. Applicants in the Memorials formulated the following legal propositions regarding the provisions of Article 4 of the Mandate [1].

(i) "Armed installations *not related to police protection or internal security* fall within the class of 'military bases' or 'fortifications' and are therefore prohibited by Article 4 of the Mandate [2]." (Italics added.)

(ii) "*Facilities for police or internal security purposes are permitted*, but not military bases [2]." (Italics added.)

(iii) "The type of facility, its location, armament, equipment, organization and place in the Union's administrative hierarchy and chain of command determine whether it is a military base or fortification [2]."

2. In dealing with Applicants' aforementioned propositions, Respondent in the Counter-Memorial made, *inter alia*, the following observations:

(a) That there was a basic fallacy in propositions (i) and (ii) in that Applicants used the limitation in the first sentence of Article 4 of the Mandate, which concerns the training of Natives, as their criterion for determining whether a military installation or facility was a "military base". Their propositions in effect ignored the distinction between, on the one hand, the training of Natives, which in terms of Article 4 was prohibited, save for the purposes of internal police and local defence of the Territory, and, on the other hand, the training of non-Natives, in respect of which the Mandate contained no prohibition or limitation [3].

(b) That the said propositions employed the expression "internal security", instead of the expression "local defence" which appeared in Article 4, thereby in effect reducing the two concepts in Article 4, viz., "internal police" and "local defence", to one, called by Applicants "police protection or internal security" [4].

3. Applicants' reaction to the observations restated in paragraph 2 above emerges from paragraphs (3) and (4) of Annex 9 to their Reply [5]. In paragraph (3) Applicants deal with the question of an alleged "incompatibility" of the two "propositions" contained in Article 4 of the Mandate, viz., that Natives of the Mandated Territory may be trained for police and defence purposes, and that military bases and fortifications are prohibited. In this regard they advance the following interpretation as "the most likely, and the only reasonable, explanation":

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[1] To facilitate reference to the separate propositions a sub-paragraph number is assigned to each.

[2] I, p. 181.

[3] *Vide* **IV**, pp. 59-60.

[4] *Ibid.*, p. 60.

[5] **IV**, pp. 566-567.

"bases and fortifications are forbidden, and no facility whose purpose is to assist the training of natives for police and local defence is considered to be such a base or fortification [1]".

Respondent will deal later [2] with Applicants' reasoning in so construing Article 4. For the present Respondent is concerned only with drawing attention to the effect of such a formulation, and to demonstrate that Applicants now depart from their Statement of Law regarding Article 4 as formulated in the Memorials.

Firstly, Applicants now correctly speak of "police protection and local defence", and no longer roll the two concepts into one [3]. Secondly, however, the criterion of being related to police or local defence is now treated by Applicants as applying only to facilities for the training of Natives [4]. And, inasmuch as they accept that none of Respondent's facilities complained of by them relates to the training of Natives, the said criterion now falls out of the picture altogether.

4. In the last-mentioned respect, Applicants say that—

"[s]ince ... Respondent's military facilities exclude members of the 'Native' population of the Territory ... all of such facilities must ... be scrutinized in the light of the second sentence of Article 4 and in the broad scope of the last sentence of Applicants' 'Statement of Law' [5]".

The last sentence in Applicants' "Statement of Law" in the Memorials is the proposition marked (iii) in paragraph 1 above. Again it is evident, therefore, that in respect of all their charges of alleged violation of the "military clause", the propositions marked (i) and (ii) in paragraph 1 above are now no longer relied upon by Applicants: indeed, the criterion of being related to police or local defence is now treated as irrelevant [6].

5. In purported explanation of this complete departure from the stand taken in the Memorials, Applicants allege [7] that they learned that the Territory's military facilities excluded members of the Native population only when the Counter-Memorial was filed; and they say that, as a result of this knowledge, "the immediate reason for part of (their) previous formulation has fallen away" [7]. In this regard Respondent observes that:

(a) Respondent's policy of excluding the Native population of South West Africa from military training, and limiting such training to the White inhabitants of the Territory, has been consistent ever since the inception of the Mandate. The fact of the existence of such a policy, and that the Permanent Mandates Commission was fully aware thereof, appears from Respondent's annual reports to the League of Nations [8], from the Minutes of the Permanent Mandates Commission [9], and from the attitude adopted by Re-

[1] **IV**, p. 566.

[2] Chap. IV, *infra*.

[3] *Vide* para. 2 *(b)*, *supra*.

[4] *Vide* para. 2 *(a)*, *supra*.

[5] **IV**, p. 567. The last sentence of Applicants' Statement of the Law is cited in para. 1 (iii), *supra*.

[6] Applicants try to keep it alive—*vide* Chap. IV, para. 12, *infra*—but nowhere seek to apply it.

[7] **IV**, p. 567.

[8] *Vide* **IV**, pp. 54-56, 64 and the annual reports mentioned in footnotes 1 and 2 on p. 55 and footnote 2 on p. 56.

[9] *P.M.C., Min.*, XVIII, pp. 147-148; XXVII, p. 170 and XXXI, p. 135.

spondent in answer to the League Council's request in 1924 for the views of Mandatories on military recruitment [1]. Finally, the existence of such a policy was also common knowledge amongst commentators on the mandate system [2].

With regard to the position after the dissolution of the League, the Committee on South West Africa mentioned specifically in its 1959 report that—

> "[n]ew legislation governing the defence of the Union of South Africa and South West Africa, the Defence Act No. 44 of 1957, was brought into force in 1958. 'Non-Europeans' are excluded from compulsory military service and other provisions of the Act, however, except that they may be engaged for auxiliary services as guards or watchmen or to perform other non-combatant duties, or they may engage themselves voluntarily for service in the South African Defence Force in such capacity and subject to such conditions as may be prescribed [3]".

In the circumstances it is, to say the least, surprising that Applicants, who profess to have such a keen interest in what takes place in the Territory, were unaware until the filing of the Counter-Memorial that there is no military training of Natives in the Territory.

(b) But, even if Applicants were in fact unaware of Respondent's aforementioned policy, this would still not in itself explain the departure from their previous formulation and attitude.

It will be recalled that, in their application of the law to the facts in the Memorials [4], Applicants sought to apply the criterion of "police and internal security purposes" to each and every one of the "installations" and "facilities" complained of, without drawing any distinction in that regard between Natives and non-Natives. Consistently with the attitude now adopted in the Reply [5], this cannot be explained except on the basis that Applicants thought that each "facility" or "installation" involved the training or use of Natives *only*, and that the purposes extended beyond police and local defence. Respondent finds it hard to believe that this was the case.

6. Having demonstrated in the preceding paragraphs that Applicants in the Reply discard the interpretation of Article 4 contended for in the Memorials, Respondent will now proceed to a consideration of Applicants' comments on the meaning and effect given to the clause by Respondent in the Counter-Memorial [6].

Applicants commence by saying—

> "Respondent has given a narrow meaning to the 'military clause' contained in Article 4 of the Mandate by the use of dictionary definitions and its own assertions [7]". (Footnote omitted.)

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[1] *P.M.C., Min.*, VI, p. 9.

[2] Wright, Q., *Mandates under the League of Nations* (1930), p. 472 and Hall, H. D., *Mandates, Dependencies and Trusteeship* (1948), p. 67.

[3] *G.A., O.R., Fourteenth Sess., Suppl.* No. 12 (A/4191), p. 12 (para. 84).

[4] **I**, pp. 182-183.

[5] *Vide* paras. 3 and 4, *supra*.

[6] **IV**, pp. 47-53.

[7] *Ibid.*, p. 553.

This comment is wholly unwarranted. With regard to the first sentence of Article 4, Respondent stated that the only possible construction thereof was that the Mandatory was permitted to give military training to Natives for the purposes of internal police and local defence, and that, inasmuch as the Article as a whole contained no provisions restricting the military training of persons other than Natives, such persons could be trained for any lawful purpose [1]. This construction, which gives full effect to the plain and ordinary meaning of the words employed therein, can surely not in any way be regarded as "narrow", or as resting on "dictionary definitions" or on Respondent's "own assertions".

With regard to the second sentence of Article 4 [2], Respondent did rely on dictionary definitions of the term "military base", and with reference thereto Respondent stated the proposition that failing the purpose of utilization for operations or a campaign, actual or prospective, by a force or an army, a place or facility could not be said to be maintained as a military or naval base. Respondent also argued that, inasmuch as military training of the inhabitants of the Territory was permissible in terms of Article 4, and would indeed fall within Respondent's duties relative to the Territory, it was inconceivable that the prohibition against military bases was intended to extend to ordinary military training facilities [3], and in support of this contention Respondent referred to actual military activities in other mandated territories [3]. Also in regard to this part of Article 4, Respondent cannot understand how Applicants can make the charge that Respondent's construction, which gives full effect to the plain and ordinary meaning of the words employed, read in the context of the Article as a whole, and which is in conformity with what was practised in other mandated territories, is "narrow".

7. Applicants contend further that the meaning assigned to Article 4 of the Mandate by Respondent is inconsistent with—

(a) "the broad purpose of the military clauses in the mandates system",
(b) "the plain meaning of the clause on its face", and
(c) "the interpretation of the military clauses by the Permanent Mandates Commission" [4].

Respondent will in the following paragraphs deal with the comments made by Applicants under the said heads.

B. The Purpose of the Military Clause

8. Applicants say that "[t]he military clauses had a broad general purpose and the terms therein cannot be narrowly interpreted" [4]; and they cite Stoyanovsky to the effect that the basic principle of the said clauses was "... the complete neutralization of mandated territories in the event of war, whether the mandatory is belligerent or not" [4]. (Footnote omitted.)

Respondent has already indicated that its interpretation of Article 4

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[1] IV, p. 48.
[2] To which Applicants' said comment more particularly relates—*vide ibid.*, p. 553, footnote 1.
[3] IV, p. 51.
[4] *Ibid.*, p. 553.

gives full effect to the plain and ordinary meaning of the words employed, and that the charge of a "narrow" construction on its part is unfounded [1].

The statement of Stoyanovsky quoted by Applicants goes no further than to expound a principle that, in the event of war, there was to be complete neutralization of mandated territories even where a Mandatory was a belligerent. The concept of neutralization in the event of a war does not, however, exclude the right and duty to act in defence of the mandated territory itself, and to train the inhabitants for that purpose. Respondent's contention is therefore not in conflict with Stoyanovsky's view.

9. Applicants further charge Respondent with qualifying the language of the military clauses in two respects.

In the first place, they say, Respondent qualifies it—

> "... by stating that the clause '... was probably ... intended to prevent the Mandatory from using the Mandated Territory *as a base of aggression*, by training large Native armies, or by establishing military or naval bases in the Territory' [2]". (Footnote omitted.)

By quoting only part of Respondent's statement relative to the purpose of the military clause, Applicants create a misleading impression. Respondent's statement was as follows:

> "The abovementioned safeguard, which was reflected in Article 4 of the Mandate for South West Africa, *was no doubt conceived in the interests of the indigenous population so as to prevent their military exploitation by the Mandatory*. It was probably *also* intended to prevent the Mandatory from using the Mandated Territory as a base of aggression, by training large Native armies, or by establishing military or naval bases in the Territory [3]." (Italics added.)

Regard being had to the full statement, including the italicized words omitted by Applicants in their citation from the Counter-Memorial, Applicants' criticism of Respondent's suggestions as to the purpose of the military clause is unwarranted. Respondent did not contend, as Applicants aver, "that military bases must somehow be related to aggressive designs" [2]; nor does Respondent's rendering of the purpose of the military clause call for Applicants' comment, by way of as submission, that "the purpose of the Mandate is to benefit the inhabitants of the Territory" [2]. Respondent accepts that the establishment in the Territory of a facility which is a military or naval base is prohibited, irrespective of the use to which that facility may be put. What Respondent, however, does contend is that in determining whether a particular facility is, or is not, a base within the contemplated meaning of Article 4, due regard must be had, *inter alia*, to its intended purpose, whether for present or future use.

In this respect Applicants' statement that—

> "... even though military and naval bases, or fortifications, may have no presently intended offensive purpose ... they are inconsistent with the Mandate because they are susceptible of offensive use [2]",

begs the question at issue. Military and naval bases and fortifications are

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[1] *Vide* para. 6, *supra*.
[2] IV, p. 553.
[3] *Ibid.*, p. 47.

prohibited even though their present use may be innocent. But in determining whether a facility is a prohibited installation, regard must be had, *inter alia*, to its intended purpose. To regard a particular facility as a prohibited installation merely because it is, in Applicants' words, "susceptible of offensive use", must lead to farcical results, inasmuch as many innocent installations—harbours, airfields, roads, etc.—would then have to be classed as forbidden installations.

10. Applicants' next point of criticism is directed at Respondent's statements that there was at the Paris Peace Conference—

> "... no doubt that a Mandatory was to be entitled to train the inhabitants of a Mandated territory (including the Natives) for the defence of *that Mandated territory* [1]",

and that "[t]he duty—and the right—to defend the Territory, is that of Respondent ..." [2].

Applicants say that Respondent's construction to the effect that it has a right and duty to defend the Territory is—

> "... wholly out of keeping with the nature and substance of the Mandate institution, and ignores the basic relationship between the Mandatory and the League of Nations [3]".

In propounding their argument in support of the aforegoing contention, Applicants repeat their quotation from Stoyanovsky to the effect that the objective of the military clauses was the "complete neutralization of the mandated territories in the event of war" [3]. Respondent has already dealt with this statement of Stoyanovsky [4], and reiterates that it is not in conflict with Respondent's contention—i.e., that Respondent has the right and duty to act in defence of the Territory if the Territory itself is attacked, and may for that purpose employ not only the inhabitants of the Territory, but also Respondent's own forces.

11. By reference next to Articles 1 and 8 to 17 of the Covenant, Applicants say that—

> "... the primary safeguard for [Mandated] territories did not reside in the strength of the Mandatory, but in the system of collective security established by the League [3]".

A proper reading of the said Articles shows that the intention of the authors was to establish through the League collective security for the preservation of peace—a safeguard intended for the benefit of all States. In no way, however, could these Articles be read to contain or support the proposition that the *only* safeguard for mandated territories resided in the system of collective security established by the League, to the exclusion of any right or duty on the part of Mandatories to repel attacks on the mandated territories committed to their charge. In the absence of clear provision to the contrary, a duty to promote the well-being and progress of the inhabitants to the utmost must include a duty to take such steps as the Mandatory may consider proper to protect them against aggression. This would naturally include a right, in the Mandatory's discretion, to train the inhabitants of the mandated territory for local

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[1] IV, p. 50.
[2] *Ibid.*, p. 48.
[3] *Ibid.*, p. 554.
[4] *Vide* para. 8, *supra*.

defence purposes, and, as a necessary corollary, to use such troops in repelling any attack on that territory. The fact that the military training of Natives was not completely prohibited, but was permitted for police and defence purposes, shows in itself that the system of collective security established by the League could not have been intended to be the sole safeguard for mandated territories against aggression. As regards training and using inhabitants other than Natives for such purposes, there was no provision prohibiting this or even qualifying the discretion of the Mandatory in that regard. And by the same token there could be no reason, whether based on legal or moral considerations, why the Mandatory should not have used its own troops to assist the inhabitants of a mandated territory in the defence of that territory when the latter was threatened by aggression.

These remarks apply equally to the extract cited by Applicants from Duncan Hall [1], and to Applicants' statement that "the mandates system was founded upon a new, dynamic concept of collective responsibility" [1].

12. Applicants in this regard state further:

> "It is consistent with this [the concept of collective responsibility] that the League should bear the *ultimate responsibility in the event of an attack* upon a Mandated Territory *severe enough to overwhelm the native forces* which would have been trained for 'internal police and the local defence of the territory' [1]." (Italics added.)

The *ultimate* responsibility of the League for the preservation of peace is not in issue. The point in issue is the right of a Mandatory to resist an attack upon a mandated territory, and for that purpose to make use of the trained inhabitants of the territory (Natives and non-Natives), as well as its own forces.

Applicants advance no reasons, moral or legal, in justification of the proposition that a Mandatory should, in the event of an attack on the mandated territory, allow the Native forces in the territory to be overwhelmed without calling in the aid of the non-Native forces of the territory or of its own forces.

This untenable proposition advanced by Applicants is, in fact, controverted by the practice of Mandatories during the League of Nations period to provide for the local defence of territories under mandate by means not only of the Native inhabitants of such territories, but also of non-Native troops, and even of troops brought into the mandated territories from outside. The question of the training and use of non-Natives in the military organizations of mandated territories will be dealt with later in this chapter [2]. For specific examples of the use made of extraneous forces in other mandated territories Respondent refers to the position which obtained in Tanganyika, Ruanda-Urundi, and the Cameroons (under British Mandate).

(a) *Tanganyika:*

A substantial number of the troops stationed in the mandated territory were for many years recruited in Nyasaland for service in Tanganyika and elsewhere [3]. The officers of the military forces

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[1] IV, p. 554.

[2] Para. 14, *infra*.

[3] *P.M.C., Min.*, IX, p. 147; XV, p. 121; XVIII, p. 34 and XXII, pp. 133 and 142.

stationed in Tanganyika were European officers of the British Regular Army seconded for service to the King's African Rifles [1].

(b) *Ruanda-Urundi*:

For many years there was no military training of the Native inhabitants of this mandated territory. For its defence the Territory relied on the extraneous forces of the Belgian Congo [2].

(c) *Cameroons* (under British Mandate):

The Territory relied for its defence and internal security on extraneous Nigerian military forces, which were used in the mandated territory. The Territory also contributed towards the cost of maintaining the Nigerian military forces [3].

The practice on the part of Mandatories to employ extraneous forces for the defence of their mandated territories was mentioned by Lord Lugard as early as the Third Session of the Permanent Mandates Commission. He said:

> "There are some mandated territories which are administered as an integral part of the neighbouring colony or protectorate of the mandatory Power. In such cases a separate force, either a military force or an armed police constabulary, is not usually raised for the defence of the mandated territory itself, and a detachment from the permanent forces of the neighbouring territory of the mandatory Power is sent into the country for its control and defence. It would be relieved in due course by another detachment and would return to its own headquarters [4]."

At no stage was it even suggested in the Permanent Mandates Commission or by the League Council that the use of extraneous forces in the defence of mandated territories could be regarded as an infringement of the relevant military clauses. And at the outbreak of the Second World War no doubts were raised as to the right of Mandatories, where their mandated territories were threatened or invaded by aggressors, to defend them by the use of the Mandatories' own forces, as well as other extraneous forces, both European and non-European [5].

With regard to Applicants' statement relative to particular provisions inserted in the A Mandates, Respondent refers to what is stated in Chapter IV, paragraph 6, *infra*. Respondent contends that such provisions are of no assistance in an interpretation of the military clauses in the B and C Mandates.

13. Applicants deal next with what they describe as "attempts" on the part of Respondent—

> "... to exclude military training camps from the definition of 'military base', [by] referring to 'considerable permanent military forces stationed within (the) boundaries (of practically all the African territories under Mandate)' [6]".

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[1] *P.M.C., Min.*, XV, p. 121.

[2] *P.M.C., Min.*, IV, p. 68; XIV, p. 127; XXII, p. 247; XXIV, p. 84 and XXXV, p. 61.

[3] *P.M.C., Min.*, XIV, p. 149 and XIX, p. 27.

[4] *P.M.C., Min.*, III, p. 196.

[5] *Vide* Hall, H. D., *Mandates, Dependencies and Trusteeship* (1948), pp. 71, 260 and 267-269.

[6] IV, p. 554.

Applicants say that Respondent failed to point out that "such forces were almost entirely composed of *natives*", and propound the following argument:

> "All of the other 'African territories under Mandate' were under 'B' Mandates, the language of which prohibited the Mandatories from organizing '. . . any *native military forces* in the territory except for local police purposes and for the defence of the territory'. Respondent's whole argument becomes strained as soon as the word 'native' is added to all of Respondent's assertions concerning 'permanent military forces' [1]." (Footnotes omitted.)

Again Applicants' comment is unwarranted. The military clause in each of the B Mandates—save the Mandates for French Togoland and the Cameroons, which contained additional provisions—read as follows:

> "The Mandatory shall not establish any military or naval bases, nor erect any fortifications, nor organise any native military force in the territory except for local police purposes and for the defence of the territory [2]."

In support of its argument that the prohibition against military bases was not intended to extend to ordinary military training facilities, Respondent referred to the position which, during the lifetime of the League, obtained in the B Mandated territories in Africa. A number of the African territories under mandate had large permanent military forces stationed within their boundaries and trained Natives for police and local defence purposes. Respondent pointed out that these territories had facilities for their military forces, for military training, and for supplies, maintenance, armament, material and transport, and that it was at no time suggested that in providing such facilities the Mandatories concerned had established "military bases" or "fortifications" in violation of the military clause.

This argument is sound and above criticism. In fact, Applicants propound the same basic argument in their Reply [3].

What Applicants do suggest, however, as a contention underlying their interpretation of the military clause in both the B and C Mandates, is that Respondent's argument holds good only for the training of Natives and not for the training of non-Natives.

Applicants advance no reason for making this distinction, other than indicating that the training of Natives for purposes of internal police and local defence was specifically mentioned in the military clause. There is, however, no ground for the distinction sought to be drawn by Applicants. The training of Natives for purposes of internal police and local defence was specifically mentioned in the military clause for a particular reason, namely to state the permissible purposes for which Natives could be trained, as an exception to the general prohibition against the military training of Natives, which was also specifically contained in the clause. The clause did not, either in express terms or by implication, prohibit or restrict the training of non-Natives, and in this respect the wording of the clause was in keeping with its intended purpose, as explained in discussions before and during the Paris Peace Conference [4].

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[1] **IV**, p. 554.
[2] E.g., Art. 4 of the British Mandate for East Africa (Tanganyika Territory).
[3] **IV**, p. 555, and in Annex 9, p. 566 (para. 3).
[4] *Vide* **IV**, pp. 48-50.

14. There can be no doubt, both on the plain meaning of the wording of the military clause, and in accordance with its purpose, that it was permissible for Mandatories—both in the B and C Mandated territories—to train the inhabitants of such territories, *Native and non-Native*, for purposes of internal police and local defence.

The qualification which Applicants seek to introduce, namely that the training of non-Native inhabitants of the B and C Mandated territories was not permitted, does not flow from the wording of the clause, and is not consistent with the history of events and proposals before and during the Paris Peace Conference. Nor is it consistent with the position which in practice obtained in the African mandated territories during the lifetime of the League. Applicants say in this last-mentioned regard that the military forces stationed in the African territories under mandate "were *almost* entirely composed of natives" [1]. The use of the word "*almost*" in itself refutes Applicants' contention that the military training of non-Natives was not permitted. In fact the composition of such forces is significantly revealing.

In practically all cases such forces included Europeans serving as officers. In Ruanda-Urundi a whole European volunteer corps was created, and the Permanent Mandates Commission was informed that—

> "[i]t was desirable that the Europeans should be organized on a military basis in order to be prepared for any surprise. The volunteer corps would only be used in case of disturbances or other unusual occurrence that troubled the peace of the territory [2]."

And as regards the military organization in South West Africa, Respondent has already indicated that the Permanent Mandates Commission was well aware that it consisted solely of Europeans [3].

At no time was it suggested by the Commission or the League Council that the training and use of non-Natives by Mandatories for police and local defence purposes could be regarded as a violation of the military clause.

In the premises, it is submitted that the position taken by Applicants has no juridical basis, and that their attempted attack upon Respondent's contention relative to the purpose of the military clause is without substance.

C. "The Plain Meaning of the Clause on its Face" [4]

15. Respondent has already indicated that the military clause contained no provisions regarding the military training of non-Native inhabitants of the mandated territory. It was concerned solely with the training of Native inhabitants and with the prohibition against military and naval bases and fortifications. The training of Natives for internal police and local defence was specifically mentioned in the clause in order to prescribe the permissible purposes for which the Native inhabitants could be trained, as an exception to the general prohibition against their military training. In the case of non-Natives there was no prohibition, and therefore no need for an exception to a prohibition. There can be no

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[1] **IV**, p. 554. (Italics added.)
[2] *P.M.C., Min.*, XXIV, p. 84.
[3] *Vide* para. 5, *supra*.
[4] *Vide* **IV**, pp. 553 and 555.

question but that on the plain and natural meaning of the clause, on the face thereof, the Mandatory was entitled to train any of the inhabitants of the Territory, Native and non-Native, for internal police and local defence of the Territory. For the purpose of such training there would, of course, have to be training facilities and, in Respondent's submission, it follows that on a proper reading of the clause the prohibition against military bases was not intended to extend to facilities utilized solely for the normal training of inhabitants for internal police and local defence purposes. As has been noted [1], Applicants in fact adopt the very same line of reasoning [2], but seek to limit it to Native forces, i.e., so as to conclude that "... the prohibition on military bases [could not *have*] *been considered as being applicable to native forces*" [3]. (Italics added.) This limitation in their conclusion results from a basic premise, namely that the Mandatory was permitted to train only Natives and not also the non-Native inhabitants, and not from anything contained in or suggested by the clause. On the contrary, as already indicated [4], this premise is not supported by the plain meaning of the clause, and is inconsistent with the purpose of the clause and with the practice of Mandatories during the lifetime of the League of Nations.

It need only be stated further that none of the arguments advanced by Applicants in paragraph *b*, at page 555 of their Reply, serves to support the limitation which they seek to import into the clause. There is no need to give consideration to the soundness or otherwise of these arguments. Suffice it to say that each and every one would, if good in relation to the training of Natives, also hold good for the training of inhabitants of a mandated territory other than Natives.

D. The Views of the Permanent Mandates Commission

16. Applicants say that—

> "[t]he views of the Permanent Mandates Commission on the military clauses demonstrate with singular clarity the common assumption that they were intended to be scrupulously adhered to and vigorously enforced [3]". (Footnote omitted.)

Respondent accepts this as a correct statement of the attitude of the Commission, but fails to see its relevance to the issues under consideration, which concern the meaning of the clause. It is, in Respondent's submission, a complete *non sequitur* to infer, as Applicants do [5], that the "common assumption that [the military clauses] were intended to be scrupulously adhered to and vigorously enforced" necessitates a vague and so-called "broad interpretation" of the phrase "military or naval base"—which really amounts to revision and not interpretation—as opposed to the natural meaning thereof relied upon by Respondent.

Nor can support for Applicants' proposition be gathered from the discussion in the Commission concerning the alleged existence of a naval base in the Territory under Japanese Mandate, to which reference is made

[1] *Vide* para. 13, *supra*.
[2] **IV**, pp. 555 and 566.
[3] *Ibid*., p. 555.
[4] *Vide* paras. 13-14, *supra*.
[5] **IV**, pp. 555-556.

by Applicants. Applicants appear to attach significance to certain questions put in that regard to the representative of Japan (Mr. Ito) by members of the Commission. In the first place, Applicants regard as a "sweeping approach" on the part of the Commission a question whether Mr. Ito knew from a reliable source that " 'no establishment existed in the South Sea Islands that *could be called a naval base*' " [1]. Respondent fails to see where the expression "*could be called a naval base*" takes Applicants in their argument. The question as framed by M. Rappard could never have been intended to signify that the Commission was concerned about the establishment of a facility which, on a proper construction of the military clause, could not be regarded as a naval base. Nor is the matter taken further by the question put by the Chairman of the Commission, namely whether the works undertaken were "*intended only to promote mercantile navigation*"[1]—a question which most certainly was pertinent to the matter then under enquiry, and which demonstrates the correctness of the contention consistently advanced by Respondent, i.e., that in determining whether a particular facility is a prohibited installation, regard must, *inter alia*, be had to its intended purpose [2]. Finally, Applicants appear to suggest, on the strength of one of the questions asked by the Chairman of the Commission, that the presence of a "*single soldier or a single sailor in . . . [a] . . . territory under mandate*" would constitute a violation of the military clause [3]. Respondent submits that the suggestion is too preposterous to warrant discussion.

17. Applicants' statement that the only meaning which may be given to the second sentence of Article 4 of the Mandate "is the broadest possible interpretation consistent with complete neutrality of the mandated territory" [3], is a repetition of the proposition advanced at page 553 of the Reply with reference to a quotation from Stoyanovsky, which has already been dealt with [4].

18. Arguing further in justification of their novel approach, Applicants say:

> ". . . narrow dictionary definitions of 'military base' are wholly incompatible with the interpretation laid upon such term by the Permanent Mandates Commission and inconsistent with the entire thrust of the Mandates System [5]".

In the first place, Applicants produce no evidence of an "interpretation" placed upon the term "military base" by the Permanent Mandates Commission. Perhaps their contention in this regard is that the question put to the representative of Japan by the Chairman of the Commission, regarding "a single soldier or a single sailor", is indicative of an interpretation laid upon that term by the Commission. Indeed, when dealing with the facts, Applicants put the same question to Respondent relative to the Regiment Windhoek [6]. In this regard Respondent repeats that it would be preposterous to suggest that the question put by the Chairman of the Commission was intended to reflect an opinion on the part of the

[1] IV, p. 556. (Italics added by Applicants.)
[2] *Vide* para. 9, *supra*.
[3] IV, p. 556.
[4] *Vide* para. 8, *supra*.
[5] IV, p. 557.
[6] *Ibid.*, p. 559. *Vide* also Chap. III, para. 6, *infra*.

Commission that the mere presence of "a single soldier or a single sailor" in a mandated territory would constitute the establishment of a base in terms of the military clause. If that had indeed been the opinion of the Commission, then it must follow, in view of what has been stated above relative to the practice in the African mandated territories [1], that the Commission knowingly allowed large scale violations of the clause.

Secondly, Respondent does not understand what Applicants intend to convey by the expression "entire thrust of the mandates system". Respondent agrees with Applicants' statement that the prohibitions contained in the military clause were conceived in the interests of, *inter alios*, the inhabitants of mandated territories [2], and that there was a "system of collective responsibility and security expressed by the mandates system" [3]. Respondent is, however, at a loss to see how the dictionary definitions referred to by it can be said to be inconsistent with these features of the mandate system—if these are indeed the features relied upon by Applicants as giving "thrust" to the system. There is no indication that the authors of the system, when they used the term "military base", had in mind anything else than what is signified by the plain and ordinary meaning of the words employed, which is also the meaning assigned thereto in the dictionaries.

19. With regard to the dictionary definitions of the expression "military base" cited by Respondent, Applicants also say:

> "Respondent has, in effect, limited the meaning of the term 'military base' to coincide with the existence of a state of war, since neither 'operations' nor a 'campaign' can truly be said to exist other than in wartime [3]."

Arguing further that "the Mandates contain no language which can be interpreted as prohibiting military installations *only in time of war*", but that, on the contrary, "[t]he purpose and application of Article 4 is obviously *in time of peace*", Applicants conclude as follows:

> "It is a distortion of the clear language and intent of Article 4 to argue that the term 'military base', as used in all 'B' and 'C' Mandate agreements, referred only to *operations* or *campaigns*, 'actual or prospective' [3]." (Footnote omitted.)

In so arguing Applicants are in effect attributing to Respondent a contention which it has not advanced.

Respondent, in referring to the dictionary definitions of the expression "military base", contended that—

> "... failing the *purpose of utilisation* for operations or a campaign, *actual* or *prospective*, by a force or an army, a place cannot be said to be maintained as a military or naval base [4]". (Italics changed.)

Applicants' reproduction of this contention is completely at fault. The contention centred round the "*purpose of utilisation*" of a facility—i.e., the purpose for which it was intended to be used—and was not dependent on actual utilization of the facility for such purpose. Applicants have attributed no significance to the fact that the words "operations or a

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[1] Paras. 12 and 14, *supra*.
[2] **IV**, p. 557. *Vide* para. 9, *supra*.
[3] *Ibid.*, as to which *vide* para. 11, *supra*.
[4] **IV**, p. 50.

campaign" were expressly qualified by the words "*actual* or *prospective*". The word "prospective" amply covers the possibility of a base being established in time of peace, for the purpose of utilization in time of war. Respondent therefore in no way limited the meaning of the term 'military base' to coincide with the existence of a state of war. It is fully aware that the mandates contained no language which could be interpreted as prohibiting military installations only in time of war, and it did not construe the military-clause as having that meaning.

20. With further regard to the definitions of the expression "military base" cited by Respondent from dictionaries, Applicants state that they "are not in the least prepared to accept a restrictive definition of 'military base' which is limited to the 'operations or campaign' of a 'force or an army' "; and they proceed to quote other dictionary definitions, with the implied suggestion that such definitions are of a wider scope than those quoted by Respondent [1]. Applicants have not, however, chosen to demonstrate in which way these definitions differ in essence from those quoted in Respondent's Counter-Memorial [2]. On the contrary, Respondent submits that the definitions cited by Applicants all include the following features as descriptive of a "military base", viz.,

(a) a locality or place, which
(b) is utilized by a military force,
(c) for the purpose of the projection or support of military operations, i.e.,
 (i) as a starting point for the operations, or
 (ii) as a source of supplies or reinforcements required for the operations, or
 (iii) as both.

These definitions therefore in no way derogate from, but are, on the contrary, in full accord with, Respondent's conclusion that—

"... failing the *purpose of utilization for operations or a campaign, actual or prospective, by a force or an army*, a place cannot be said to be maintained as a military or naval base [2]".

21. Applicants conclude their Statement of Law with the submission that, for the reasons advanced by them, "a broad and flexible meaning must be given to the term 'military base' in Article 4", an interpretation which, they say—

"... would be fully consistent with the test advanced by [them] in their Memorials, namely that 'the type of facility, its location, armament, equipment, organization and place in the Union's administrative hierarchy and chain of command determine whether it is a military base or fortification' [3]". (Footnote omitted.)

In reply Respondent reiterates that Applicants have in fact advanced no reasons why effect should not be given to the plain and ordinary meaning of the words employed in the clause.

With regard to the so-called "test" advanced by Applicants in their Memorials, and now relied upon in the Reply, the considerations mentioned therein could of course be relevant in a determination whether a

[1] **IV**, pp. 567-568 (para. 5).
[2] *Ibid.*, p. 50.
[3] *Ibid.*, p. 557.

particular facility is a military base or not; but, in jettisoning the other "tests" contemplated in the propositions formulated in the Memorials [1], Applicants in effect now disregard the most important consideration, namely the purpose which a particular facility is intended to serve. Indeed, the so-called "test" is now so broad that it does not ascribe any *meaning* at all to the expression "military base". And, as appears from Applicants' application of the "test" to the facts, the "broad and flexible meaning" not only ascribes no concrete content to the expression "military base", but introduces into such expression concepts notionally distinct from it, e.g., ordinary training institutions and isolated landing strips. Applicants even seem to suggest that the presence of "a single soldier or a single sailor" in a mandated territory could constitute a military base [2]. The result of this new approach by Applicants is, as will be demonstrated in dealing hereinafter with their treatment of the facts, that they label particular facilities as forbidden installations for no other reason than that they, Applicants, assert them to be such.

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[1] *Vide* para. 1, *supra*.
[2] *Vide* paras. 16 and 18, *supra* and Chap. III, para. 6, *infra*.

CHAPTER III

STATEMENT OF FACTS

A. The Regiment Windhoek

1. Applicants' charge as originally framed in the Memorials was that—

"[t]he supply and maintenance facilities of the regiment, together with the vehicles and material of the regiment itself would apparently constitute what is commonly known as a 'military base' [1]".

The sole reason then advanced by Applicants for the aforementioned conclusion was the contention that the "purpose" of the regiment "(was) not police protection or internal security"; and they sought to base this contention on the following:

(a) that the Regiment was part of an armoured corps, and that such corps are not normally used for "police protection or internal security", and

(b) that the Regiment was part of a conventional military organization, namely that of the "Union of South Africa", which "indicate[d] that its purpose (was) not police protection or internal security" [2].

2. Respondent having exposed in the Counter-Memorial the basic fallacies underlying Applicants' version, as set out in the Memorials, of the legal position [3], Applicants now switch to another tack. Their charge is now very vaguely framed as follows:

"... the growth of Regiment Windhoek in its several forms since 1946, its incorporation as 'an integral part of the South African Defence Forces', its establishment as part of the South West Africa Command of the defence establishment of the Republic of South Africa, and its corresponding place in the Republic's administrative hierarchy and chain of command, constitute a violation of Article 4 of the Mandate [4]".

3. Upon analysis, the reasons at present advanced by Applicants for their conclusion that the Regiment Windhoek—

"... in its present form and strength, in organization and in operation, involves the maintenance of a 'military base', within the meaning of Article 4 ... [5]",

are apparently as follows:

(a) "There appear to have been no South African military personnel in command of the pre-war Burgher Forces. The Administrator assembled the burghers for inspection and rifle practice; the Admi-

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[1] I, pp. 182-183.
[2] *Ibid.*, p. 182.
[3] *Vide* Chap. II, para. 2, *supra*.
[4] IV, p. 558.
[5] *Ibid.*, pp. 559-560.

nistrator had the power to call them up for service; the Administrator *appointed the burghers' officers* ... *In the case of the 1927* Burgher Force, it was commanded and controlled by a Chief Commandant appointed by the Administrator [1]." (Footnote omitted.)

In contrast, Applicants point to the present-day position, in which the Regiment Windhoek—

"... is part of the South African Armoured Corps of the Citizen Force, which forms an integral part of the South African Defence Forces [1]".

(b) Applicants also compare what they term the "nature of the activity and the equipment" of the pre-war Burgher Force with that of the Regiment Windhoek today [1]. In this regard they draw attention to the fact that prior to 1939 military training never developed to a point beyond rifle practice, and that during the years 1931 to 1935 there was a curtailment even of that, whereas, in contrast, the Regiment Windhoek is at present equipped with light reconnaissance vehicles (i.e., armoured cars) and members of the force are trained in the use thereof [2].

4. Conceding that there have been these changes, Respondent cannot understand how the mere fact of such changes can be charged as a violation of Article 4 of the Mandate. The inquiry is not whether there have been changes in the administration, or in the quality or equipment, of the military training of the White inhabitants of South West Africa, but whether the changed situation involves violation of the said Article.

The purpose of the Regiment Windhoek is, and has always been, the *training* of *White inhabitants of South West Africa* with a view to the *internal police and local defence of the Territory*. Modernization of the equipment of the Regiment, the training of men in the use thereof, and an organizational arrangement whereby the Regiment is administered and controlled as part of the South African Defence Forces, in no way derogate from that purpose.

With regard to the functions previously performed by the Administrator, Applicants seem to forget that the Administrator was, and is, Respondent's agent, acting under the control and instructions of Respondent. Whether Respondent performs the functions mentioned by Applicants through one agency (the Administrator) or through another (the Department of Defence) is inconsequential in deciding the point in issue.

As regards the personnel in command, although it may in passing be mentioned that the Commandant of the Regiment Windhoek is an inhabitant of the Territory, Respondent submits that also this aspect is quite clearly immaterial. The issue turns on the question whether the complex of what has been established and what is being done at the establishment constitutes a military base: Article 4 does not introduce the agency or command through which the establishment and activities are conducted as a relevant factor at all. In this regard, too, the practice followed in other mandated territories in Africa during the League of Nations period is instructive; the majority of the officers of the King's African Rifles in the mandated Territory of Tanganyika, to cite but one

[1] **IV**, p. 558.

[2] *Ibid.*, footnotes 5 and 6.

example, were British officers seconded from the Regular British Army [1]. And as regards the chain of command, the above remarks apply with equal force. Thus no objection was raised by the Permanent Mandates Commission when the Mandatory concerned proposed in 1929—

> "... that the military garrisons of Tanganyika and Nyasaland should be grouped in one command under a Commandant who would normally be resident in Dar-es-Salaam and would act as military adviser to the Governors of both territories ... [2]".

And no objections were ever made by the Commission or the League Council to the chain of command, officers or administration of the forces, extraneous to the mandated territories, but employed therein for purposes of police or local defence [3].

Finally, as regards the equipment used for training, Applicants surely cannot seriously suggest that such equipment as may be necessary for local defence and internal police purposes at the present time, is prohibited, and that only such equipment as was in fact used during the pre-Second World War period is permitted. And if Applicants cannot argue along such lines, there is no point in their comment regarding equipment, unless they argue further that the present equipment exceeds the requirements of internal police and local defence, which they do not do. In fact, they seem to contend that the purpose of the Regiment is for "internal security", and that it is "closely concerned with riot control" [4].

5. Applicants fail to state on what legal basis the changes to which they refer, are said to constitute a violation of Article 4 of the Mandate.

What they do say, however, is that such changes have taken place "since the dissolution of the League of Nations, with benefit of supervision neither by the League nor the United Nations" [5].

The relevance of this fact is not appreciated, since Applicants do not in their Statement of Law in the Reply—and the same can be said of their Statement of Law in the Memorials—rely on the absence of League supervision or United Nations supervision as a factor in determining whether a particular facility is, or is not, a forbidden installation—a proposition which would, of course, be without substance.

6. Applicants also refer once again to the discussion at the 28th Session of the Permanent Mandates Commission regarding military activities in the Japanese Mandated Islands [6], and pose the question:

> "Is it possible for Respondent to confirm that '... there [is] not a single soldier ... in the entire territory under mandate', and to reply 'that there [is] not in the entire territory a single soldier or sailor on the active list?' [5]." (Footnote omitted.)

Respondent has already pointed out that it would be farcical to suggest that the presence of a "single soldier or a single sailor" in a mandated territory would constitute the existence of a military base, and therefore

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[1] *Vide* Chap. II, para. 12, *supra*.
[2] *P.M.C.*, *Min.*, XV, p. 110.
[3] *Vide* Chap. II, para. 12, *supra*.
[4] *Vide* para. 7, *infra*.
[5] IV, p. 559.
[6] *Ibid.*, p. 556.

a violation of the military clause [1]. In this respect Respondent again refers to the position which obtained in practically all the B Mandated territories during the lifetime of the League [2].

7. In the premises aforestated, it follows, in Respondent's submission, that Applicants' citation from the "South West News" regarding alleged training of members of the Regiment Windhoek, *inter alia*, for internal police purposes, i.e., in methods for dealing with rioters [3], is pointless as regards the issue under consideration.

The same observation would apply also to the citation by Applicants [3] of a statement made by Respondent's Minister of Defence, on 28 March 1960, in the South African Senate. It must be pointed out, however, that the Minister was *not* dealing with the situation in South West Africa but in South Africa, and that the 12 infantry units mentioned, as well as the Mobile Watches, were and are all in South Africa. Applicants' citation of the extract from the Minister's speech is therefore entirely irrelevant.

8. Despite the full explanation given by Respondent in the Counter-Memorial regarding the Regiment Windhoek [4], Applicants still profess to be confused in their understanding of the organization and activities of the Regiment [5]. Respondent will therefore once more explain the factual situation.

(a) The Regiment Windhoek is a Citizen Force unit, which means that it is composed of civilians who undergo peace-time military training for certain limited periods, as explained in sub-paragraph *(c)* below. During the four years in which a trainee is enlisted as a member of the Regiment, he carries on with his ordinary civilian occupation save for the intermittent periods when he is in attendance at a training institution.

(b) There is only one institution for military training in South West Africa, viz., the military camp at Windhoek. The sole function of this camp is to cater for the training of the members of the Regiment Windhoek during the periods set out in sub-paragraph *(c)* (ii) below. The camp has ablution and cooking facilities only. Sleeping accommodation is provided during every training course by the pitching of tents. Except when a training course is taking place, the training camp is totally inactive, i.e., for the major part of every year.

(c) In regard to training received by members of the Regiment, the following was stated in the Counter-Memorial:

> "The Citizen Force recruits of the Regiment are ordinary civilians of South West Africa, whose only peacetime military obligation is to attend two training courses, of fourteen days each, during a period of three years, at the training camp at Windhoek [6]."

This statement requires amplification and correction as follows:

[1] *Vide* Chap. II, paras. 16 and 18, *supra*.

[2] IV, pp. 51-52, and Chap. II, paras. 12-14, *supra*.

[3] IV, p. 559.

[4] *Ibid.*, pp. 54-57.

[5] *Ibid.*, p. 569.

[6] *Ibid.*, p. 57.

(i) The two periods of 14 days each have been extended to three weeks each [1].

(ii) The said two periods constitute the only training which members of the Regiment receive in South West Africa itself, and also the only training in which they are combined as units of the Regiment. In these respects the purport of the above statement in the Counter-Memorial was perfectly correct.

(iii) The total training which the individuals enlisted in the Regiment are obliged to undergo, is not, however, confined to the above [2]. The said two short periods of training are spread over the last three years of the trainee's membership in the Regiment. In his first year he receives, in the Republic of South Africa, initial recruit training extending over a period of nine months. While receiving this training, such recruits are dispersed at various training institutions in the Republic: in other words, they are mingled with recruits from all over the Republic receiving the same basic training, and they consequently do not then operate as a unit of the Regiment Windhoek.

(d) Except for attending the aforementioned courses, a member of the Regiment Windhoek has no peace-time military obligations, save that he may be called up at any time [3] if needed for purposes of restoring or maintaining law and order. There has, however, been no such call up since the establishment of the Regiment in 1946 under the then designation of the South West African Infantry [4].

(e) The Commanding Officer of the Regiment Windhoek, at present Commandant A. S. Engels, is also a member of the Citizen Force (i.e., not a professional soldier in the Permanent Force) and is predominantly occupied with his normal civil occupation. Administrative work in connection with the Regiment Windhoek is attended to by the said Officer at the administrative headquarters of the Regiment at Windhoek after his normal working hours in civil occupation. He receives his instructions, both in regard to administration and in regard to training of the Regiment, from command headquarters at Windhoek. The said headquarters, known as the South West Africa Command, consists of a Permanent Force staff of three officers and seven other ranks permanently stationed at Windhoek. Its functions further include command

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[1] Departmental information.

[2] The contrary indication conveyed by the above-quoted statement in the Counter-Memorial, was due to a misunderstanding, which is sincerely regretted, between Respondent's legal representatives and its Department of Defence. The Defence authorities supplied information which was intended to relate only to activities of the Regiment as such, in South West Africa itself, being under the impression that that was all that was required, whereas the legal representatives understood the information as relating to the total obligation of the individuals concerned. The misunderstanding was first realized in the course of preparation of this Rejoinder.

[3] I.e., during the four years of his membership of the Regiment at the termination of which he is placed on the reservist list.

[4] *Vide* IV, p. 56.

over the administration and training of the Commandos and the School Cadet Organization [1].

In the light of the foregoing, the conclusions sought to be implied by Applicants from their reading of the Counter-Memorial [2] are invalid. There are no "field operations" or "other headquarters" of the Regiment "at a place other than Windhoek", as suggested. The Regiment is not "stationed" at a place other than Windhoek. No part of the Regiment is at any time "permanently stationed" anywhere. The Regiment is either assembled at the training camp at Windhoek for the limited periods of training stated in sub-paragraph *(c)* (ii) above, or totally inactive [3].

9. In reply to Applicants' concluding reminder that "Respondent is applying its own narrow and inappropriate definition of 'military base' to the Regiment in order to conclude that there is no violation of Article 4", as opposed to what Applicants term "the broad thrust of the language of Article 4" [4], Respondent says that there is no question of any "narrow definition" on its part, and refers to what has been stated in Chapter II above regarding the meaning and purpose of the Article.

10. Respondent submits that in the premises aforestated Applicants' contention that the—

> "... Regiment Windhoek, in its present form and strength, in organization and in operation, involves the maintenance of a 'military base', within the meaning of Article 4 of the Mandate ... [5]",

has no foundation whatsoever.

B. The Military Landing Ground in the Walvis Bay Area

11. Also with regard to this facility Applicants now shift from the stand taken in the Memorials.

The charge made in the Memorials was that the landing ground in question was one of three "military bases" maintained by Respondent "*within the Territory*" [6].

It appears that Applicants were in this respect misled by a report of the Committee on South West Africa [7]. Respondent explained in the Counter-Memorial that the facility in question is not situated in the Territory which was mandated to Respondent [8].

Although this explanation is accepted by Applicants [9], they now take the position that there is a violation of Article 4 despite the fact that the facility in question is *not* "within the Territory".

12. Upon analysis, the only reasons advanced by Applicants for the contention aforestated are the following:

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[1] *Vide* para. 23, *infra*.

[2] IV, p. 569.

[3] *Vide* sub-para. *(c)* (i), *supra*, regarding the basic training of individual members of the Regiment in South Africa.

[4] IV, p. 559.

[5] *Ibid.*, pp. 559-560.

[6] I, p. 181. The only reason then advanced by Applicants for their contention that the said facility was a military base was that it "is apparently not intended for police or internal security use". I, p. 183.

[7] I, p. 182.

[8] IV, pp. 58-59.

[9] *Ibid.*, p. 560.

(a) "The addition of substantially greater military and naval elements to Walvis Bay is, in relative terms, the 'establishment' of a base since the Mandate was conferred and/or since the dissolution of the League of Nations [1]", and

(b) "Furthermore, Walvis Bay must, in a military sense, be considered to be 'in' South West Africa, inasmuch as it is completely surrounded by territory subject to the Mandate and necessarily depends thereon for essential services, transport, communications and supplies, including water [2]."

In the first place, assuming for purposes of argument that Applicants' geographic and factual description of Walvis Bay as "completely surrounded by territory subject to the Mandate and necessarily dependent thereon", is correct—a matter with which Respondent will deal later [3]—what legal justification is there for considering it, "in a military sense", to be "in" South West Africa? Applicants do not refer to, nor is Respondent aware of, any legal principle which under such circumstances would, "in a military sense" or in any other sense, constitute one territory part of another.

13. Secondly, Applicants err in the facts stated as the basis for their proposition. The Port and Settlement of Walvis Bay is not "completely surrounded" by the Territory of South West Africa, *nor* does it "necessarily depend thereon for essential services, transport, communications and supplies, including water". Walvis Bay is approachable from the sea without entering or crossing any part of the Territory of South West Africa. Although use is in fact made of certain services provided from the Territory, such as road and rail transport, telephone and postal communications [4], Walvis Bay is not "necessarily" dependent thereon. Nor is Walvis Bay dependent on the Territory of South West Africa for its water supply. In fact it does not obtain its water supply from the Territory.

14. Applicants seek to bolster up this contention to which they are now driven, with the statement that—

> "[t]he central purpose of the military clause and the intent of the framers of the Mandate, moreover, was the complete neutralization of the Territory and the protection of the inhabitants from attack provoked, *inter alia*, by the presence of military or naval bases [1]".

In the respect under consideration, the purpose of the military clause and the intent of the framers of the Mandate appeared clearly from the clause itself, the relevant sentence of which read: "Furthermore, no military or naval bases shall be established or fortifications erected *in the territory*." (Italics added.)

There were no indications, either in the mandate instruments or elsewhere, that the framers of the mandates intended to prohibit, or place any restriction on, the establishment by a Mandatory of military bases or other military installations in its own Territory.

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[1] **IV**, p. 560

[2] *Ibid.* An additional argument advanced in support of this reason is dealt with in para. 14, *infra*.

[3] Para. 13, *infra*.

[4] This flows from the fact that Walvis Bay is administered as if it were part of the Territory. *Vide* **IV**, pp. 58-59.

15. Inasmuch as there is in Respondent's submission no substance in Applicants' contention that Walvis Bay must "in a military sense, be considered to be 'in' South West Africa", no purpose will, it is submitted, be served in dealing with Applicants' citation from a statement made by the South African Minister of Defence in 1961 regarding military activities in Walvis Bay [1], nor with the citation from a report of the Committee on South West Africa on the same subject [2].

16. As to Applicants' conclusion that—

> "[w]ithout the safeguard of adequate administrative supervision, the presence of a large military and naval base such as Walvis Bay entirely within the Mandated Territory . . . is in violation of Article 4 of the Mandate . . . [2]",

Respondent cannot appreciate the relevance of administrative supervision, or the lack thereof, in respect of a region not forming part of the mandated territory and never intended to be subject to supervision.

C. The Alleged "Military Camp" or "Military Air Base" in the Kaokoveld

17. Originally Applicants alleged the existence of a " 'military camp' and/or 'military air base' " in the Kaokoveld [3]. Respondent in the Counter-Memorial demonstrated that the "camp" had existed for a week only to house a small visiting party [4]. Applicants are apparently not persisting with this aspect of the charge, and are concentrating on the "air base" aspect. This relates to an unmanned, unfortified landing strip at Ohopoho, in the Kaokoveld, as described in the Counter-Memorial [5].

In the Memorials Applicants' contention was that the facility complained of was a prohibited installation because it was "apparently not maintained for police or internal security purposes" [6].

Respondent having in the Counter-Memorial exposed the fallacies in Applicants' Statement of Law relative to Article 4 of the Mandate [7], and having explained that this particular airstrip, like certain others in the Territory, is used mainly by the South West Africa Administration for administrative purposes, but also intermittently by aircraft of the South African Air Force for purposes concerned with rescue operations and with internal security and local defence, Applicants in the Reply adopt an entirely different line of reasoning. Their case as now presented is in effect that if the airstrips in question are maintained for use by military aircraft and are available for such use, this in itself constitutes a contravention of Article 4 of the Mandate—even if such use may be "intermittent and occasional", and without regard to the purpose of such user, namely whether for internal police and local defence or for other purposes. That the above is now in effect Applicants' case appears clearly from their new line of reasoning. Thus Applicants say:

> "Even if Respondent's narrow definition of 'military base' is employed, it is clear that airfields which are maintained for use by

[1] **IV**, pp. 560-561.
[2] *Ibid.*, p. 561.
[3] **I**, p. 183 read with p. 182.
[4] **IV**, p. 59 (para. 13).
[5] *Ibid.*, pp. 58-59.
[6] **I**, p. 183.
[7] *Vide* Chap. II, para. 2, *supra*.

military aircraft and available for such use at any time, are places which may be 'utilized ... for the purposes of operations or a campaign'[1]."

It follows from Applicants' contention that no airstrips in the Territory may be maintained for use by, or made available for the use of, military aircraft, no matter what the purpose of such user may be.

Taken to its logical conclusion such a contention would mean that no military training of Air Force personnel in the Territory could take place, not even for the purposes of internal security or local defence—a proposition which, in the light of the provisions of Article 4 of the Mandate, is destroyed by its very absurdity.

18. In so far as Applicants make use of Respondent's definition of the term "military base" in seeking to establish the above proposition, they do not render Respondent's definition properly and fully.

In construing the said term Respondent stated that—

"... failing the *purpose of utilization for operations ... actual or prospective, by a force or an army*, a place *cannot* be said to be maintained as a military or naval base [2]".

Applicants in applying this test in the Reply, however, ignore the point specifically made by Respondent, namely that the intended purpose should be to utilize such facility—

"(i) as a starting point for the operations or campaign, or
(ii) as a source of supplies required for the operations or campaign, or both [2]".

To ignore this aspect leads to the absurdity that many places which are notionally quite unrelated to the concept "military base"—e.g., roads, railways, etc.—but which can in some sense be "utilized for the purposes of operations or a campaign", are to be regarded as military bases.

Applicants also conveniently ignore the further point, specifically made by Respondent, that—

"... whereas in terms of Article 4 military training is permissible, and would indeed fall within Respondent's duties, it is inconceivable that the prohibition against military bases was intended to extend to ordinary military training facilities [2]".

To say then, as Applicants do, that in terms of Respondent's own definition the airstrips in question are forbidden installations because they are places which may be "utilized ... for the purposes [of operations] or a campaign" [3], is a misstatement of Respondent's definition of the military clause. The unmanned strips in question, without facilities for maintenance, service or supplies, do not serve as *starting points* for, or *sources of supplies* required for, operations or a campaign, and cannot therefore, in terms of Respondent's definition, be regarded as prohibited installations.

Moreover, in applying Respondent's definition to the facts, Applicants strain the meaning of the word "operation" when they say that the

[1] **IV**, p. 561.

[2] *Ibid.*, p. 50.

[3] This proposition is repeated at **IV**, p. 562 in the following terms:

"... there has been a clear violation of Article 4 of the Mandate (even under Respondent's narrow formulation) since such strips are admittedly utilized in the present for operational purposes and may at any time be used for the purposes of a campaign."

present use of the airstrips in question by military aircraft for limited purposes, including, *inter alia*, the training of Air Force personnel with regard to internal security and the local defence of the Territory, amounts to the use thereof (by a force or an army) for purposes of "operations".

19. In a footnote to this part of their argument Applicants cite the following passage from the Counter-Memorial:

> "It is imperative that South African Air Force pilots should from time to time be made acquainted with the landing strips within the Territory so as to be able to perform the responsibilities which rest upon Respondent in respect of defence, internal security and rescue operations in the Territory [1]."

Applicants' response thereto is as follows:

> "Applicants do not quarrel with 'internal security and rescue operations in the Territory', but maintain that Respondent's misconception of its duties with respect to defence of the Territory has led into a direct violation of Article 4 of the Mandate [1]".

Ignoring for the present Applicants' further contention relative to supervision of Respondent's administration of the Territory, which will be dealt with hereinafter [2], Respondent reads this passage as meaning that the use of the airstrips in question for certain limited military purposes—internal security and rescue operations—would not *per se* constitute a violation of Article 4 of the Mandate, but that their use for defence of the Territory constitutes such a violation. Respondent has already dealt with Applicants' contention that Respondent is not entitled nor in duty bound to act in defence of the Territory [3], and reiterates that it has such a right and duty.

Upon a finding that Respondent has such a right and duty, the distinction drawn by Applicants between use of the airstrips in question for, on the one hand, internal security and rescue operations, and, on the other hand, defence purposes, would fall away, and in consequence render Applicants' whole argument baseless.

The isolated airstrips in question provide landing points for aircraft, but do not and cannot *per se* constitute bases from which a force operates or draws its supplies.

In any event, Respondent fails to see how any misconception of duty on its part could make a "base" out of something which inherently and notionally could not possibly be a "base"—as that term is normally and naturally understood in the military context. Even tested by Applicants' own "broad" criteria it is impossible to suggest that such airstrips are military bases. The *type of facility* is not peculiar to military activity, nor is its *location*; it boasts no *armament* and no *equipment*; it is unmanned; it has no *organization*; and no *place in* (Respondent's) *administrative hierarchy and chain of command*. It is not surprising that there is a striking absence of even an attempt on Applicants' part to justify their submission on their own "broad" test [4].

20. With regard to the use of the airstrips in question, Applicants

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[1] **IV**, p. 562, footnote 1.
[2] Para. 20, *infra*.
[3] *Vide* Chap. II, paras. 10-14, *supra*.
[4] **IV**, p. 567.

propound a further argument relative to administrative supervision, which leads them to contend that—

> "[s]o long as Respondent fails to recognize the administrative supervisory authority of the United Nations, while at the same time maintaining airstrips, such maintenance must be considered incompatible with Respondent's duties under Article 4 if the purpose and use of such airstrips in is [sic] any degree directed toward military ends (as Respondent concedes) [1]".

This contention not only rests on a misconception dealt with elsewhere in Respondent's pleadings [2]—namely that the United Nations has "administrative supervisory authority" in respect of South West Africa—but is also otherwise basically unsound. To say that the determination whether a particular facility does or does not constitute a military base, depends upon the existence of administrative supervision, is to introduce into the military clause a qualification which it does not bear either in express terms or by implication. In fact, it is significant that in their Statement of Law—both in the Memorials and in the Reply—Applicants make no mention of such a qualification. It is simply introduced at this stage of their argument as a reason why Applicants contend that there is a violation of Article 4 of the Mandate, apparently because they can find no legal basis for their contention. If Respondent should be under a duty to submit to administrative supervision on the part of somebody, and refuses to do so, such refusal would constitute a violation *of that duty*, but it could hardly be relevant to the different question whether a particular installation does, or does not, constitute a military base as contemplated in Article 4 of the Mandate. The question is not, as Applicants appear to suggest [1], whether "objection" to any military use of airstrips would be "unreasonable" in the absence of administrative supervision, but whether such use constitutes a violation of a particular provision, viz., Article 4 of the Mandate.

In Respondent's submission this charge also is baseless.

D. Military Activity in General

21. Applicants originally complained that Respondent maintained "three 'military bases' within the Territory" [3]. In the Reply they are not content to abide by this charge. They bring an additional complaint that a situation has been created—

> ". . . where there is the equivalent of a series of military bases or potential military bases in the Territory, or, at worst, where the Territory itself and its 'White' inhabitants have become armed and coordinated to the extent that the Territory has been transformed into a 'military base' within the meaning and intent of the Covenant and the Mandate [4]".

Respondent respectfully submits that it is not obliged to deal with what is in effect an entirely new charge. However, as very little need be said to demonstrate that the charge is preposterous, Respondent will proceed to do so.

[1] **IV**, p. 562.
[2] **II**, pp. 113-164 and Part II, Chap. III, supra.
[3] **I**, p. 181.
[4] **IV**, p. 564.

22. As regards the legal position, Applicants have not advanced any argument to show that Article 4 of the Mandate can be construed to include a prohibition against military activities of the nature now introduced into their complaint. Article 4 does not prohibit military activity not related to military or naval bases or fortifications, or to the military training of Natives. Neither does Article 4 prohibit any facility which, although not a "military base", can by some or other process of reasoning, or in some sense or another, be regarded as "equivalent" to a military base or to a "potential" military base.

With regard to Applicants' submission that the whole Territory "has been transformed into a 'military base' ", the notion of a large, thinly populated country constituting in its entirety a "military base", is obviously incompatible with the concept "military base".

23. As a basis for their charge Applicants rely on the following alleged facts and factors, taken together:

(a) "... Respondent's admitted practice of maintaining an indeterminate number of landing strips which may be, and are, used by military aircraft of the South African Air Force ...[1]",

(b) "... the increasing build-up of military strength in Walvis Bay ...[1]",

(c) "... the apparently ever-increasing amount of military activity by cadet corps and 'Commando units' in the schools, communities and countryside of the Territory ...[1]",

(d) "... [the] *Regiment Windhoek* ...[1]".

Respondent has dealt with the matters detailed under *(a)*, *(b)* and *(d)* above and has, in its submission, clearly demonstrated that the airstrips in question, the military facility at Walvis Bay (which is not situated in South West Africa) and the facilities of the Regiment Windhoek, can by no stretch of imagination be considered, singly or collectively, as "military bases" in the Territory in terms of the Covenant and Article 4 of the Mandate. There remain the factual allegations quoted in *(c)* above, with regard to which Respondent states as follows:

The cadet detachments established at certain schools for European children in the Territory receive elementary training in drilling and target practice with small calibre rifles. Each cadet spends approximately 45 minutes per week in such activities. One rifle is issued to a school for every 30 cadets.

With regard to the Commando units, membership is voluntary. Members are civilians, who can be called upon when necessary to guard vulnerable points and to assist the civil authorities to maintain law and order: in other words, the purposes are again strictly confined to internal police and local defence. Each member is issued with a rifle, and each unit is issued with three light machine guns and three sub-machine carbines for target practice purposes.

By no process of reasoning can the above organizations be regarded as "military bases" in terms of Article 4.

24. With regard to Applicants' reference to "three recent resolutions of the General Assembly"[1] which impute bad faith and violations of the

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[1] IV, p. 563.

military clause to Respondent, Respondent points out that such resolutions were seriously at fault in this respect.

Two of the resolutions referred to by Applicants [1] preceded the visit to the Territory by M. Carpio and Dr. Martinez de Alva, respectively Chairman and Vice-Chairman of the Special Committee for South West Africa, during 1962. The events which followed upon the said visit have been dealt with elsewhere [2], and it is sufficient for present purposes to note that the findings of M. Carpio and Dr. de Alva completely refuted the allegations of expansion of military forces and activity in the Territory, as incorporated in the said two resolutions. Nevertheless the third of the resolutions [3], adopted shortly after the said visit, once more implied charges which in the light of the true facts, as set out in the Counter-Memorial and herein, were wholly unfounded.

25. In the premises it is hardly necessary for Respondent to say that it denies Applicants' charge that—

> "... there is the equivalent of a series of military bases or potential military bases in the Territory, or ... [that] the Territory has been transformed into a 'military base' within the meaning and intent of the Covenant and the Mandate [4]".

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[1] *G.A. Resolutions* 1702 (XVI) and 1703 (XVI), 19 Dec. 1961 in *G.A., O.R., Sixteenth Sess., Suppl.* No. 17 (A/5100), pp. 39-41, referred to in **IV**, p. 563.

[2] *Vide* **IV**, pp. 60-61 and Part I of the Rejoinder.

[3] *G.A. Resolution* 1805 (XVII), 14 Dec. 1962 in *G.A., O.R., Seventeenth Sess., Suppl.* No. 17 (A/5217), pp. 38-39.

[4] **IV**, p. 564.

CHAPTER IV

RESPONDENT'S ANSWER TO ANNEX 9 OF THE REPLY—SUPPLEMENTARY MATERIAL WITH RESPECT TO ALLEGED VIOLATIONS OF ARTICLE 4 OF THE MANDATE

A. General

1. The supplementary material contained in Annex 9 to the Reply is divided into eight numbered paragraphs, which are concerned in part with Respondent's Statement of the Law relative to Article 4 of the Mandate [1], and in part with the facts as dealt with by Respondent [2].

Much of the material in the said Annex has, in some respects to a larger and in others to a lesser extent, been dealt with in the preceding chapters [3], and it will not be necessary to repeat what has been stated there. In its treatment of the Annex in this chapter Respondent will therefore in many instances merely refer to what has already been stated in the preceding chapters.

2. The subject-matter of the Annex is hereinafter dealt with by reference to the paragraph numbers assigned thereto by Applicants.

B. Paragraph (1) of the Annex [4]

3. In this paragraph Applicants deny Respondent's contention that a "Mandatory was ... entitled to train the inhabitants of a mandated territory (including the Natives) for the defence of *that Mandated Territory*" [5], and take the stand that—

> "... *the restriction on military and naval bases and fortifications would logically place a clear limitation on the presence of troops other than native* [4]". (Italics added.)

Respondent has already dealt fully with this issue [6], and will here merely concern itself with the further arguments advanced by Applicants relative to the discussion in the Council of Ten concerning the military clause [7].

4. In the first place, Applicants say that the discussion "related only to *(a)* the military training of the *natives* for police and defence; and *(b)* raising *native* armies in the event of a general war", and they aver that the interchange between Messrs. Clemenceau, Lloyd George and Wilson "was concerned with the raising and training of *native* troops; the presence, raising, or training of troops other than native was neither anticipated, suggested, nor discussed" [4].

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[1] IV, pp. 47-53.
[2] *Ibid.*, pp. 54-62.
[3] *Vide* explanation in Chap. I, para. 4, *supra*.
[4] IV, p. 565.
[5] *Ibid.*, p. 50.
[6] Chap. II, paras. 15-21, *supra*.
[7] *Vide* IV, pp. 48-50 for statements made in the course of the discussion.

Save in one respect this statement of fact appears to be correct. The respect in which it is incorrect, is the allegation that "the presence, raising, or training of troops other than native was [not] anticipated". Admittedly that question was neither raised nor discussed, but there is nothing on record to show that it was not "anticipated".

The position which Respondent takes with regard to the discussions in question is that the Council of Ten showed concern only about the training of Natives, and not also of non-Natives, hence their resolution to prohibit the training of Natives alone, and even then to a qualified extent only. If there had been an intention to prohibit the training of non-Natives, or, as Applicants suggest, even the presence of non-Native troops in the mandated territories, the military clauses with regard to B and C Mandated territories would surely have been differently worded.

5. Applicant's second point is that the discussion in the Council of Ten "was, at best . . . opaque" and they cite the following extract from Baker, *Woodrow Wilson and World Settlement*: "It was not surprising that, as a result of this colloquy, the secretariat should have been puzzled as to what was really meant "[1]. It is true that Baker refers to ambiguity and uncertainty arising from the discussions in the Council of Ten. Such confusion as there was, however, centred entirely around the demands of the French delegation which "wanted definite assurances of their right to raise and train Negro troops *to use in Europe or elsewhere* if necessary" [2]. There was no confusion at all about the right of a Mandatory to train the inhabitants of a mandated territory (including the Natives) for the defence of *that mandated territory.*

C. Paragraph (2) of the Annex [1]

6. Applicants cite without comment passages from the works of Quincy Wright [3] and Duncan Hall [4]: Respondent cannot understand what exactly Applicants wish to establish by these citations. The passages in question certainly do not support Applicants' contention immediately preceding the quotations [5], viz., that "the restriction on military and naval bases and fortifications would logically place a clear limitation on the presence of troops other than native". Nor do they support the contention advanced elsewhere [6], viz., that Respondent has no right to defend the Territory in the event of it being attacked. Neither of these contentions was, incidentally, as far as Respondent is aware, ever advanced by any commentator, State or person, up to the time of the filing of the Reply by Applicants.

Respondent can therefore only pass the following general comment regarding the said quotations. Both the Covenant and the mandate instruments differed materially in respect of the military clauses as between A Mandates, on the one hand, and B and C Mandates, on the other [7]. How the quotations here under discussion, both of which concern

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[1] IV, p. 565.

[2] Baker, R. S., *Woodrow Wilson and World Settlement* (1923), Vol. I, p. 429. Italics added.

[3] Wright, Q., *Mandates under the League of Nations* (1930).

[4] Hall, H. D., *Mandates, Dependencies and Trusteeship* (1948).

[5] IV, p. 565 (para. 1).

[6] *Ibid.*, p. 554.

[7] *Vide* Art. 22 (4) of the Covenant of the League of Nations; Art. 2 of the Mandate for Syria and the Lebanon—and Art. 17 of the Mandate for Palestine.

A Mandates, can be relevant to Applicants' contentions, is not apparent. The only valid inference which can be drawn from the military provisions in the A Mandate instruments, is that Applicants are quite wrong in denying that Mandatories had the right and duty to defend the territories entrusted to their care. Applicants' statement that a right and duty of a Mandatory to defend a mandated territory is—

> "... wholly out of keeping with the nature and substance of the Mandate institution, and ignores the basic relationship between the Mandatory and the League of Nations [1]",

is directly controverted by the express provisions on that subject in the A Mandates. So, e.g., the Mandate for Syria and the Lebanon provided, *inter alia*, that: "The Mandatory may maintain its troops in the said territory for its defence [2]."

7. Applicants in the paragraph under consideration also say that—

> "... if there were, *arguendo*, a duty and right to defend the Territory ... [s]uch 'duty and right' ... had, then, to be performed, and exercised, *without* establishing military or naval bases and *without* erecting fortifications; the language of the military clauses is too clear to permit of any other construction [3]".

This statement Respondent admits to be correct as far as it goes; but by the same logic it seems evident that certain activities directed towards the defence of the Territory—e.g., training of inhabitants for that purpose, and provision of means of communication and reconnaissance—must have been contemplated as legitimate and even desirable. Consequently the authors of the clause could not have considered or intended that the prohibition against the establishment of bases and fortifications would extend to such activities *per se*.

D. Paragraph (3) of the Annex [3]

8. Applicants in their reasoning in this paragraph proceed from the basic premise that there is of necessity an "incompatibility of the two propositions contained in the 'B' and 'C' Mandates" [4], which have to be reconciled by construction if possible. Applicants, however, adduce nothing in support of the suggested incompatibility. They do not refer to any discussion of such alleged incompatibility during the Peace Conference, nor to a single reference thereto during the League of Nations period, nor to appreciation thereof on the part of even a single commentator on the mandate system. In Respondent's submission there is no such incompatibility. The plain and ordinary meaning of the term "military base" in no way includes a facility the sole purpose of which is directed towards military training. There was consequently no reason why the authors of the mandates should have regarded such a facility as being even *prima facie* incompatible with a prohibition against bases. And this is the straightforward explanation why they did not insert into the prohibition any words of qualification with reference to contemplated military train-

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[1] IV, p. 554.
[2] Art. 2 of the Mandate for Syria and the Lebanon.
[3] IV, p. 566.
[4] *Ibid.* The two propositions being: (i) bases and fortifications are forbidden and (ii) military training of the Natives for certain specific purposes is permitted.

ing of inhabitants. There is no need for an artificial construction that a facility for the training of Natives for police and local defence is not to be "considered" a base [1]: the authors of the mandates quite clearly in fact did not regard any training facility as being *per se* a base.

Moreover, the practice of Mandatories during the League period, without any objections from the Permanent Mandates Commission [2], affords confirmation that the premise of "incompatibility", on which Applicants base their reasoning, is incorrect.

Military training of Natives was prohibited except for limited purposes, and the training of persons other than Natives was not prohibited and therefore permitted. This situation is in no way affected by the prohibition against "military or naval bases" [3].

9. With regard to Applicants' submission that—

> "[t]he very concept of 'military' or 'naval' bases suggests, in context, the familiar patterns of European troops and ships, based in the Mandated Territory for training, development, or operations [4]",

Respondent says:

(a) that no legal basis is advanced for this submission;

(b) that it is not clear what the expression "familiar patterns of European troops and ships" means [5];

(c) that institutions for "training" and for "operations" need not be combined, and frequently have a separate existence, with the result that whereas the latter could be bases, the former need not be; and

(d) that, in any event, Applicants' proposition would in effect mean that a particular facility manned by Natives would immediately become a prohibited installation if non-Natives were included in the personnel—a situation which surely could not have been intended.

10. Applicants' further argument that their—

> ". . . interpretation is reinforced by the juxtaposition, in the 'B' mandates, of the language permitting certain '*native military forces*' with the language prohibiting bases [6]",

does not in any way lend support to their contention that the training of non-Native inhabitants was not permitted. In view of the general prohibition against the training of Natives, every exception thereto required to be expressly stated; but as there was no such prohibition as regards non-Natives, there was no need or occasion for stating any exceptions in their case.

11. Applicants finally argue that the word "establish" in Article 4—

> ". . . suggests, in the context of the times, *(a)* an outside agency or a force entering the Mandated Territory from outside and becoming established; and *(b)* a condition permanent in nature and related, in scope, to objectives other than the objectives permissible for the

[1] *Vide* Applicants' construction No. (iii) at **IV**, p. 566.

[2] *Vide* Chap. II, paras. 12-14, *supra*.

[3] *Vide* Chap. II, paras. 13-15, *supra*.

[4] **IV**, p. 566

[5] Applicants can hardly suggest that the training of *non-Native inhabitants* of any territory relevant to the enquiry was in accordance with a "familiar pattern"; and if this is not Applicants' meaning, their suggestion is irrelevant as to the point in issue, viz., whether the training of non-Native inhabitants of the Territory involves the maintenance of a "military base".

[6] **IV**, pp. 566-567

military training of the natives under the 'C' Mandates or the maintenance of native military forces under the 'B' Mandates [1]".

Respondent submits that, on analysis of this proposition, Applicants would define a military base as—

(i) a facility of an extraneous force or agency, which
(ii) has entered the territory from outside, and which
(iii) has become permanently established therein, and which
(iv) is concerned with objectives other than the permissible objectives of military training of the Natives.

No legal grounds are adduced by Applicants for this proposition, and Respondent submits that it is without foundation or substance. Respondent does not understand what Applicants mean by the word "agency", but reiterates that there can be no question of a "military base" unless a *military force* or an *army* utilizes a place for the projection or support of its operations, actual or prospective, or unless the said place is intended for such utilization [2]. With regard to the "permissible objectives" mentioned by Applicants, Respondent reiterates that such objectives would include not only the training of Natives, but also the training of non-Natives.

E. Paragraph (4) of the Annex [1]

12. In this paragraph Applicants say—

"Respondent's contention that '. . . the sole criterion applied to each facility (by Applicants) appears to be the fact . . . that its purpose is not police protection or internal security' is wholly incorrect [1]." (Footnote ommitted.)

This comment by Respondent on the position taken by Applicants in the Memorials is, however, valid and cannot be assailed. In this regard Respondent refers to its analysis in Chapter III above of the reasons advanced by Applicants in the Memorials for concluding that each of the three facilities mentioned by them was a military base [3]. It is clear from what is there stated that there was no "confusion on the part of Respondent" [1], as Applicants now suggest, when it passed what was, and still remains, a valid comment on the stand taken by Applicants in the Memorials. Respondent has already demonstrated [4], and reaffirms, that Applicants in their Reply now adopt an entirely new approach.

Applicants also say that—

". . . Respondent cannot deny that a generally reasonable criterion for determining whether installations are military bases is, in fact, whether they are intended solely for 'police protection or internal security' [1]".

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[1] IV, p. 567.

[2] *Vide* Chap. III, para. 18, *supra*.

[3] *Vide* Chap. III, para. 1, *supra*, regarding the Regiment Windhoek. *Vide* Chap. III, para. 11, *supra* [footnote 1], regarding the military landing ground in the Walvis Bay [Swakopmund] area. *Vide* Chap. III, para. 17, *supra*, regarding the military camp or air base in the Kaokoveld.

[4] *Vide* Chap. I, para. 2; Chap. II, paras. 1-3; Chap. III, paras. 1-3, 11 and 17, *supra*.

Respondent can, however, deny this. Although the so-called "criterion" could possibly by itself lead to the negative conclusion that a particular facility is not a military base, it is hard to see how it could ever by itself lead to an opposite, positive conclusion. In any event, however, Applicants now in fact entirely ignore this criterion in the position taken in their Reply, where they merely "reiterate and repeat the far broader criteria of [the] last sentence in their 'Statement of Law' " [1].

F. Paragraph (5) of the Annex [2]

13. Respondent has already dealt with the definitions quoted by Applicants in this paragraph [3], and respectfully refers the Court to what was there stated. With regard to the statement by Paul H. Clyde, quoted by Applicants from the book *Japan's Pacific Mandate*, Respondent says that it is of no assistance at all in the present enquiry, namely as to the meaning of the term "military base". It merely illustrates the difficulties which may in particular cases be encountered in deciding whether a particular facility is or is not a "military base".

G. Paragraph (6) of the Annex [4]

14. The extracts cited by Applicants from *The Windhoek Advertiser* take their argument no further. With regard to the first extract [5], Respondent has already confirmed that the Regiment Windhoek is a part of the South African Armoured Corps of the Citizen Force, which forms an integral part of the South African Defence Forces [6]. The term "South West Africa Command" is generally used to designate the Command Headquarters referred to above [7], comprising the permanent administrative personnel stationed at Windhoek which consists of three officers and seven other ranks [8]. Its functions, as has been seen [9], are to exercise command over the administrative work and the training operations in connection with the Regiment Windhoek, the school Cadet Corps, and the Commando units. The Regiment Windhoek is not, as Applicants suggest, "referred to as the 'South West Africa Command' " [5]. The further confusion professed by Applicants regarding the Regiment Windhoek [10] has already been clarified [11].

15. The second extract quoted by Applicants from *The Windhoek Advertiser* referred to a proposal to form a Commando unit at Oranjemund. The membership, armament and functions of Commando units have already been explained [12]. The proposed Commando unit at Oranjemund in fact never came into being.

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[1] **IV**, p. 567, and *vide* also Chap. II, paras. 3 and 4, *supra*.
[2] *Ibid.*, pp. 567-568.
[3] Chap. II, para. 20, *supra*.
[4] **IV**, pp. 568-569.
[5] *Ibid.*, p. 568.
[6] *Ibid.*, p. 56.
[7] *Vide ibid.*, p. 56 and Chap. III, para. 8, *supra*.
[8] *Vide* Chap. III, para. 8 *(e)*, *supra*.
[9] *Vide* Chap. III, paras. 8 *(e)* and 23, *supra*.
[10] **IV**, p. 569.
[11] Chap. III, para. 8, *supra*.
[12] Chap. III, para. 23, *supra*.

H. Paragraph (7) of the Annex [1]

16. With regard to the quotations in this paragraph of the Annex Respondent states as follows:

Sub-paragraph (a)

The "territorial sea area" mentioned in this quotation falls within the territorial waters of the Port and Settlement of Walvis Bay, and is therefore not part of the Territory of South West Africa [2]. This quotation accordingly warrants no further comment.

Sub-paragraph (b)

The area dealt with in this quotation, as appears from its text, is within the boundaries of the Port and Settlement of Walvis Bay and therefore outside the Territory of South West Africa [2]. Also with regard to this quotation Respondent refrains from comment, save to state that this is another example of untrustworthy information conveyed to the United Nations by petitioners. The quotation has been taken by Applicants from a petition to the United Nations by SWANU and SWAPO [3]. The last sentence of the quotation, viz., "[m]any more are in other Camps" is fictitious, and did not appear in the newspaper report of which it purports to be a part.

Sub-paragraph (c)

The Hercules aircraft, referred to in this sub-paragraph, was on a flight from Pretoria to Walvis Bay on 1 April 1963. The aircraft landed at Windhoek to allow two officers, who were on an inspection visit to the South West Africa Command [4] to disembark. There were no trainees on the aircraft, which carried a total of only 14 passengers, of whom four were civilians.

I. Paragraph (8) of the Annex [5]

17. Respondent has already dealt with the attitude adopted by Applicants relative to the Joint Statement of 26 May 1962, to which the Chairman (M. Carpio) and the Vice-Chairman (Dr. Martinez de Alva) of the Special Committee for South West Africa were parties [6]. The only point sought to be made by Applicants in this paragraph is that, according to a letter written by the Chairman of the said Committee, the Committee " [did] not consider or recognize such communique as anything official or of any binding effect whatever "—the reason advanced for such attitude being—

> ". . . that the alleged communique was not an official act of [the] Committee nor of the Chairman thereof, nor has anyone been authorized either by this Special Committee or the General Assembly to enter or join in such a communique [5]".

With regard to this argument Respondent states that the question

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[1] **IV**, p. 570.
[2] *Vide ibid.*, p. 57.
[3] *Vide ibid.*, p. 570, footnotes 1 and 2.
[4] *Vide* para. 14, *supra*.
[5] **IV**, pp. 370-371.
[6] *Vide* Part I of the Rejoinder and also Chap. III, para. 24, *supra*.

whether the said communique was recognized as "official" or "binding" on the United Nations organs or not, cannot affect the undoubtedly strong probative value of the conclusions subscribed to by M. Carpio and Dr. de Alva. Such conclusions represented a clear admission on their part that the resolutions concerning militarization in the Territory, which the General Assembly had passed prior to their visit, with the support of their countries, the Philippines and Mexico [1], were seriously at fault.

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[1] *G.A. Resolutions* 1702 (XVI) and 1703 (XVI), 19 Dec. 1961 in *G.A., O.R., Sixteenth Sess., Suppl.* No. 17 (A/5100), pp. 39-41; *G.A., O.R, Sixteenth Sess.*, 1083rd Plenary Meeting, 19 Dec. 1961, p. 1106; *G.A., O.R., Sixteenth Sess., Fourth Comm.*, 1247th Meeting, 13 Dec. 1961, p. 588 and 1248th Meeting, 13 Dec. 1961, p. 591.

CHAPTER V

CONCLUSION

1. In the light of what has been stated in the Counter-Memorial [1], and in the foregoing chapters of this Rejoinder, Respondent denies each and every one of Applicants' charges as originally advanced in the Memorials [2], and as amplified in the Reply [3], relative to the establishment or maintenance in South West Africa of alleged military bases.

2. In the premises Respondent denies that it has violated Article 4 of the Mandate and Article 22 of the Covenant of the League of Nations, in the respect aforestated or at all.

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[1] IV, pp. 47-66.
[2] I, pp. 181-183.
[3] IV, pp. 553-571.

PART V

Alleged Violations by Respondent of Article 2 (1) of the Mandate and Article 22 of the Covenant

CHAPTER I

INTRODUCTION

1. Applicants' charges, as formulated in Chapter VIII of the Memorials, concerned alleged violations by Respondent of the following duties imposed by Article 22 of the Covenant and Article 2 (1) of the Mandate:

(a) the duty to "refrain from unilateral annexation" [1], and

(b) the duty "to advance the political maturity of the Territory's inhabitants so that they may ultimately exercise self-determination" [1].

Applicants' charges were based on certain statements, set forth in section B 1 of Chapter VIII of the Memorials [2], and on certain acts of Respondent, recounted in section B 2 of the said chapter of the Memorials [3].

2. Respondent, before dealing with Applicants' charges in the Counter-Memorial, made the following specific statement:

> "Although Respondent contends that the Mandate has lapsed, a contention which, if upheld, will obviate an enquiry into the charges made by Applicants in Chapter VIII of their Memorials, Respondent nevertheless will in this and the following Chapters deal with Applicants' charges *on the assumption, for purposes of argument, that the Mandate is still in force* [4]." (Italics added.)

On the basis of the said assumption, Respondent first dealt with Applicants' Statement of Law relative to the international status of South West Africa and to the duty to advance the political maturity of the Territory's inhabitants [5].

Having stated its contentions regarding the legal position, Respondent devoted a chapter to the historical background relative to the status of South West Africa and to Respondent's attitude thereanent, both during the lifetime of the League of Nations and thereafter [6], and then dealt fully with the statements and acts relied upon by Applicants [7].

In the light of this treatment of the subject, Respondent denied all the charges of violation of Article 2 (1) of the Mandate and Article 22 of the Covenant [8].

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[1] **I**, p. 185; *vide* Analysis of Applicants' Statement of Law as set forth in **IV**, pp. 67-68.

[2] **I**, pp. 186-189.

[3] *Ibid.*, pp. 189-165.

[4] **IV**, p. 68.

[5] *Ibid.*, pp. 68-85.

[6] *Ibid.*, pp. 76-85.

[7] *Ibid.*, pp. 86-131.

[8] *Ibid.*, p. 132.

3. In the Reply Applicants do not deal specifically either with Respondent's Statement of the Law relative to its duties under Article 2 (1) of the Mandate and Article 22 of the Covenant, or with the facts set forth by Respondent relevant to the charges in question.

Instead of doing so, they merely propound further "Argument" [1] for persisting in their charges.

4. The aforestated "Argument" is introduced with the following paragraph:

> "The facts alleged by Applicants in Chapter VIII of the Memorials are not disputed by Respondent; only their legal significance has been placed in issue [2]."

Respondent is not in agreement with this statement. Fundamental to Applicants' charges in the Memorials were the following allegations of fact:

(a) that Respondent in fact has a plan to incorporate the Territory [3];

(b) that the acts, recounted in section B 2 of Chapter VIII of the Memorials were in fact perpetrated by Respondent in the effectuation of the aforementioned plan to incorporate [3]; and

(c) that there is an "awareness" on the part of Respondent "that its actions in this respect exceed the permissible bounds of the Mandate, if the Mandate is still effective" [4].

All the above allegations of fact were specifically denied by Respondent in the Counter-Memorial. Furthermore, the "facts alleged by Applicants" which, according to them, "are not disputed by Respondent", must, for a proper appreciation of their legal significance, be viewed in the light of the further relevant facts recounted by Respondent in the Counter-Memorial [5], which facts are not disputed by Applicants.

5. In their "Argument" in the Reply, Applicants find it convenient to "discuss [Respondent's] acts and the intent . . . within the context and framework of [three] legal conclusions" [2]. These so-called "legal conclusions", and Applicants' discussion under each, will be dealt with separately in the following chapters. Before, however, proceeding to do so, Respondent draws attention to the fact that also in this part of Applicants' case there appears to be a major shift from the position taken by them in the Memorials.

Whereas the case made in the Memorials appeared, on analysis, to be a charge of improper motive, purpose or intent on the part of Respondent, viz., a plan to incorporate the Territory unilaterally [6], Applicants have now introduced an alternative contention to the effect that—

> "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 [2]."

This aspect will be further illustrated and dealt with hereinafter [7].

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[1] *Vide* heading to Chap. VII B 2 at **IV**, p. 573.

[2] **IV**, p. 573.

[3] **I**, pp. 189, 193, 194 and 195.

[4] *Ibid.*, p. 187.

[5] **IV**, pp. 86-181.

[6] *Vide* **IV**, p. 84 for analysis of Applicants' case.

[7] *Vide* Chap. III, para. 1, *infra*.

CHAPTER II

RESPONDENT'S ALLEGED "PURPOSE OR MOTIVE TO INCORPORATE OR ANNEX THE TERRITORY"

1. The first "legal conclusion" advanced by Applicants as part of their "Argument" aforestated [1] is formulated as follows:

> "Insofar as Respondent's purpose or motive to incorporate or annex the Territory is relevant to a determination of Respondent's violation of its obligations as stated in Article 22 of the Covenant of the League of Nations and Article 2, paragraph 1, of the Mandate, as Respondent contends, *such purpose or motive clearly emerges from the record herein* [2]." (Italics added.)

Before dealing with Applicants' discussion relative to this conclusion, Respondent must indicate that the conclusion itself may create a wrong impression of Respondent's contention concerning the importance of "purpose or motive" in the present context. Respondent did *not* contend that "purpose or motive" is merely "relevant" to a determination whether there has been a violation of its duties in question. Respondent's contention, stated in unequivocal terms in the Counter-Memorial, was that "purpose and motive"—

> "... would be the very criterion, and the only criterion, for determining whether a particular action is in violation of Respondent's obligations under the Mandate ... [3]",

in the respects under consideration.

2. In their discussion of the conclusion that "Respondent's purpose or motive to incorporate or annex the Territory ... clearly appears from the record herein", Applicants say: "in decisive respects, indeed, such a purpose is conceded in Respondent's own avowals" [4].

The avowals which Applicants regard as conceding a purpose to incorporate or annex the Territory are said to be embodied in the following extracts from the Counter-Memorial:

> *(a)* "... the Mandate for South West Africa gave effect to a compromise arrangement which involved, *inter alia,* that C Mandates were, *in their practical effect,* not *far* removed from annexation [5]" (italics added),

and

> *(b)* "[t]he day to day exercise of the attributes of sovereignty thus vest in Respondent, and the powers of Respondent in the fields of administration and legislation are *practically* as wide as that of a sovereign power in regard to its own territory [6]".

It is, however, clear that, on the plain meaning of the words employed,

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[1] *Vide* Chap. I, paras. 3 and 5, *supra.*
[2] **IV**, p. 573.
[3] *Ibid.*, p. 84 (para. 23). *Vide* also p. 69 (para. 10).
[4] *Ibid.*, p. 574. Italics omitted.
[5] **II**, p. 95. *Vide* also **IV**, p. 574.
[6] **IV**, p. 69. *Vide* also **IV**, p. 574.

neither of these statements evidences any purpose or motive to incorporate or annex the Territory.

The first statement concerns merely the practical effect of the Mandate, i.e., with reference to the government and administration of the mandated territory, as distinct from its legal status; and the use of the words "in their practical effect" and "not far removed from" specifically dispels any suggestion of a claim that the position created was equivalent to annexation. In this regard Respondent refers to what has been stated in Part II of this Rejoinder relative to the practical effect of C Mandates [1].

3. Likewise, the second statement concerns the *de facto* government of the Territory, as distinct from its status in international law. Indeed, in the very passage from which Applicants have extracted this statement, Respondent drew the following distinction:

> "As far as the *status* of the Territory is concerned, Respondent must respect the requirement that it is to be a separate international status. *On the other hand,* as far as the *de facto* government of the Territory is concerned, Respondent is authorized to perform all acts covering all facets of government, administration and legislation [2]." (Italics added.)

It is clear from the context that it was with regard to this last-mentioned aspect, the *de facto* government of the Territory, that Respondent made the statement quoted in paragraph 2 *(b)* above.

By the statement "[t]he day to day exercise of the attributes of sovereignty thus vest in Respondent", nothing more was meant to be conveyed than by the statement of M. Hymans in his report to the League Council in 1920, which was adopted by the latter, to the effect that Mandatories would enjoy "a full *exercise* of sovereignty" [3], or by the statement of the Chairman of the Permanent Mandates Commission that the Mandatory "*exercises* sovereign powers" [4].

By the use of the word "*practically*" (purposely italicized in the text) Respondent dispelled any suggestion of a claim to sovereignty in the ordinary sense of the word. In fact, Respondent immediately proceeded to elaborate on the word "practically" in the context by mentioning the "limitations which fetter or condition the internal exercise of the powers of government and legislation" [5], namely the specific prohibitions contained in the Mandate and the duty to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory . . ." [2].

Consequently Respondent explicitly recognized that the Mandate created a "separate international status" for the Territory and that there were limitations upon Respondent's powers of government and legislation under the Mandate.

4. By a circuitous process of reasoning Applicants, however, seek support for their contention that the purpose or motive to incorporate

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[1] *Vide* Part II, Chap. II, paras. 4-10, *supra*.
[2] **IV**, p. 69.
[3] *L. of N., O.J.*, 1920 (No. 6), p. 337. (Italics added.)
[4] *P.M.C., Min.*, X, p. 22. (Italics added.)
[5] **IV**, p. 69 (para. 8).

or annex the Territory is "conceded in Respondent's [said] avowals". Applicants first cite from *Black's Law Dictionary* a part of one of the definitions given for the word "sovereignty".

The part cited by Applicants is that italicized in the following extract from the said dictionary:

> "*Sovereignty*. The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent [1].
>
> *The power to do everything in a state without accountability*,—to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like. Story, Const. para. 207 [2]." (Italics added.)

According to the above definitions the essence of sovereignty is *unlimited and unfettered power*. Clearly, then, Respondent's admission [3] that there are "limitations which fetter or condition" its power in the Territory [4] is irreconcilable with a claim to sovereignty in the ordinary sense of the word.

5. Applicants point to Respondent's statement that its powers in the Territory are limited by (i) the specific prohibitions contained in the Mandate, and (ii) the duty to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory" and say:

> "Taken at face value, this statement appears to concede that the Mandate is still in existence, and that Respondent recognizes its duties of international accountability and the reviewability of its performance of the Mandate obligations. In fact, Respondent has devoted a substantial portion of its Counter-Memorial to an attempted demonstration that the Mandate 'lapsed *in toto* upon dissolution of the League of Nations'. This is, as has been shown, the premise upon which Respondent has in fact conducted itself with regard to the Territory and its inhabitants, at least since November 1948, when Respondent referred to 'the *previous Mandate, since expired*' [5]." (Italics in original and footnote omitted.)

Respondent answers the above statement as follows:

(a) In the first place, there is no need for surmise on the part of Applicants as to whether Respondent, in referring to the above-mentioned limitations on its powers in respect of South West Africa, concedes that the Mandate is in existence. As has been indicated above [6],

[1] References to decided cases not recited.

[2] Black, H. C., *Black's Law Dictionary*, 4th ed. (1951), p. 1568.

[3] On the basis here under discussion, i.e., that the Mandate exists—*vide* Chap. I, para. 2, *supra*.

[4] **IV**, p. 69 (para. 8).

[5] *Ibid.*, p. 574.

[6] *Vide* Chap. I, para. 2, *supra*.

Respondent stated specifically and clearly in its Counter-Memorial that it would deal with Applicants' charges in Chapter VIII of the Memorials "on the assumption, for purposes of argument, that the Mandate is still in force"; and the reference to legal limitations on its powers in respect of South West Africa was clearly made on the basis of that assumption.

(b) Applicants' further statement that, in referring to the said limitations, Respondent apparently "recognizes its duties of international accountability and the reviewability of its performance of the Mandate obligations", is without substance. Respondent's case, stated clearly and specifically, is that, *whether or not the Mandate is still in force*, Respondent's former obligations to report and account to, and to submit to the supervision of, the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body [1].

In stating, on the assumption that the Mandate is still in existence, that there are the aforementioned limitations on its powers, Respondent did not recognize, and cannot be read as recognizing, "duties of international accountability and the reviewability of its performance of the Mandate obligations".

(c) It is true that since, and by reason of, the dissolution of the League of Nations, Respondent has consistently taken up the attitude that the Mandate had lapsed *in toto*.

It is, however, not clear to Respondent what precisely Applicants intend to convey when they add that Respondent's contention that the Mandate has lapsed "is . . . the premise upon which Respondent has in fact conducted itself with regard to the Territory and its inhabitants, at least since November 1948" [2].

Whilst Respondent has adopted the attitude that the Mandate lapsed upon dissolution of the League, it has also consistently stated and given the assurance that it would continue to administer the Territory in the spirit of the Mandate—i.e., as if all the obligations comprised in the sacred trust were still in existence—and Respondent has in fact so continued to administer the Territory.

In this regard Respondent refers to the facts stated and conclusions drawn in Chapters II and III of section C of Book VIII of its Counter-Memorial [3], which are not specifically dealt with by Applicants in their Reply, and in particular, *inter alia*, to the following explicit statement:

> "Respondent's policy to administer the Territory 'in the spirit of the Mandate' includes a voluntary abstention from unilateral incorporation, exactly as if the Mandate were still in legal operation in that regard [4]."

6. With regard to Respondent's contention that since, and by reason of, the dissolution of the League, the obligations to report and account to, and to submit to the supervision of, the Council of the League of

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[1] *Vide* II, pp. 97 and 213 and Part II, Chap. III, para. 1, *supra*.
[2] IV, p. 574.
[3] *Ibid.*, pp. 86-92.
[4] *Ibid.*, p. 87.

Nations have lapsed and have not been replaced by any similar obligations, Applicants say: "This proposition . . . is one which has guided Respondent in its conduct toward the Territory and its inhabitants, at least since November 1948 [1]."

Again it is not clear what Applicants intend to convey. If they mean that Respondent has refused to recognize the United Nations as having supervisory authority in respect of Respondent's administration of South West Africa, and has refused to submit petitions and reports to the United Nations, then their statement is correct. If, however, they mean that Respondent has in other respects changed its motives or conduct towards the Territory and its inhabitants, then Respondent denies that charge. As has been demonstrated, Respondent has since the dissolution of the League administered the Territory in the spirit of the Mandate—i.e., as if all the obligations comprised in the sacred trust were still in existence.

7. Applicants' comment in regard thereto is as follows:

> "Respondent does, it is true, aver that its policies in the Territory are carried out 'in the spirit of the Mandate', but the spirit which moves Respondent in this respect is unilaterally defined, and remains unaccounted for, unreviewed and unreviewable. Sovereignty circumscribed by such a 'fetter' surely is indistinguishable from the unfettered kind [1]."

This comment, of course, goes beyond the basis of Respondent's contention of not being accountable to a supervisory organ: it introduces in addition the further contention that the Mandate has lapsed. It is true that there would on such basis be no legal obligations resting upon Respondent in respect of the Territory. But 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 abstention from unilateral incorporation. Consequently the mere fact of expressing a view that the Mandate has lapsed, cannot be relied upon as proof of violation of any of the said obligations, assuming that they are in force. To speak in this regard of "[s]overeignty . . . indistinguishable from the unfettered kind" is to indulge in a mere play of words, which can in no way assist Applicants while Respondent in fact abstains from acting as if endowed with unfettered sovereignty in respect of the Territory. In sum, a finding that the Mandate is still in force will signify that Respondent has been wrong in an expressed view, but not that Respondent has violated the provisions of the Mandate in its administration and treatment of the Territory.

8. In further arguing their contention that "Respondent's purpose or motive to incorporate or annex the Territory . . . clearly appears from the record herein" [2], Applicants say:

> "Respondent's claim of the day-to-day attributes of sovereignty over the Territory reflects a posture which Respondent has maintained with regard to its rights and powers under the Mandate, from its inception.
>
> The records of the Permanent Mandates Commission disclose its constant effort to assert the separate international status of the

[1] **IV**, p. 575.

[2] *Vide* para. 2, *supra*.

Territory in the face of Respondent's insistence that the Mandate was in 'practical effect, not far removed from annexation' [1]."

Respondent denies the suggestion that it was continuously in disagreement with the Permanent Mandates Commission regarding the separate international status of the Territory.

Respondent admits that there were, during the lifetime of the League of Nations, discussions and an exchange of communications between it as Mandatory and the Permanent Mandates Commission relative to the international status of the mandated territory, and to the allied question of sovereignty in the mandate system.

Respondent states, however, that whatever differences there may have been between it and the Commission, Respondent never adopted an attitude which can in any way be described as a "denial to the Territory of a separate international status" [2].

9. Applicants give what they term "two illustrations" which, they say, "will suffice to demonstrate the extent of difference between the Commission and Respondent in this respect" [1]. The first illustration is a statement by General Smuts in the South African Parliament during July 1925 which led to a discussion in the Permanent Mandates Commission during June 1926 [1].

With regard to this statement, which was made at a time when General Smuts was not a member of the South African Government, Respondent states as follows:

(a) It is clear from the statement that General Smuts did not regard the position under the Mandate as being equivalent to annexation, or that South Africa could, during the existence of the Mandate, claim sovereignty over South West Africa.

The point of view expressed by General Smuts in addressing Parliament was that under the Mandate South Africa had such wide powers, administrative and legislative, that there was no need to annex the Territory, but, at the same time, he gave recognition to South Africa's obligations under the Mandate.

Thus he said in the same speech:

> "Under these circumstances I maintain—and I have always maintained—that it will never be necessary for us, as far as I can see, to annex South-West. *We can always continue to fulfil the conditions imposed on us by the mandate,* and we can always render annual reports to the League of Nations in respect of the mandate [3]." (Italics added.)

(b) The Members of the Permanent Mandates Commission themselves appear to have expressed different views on the matter raised for discussion as a result of General Smuts's speech. Applicants quote in the Reply comments on the speech by one member of the Commission, M. Orts [4]. In contrast thereto Respondent draws attention to the views of another member, M. Rappard, who is reported to have said, *inter alia*, that he—

> "*. . . did not think that a matter of principle was actually affected*

[1] IV, p. 575.
[2] *Ibid.*, p. 576.
[3] *Vide* IV, p. 79, where a fuller extract from General Smuts' speech is quoted.
[4] *Ibid.*, pp. 575-576.

by the declaration of General Smuts. The Covenant, by the terms of which mandated territories were administered in the name of the League of Nations, remained untouched. General Smuts was perfectly free to state that an integral part of the territory of South Africa was administered in the name of the League of Nations, although, in [his] view . . . it would appear more logical to say that it was administered in the name of the League of Nations as if it formed an integral part of the territory [1]." (Italics added.)

(c) The Commission did not consider it necessary to make any declaration on the matter to the League Council. In the circumstances General Smuts's statement, and the discussion thereof in the Permanent Mandates Commission, do not support Applicants' conclusion that there was on the part of Respondent a "denial to the Territory of a separate international status".

10. The other "illustration" relied upon by Applicants is the fact that certain differences arose between the Permanent Mandates Commission and Respondent during 1926 with regard to the wording of a boundary agreement concluded between Respondent and Portugal [2]. Inasmuch as this incident has already been dealt with in the Counter-Memorial [3], Respondent will for present purposes merely draw attention to the following:

(a) Applicants, in quoting from the said agreement in the Reply [2], again omit, as they did in the Memorials [4], an important qualification contained in the preamble to the agreement. This qualification was expressed in the italicized words in the following extract from the preamble:

> ". . . the Union of South Africa, *subject to the terms of the said mandate*, possesses sovereignty over the Territory of South West Africa . . . [5]". (Italics changed.)

(b) Although a controversy did arise as to the meaning of the word "sovereignty" in the above context, it is instructive to have regard to the light in which the Commission viewed the matter. Thus the Commission reported to the League Council that the wording of the preamble—

> ". . . *seems to imply* a claim to legal relations . . . not in accordance with the fundamental principles of the mandates system [6]". (Italics added.)

And the Commission expressed the hope that—

> ". . . [the South African] Government will be so good as to explain whether, in its view, the term 'possesses sovereignty' [7] expresses only the right to exercise full powers of administration and legislation in the territory of South-West Africa under the

[1] *P.M.C., Min.*, IX, p. 34.
[2] **IV**, p. 576.
[3] *Ibid.*, pp. 28-29.
[4] **I**, p. 38.
[5] *Vide* **II**, p. 28.
[6] *P.M.C., Min.*, XI, p. 204.
[7] During the Tenth Session of the Commission the Chairman had said that instead of the expression "possesses sovereignty" the "correct expression should be '*exercises sovereign powers*' " (italics added)—*P.M.C., Min.*, X, p. 22.

terms of the mandate and subject to its provisions and to those of Article 22 of the Covenant, or whether it implies that the Government of the Union regards itself as being sovereign over the territory itself [1]".

(c) Applicants omit to state that all misunderstanding was resolved through the acceptance by Respondent, in a letter of 16 April 1930, of reports adopted by the Council of the League to the effect, *inter alia*, that "sovereignty in the traditional sense of the word does not reside in the Mandatory Power "[2].

(d) During the League of Nations period similar questions also arose with regard to sovereignty in respect of other mandated territories. Thus in respect of Ruanda-Urundi, under Belgian Mandate, and Togoland and the Cameroons, under French mandate, the Permanent Mandates Commission had occasion to discuss legislative enactments, the wording of which suggested that the Mandatories concerned claimed sovereignty over the territories mandated to them [3]. And with regard to reports on the administrative union between Togoland and the Cameroons, under British Mandate, which suggested a similar interpretation, the Commission commented as follows:

> "While the Commission desires to bring this matter to the notice of the Council, it does not exaggerate its importance. As, however, the passages referred to might lead to annexationist aims being attributed quite erroneously to the mandatory Powers, it appears to the Commission that their own interest, no less than that of the League of Nations, requires that in future any formula should be avoided which might give rise to doubts on the subject in the minds of ill-informed or ill-intentioned readers [4]."

11. In the premises aforestated Respondent denies the conclusion sought to be drawn by Applicants from the so-called "two illustrations", namely a "continuing and long-standing posture [on the part of Respondent] of denial to the Territory of a separate international status" [5].

12. Respondent says that, in the light of the aforegoing analysis of Applicants' "Argument", nothing has in fact been advanced to support their conclusion that "Respondent's purpose and motive has *(sic)* been, and remains *(sic)*, that of incorporating or annexing the Territory" [5]. On the contrary, Applicants have in no way countered Respondent's exposition and analysis of its attitude towards the Territory as set forth in the Counter-Memorial [6].

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[1] *P.M.C., Min.*, XI, p. 205.

[2] *Vide* **II**, p. 29.

[3] *P.M.C., Min.*, VII, pp. 52-61 and *P.M.C., Min.*, III, pp. 22 and 222-233. *Vide* also Wright, Q., *Mandates under the League of Nations* (1930), pp. 206-207.

[4] *P.M.C., Min.*, V, p. 190 and Wright, Q., *Mandates under the League of Nations* (1930), p. 207.

[5] **IV**, p. 576.

[6] *Ibid.*, pp. 86-92.

CHAPTER III

RESPONDENT'S ALLEGED POLICIES AND ACTS

A. General

1. The second of Applicants' "legal conclusions" aforementioned [1] is rendered by them as follows:

> "Such *policies and acts*, including [Respondent's] rejection of international accountability and its insistence upon the right to govern the Territory on the basis of an unreviewable discretion, constitute *ipso facto*, and without regard to Respondent's motive or purpose, a *violation of Respondent's obligation to respect the separate internation (sic) status of the Territory* [2]."

This conclusion calls for general comment in two respects.

In the first place, it introduces an alternative contention not previously made by Applicants.

In the Memorials Applicants alleged violation by Respondent of its duty, or duties, to refrain from unilateral annexation and to promote the progress of the inhabitants toward self-determination [3]. Applicants sought to establish this charge by referring, firstly, to certain statements made, *inter alia*, by members of Respondent's Government, which statements, in their submission, proved that Respondent's "purpose is incorporation" [4], and, secondly, to certain acts of Respondent which, in their contention, had given "practical effect" to Respondent's alleged intent to incorporate the Territory [4]. Although they reiterate this charge in the Reply [2], they also now introduce an alternative contention which is new.

The attitude adopted by Applicants in this alternative contention is that Respondent's policies and acts *per se* constitute "a violation of Respondent's obligation to respect the separate international [legal] status of the Territory"—"without regard to Respondent's purpose or motive" [5].

The effect is that the essence of the original charge—an unauthorized purpose or motive—is ignored in this contention. Furthermore, Applicants advance this new contention without amending their legal conclusion in the Memorials, which conclusion reads as follows:

> "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 [6]." (Italics added.)

2. Respondent's second point of comment regarding this "legal conclusion" concerns the following words embraced therein, viz.,

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[1] *Vide* Chap. I, para. 5, *supra*.

[2] **IV**, p. 576.

[3] *Vide* Chap. I, para. 1 *supra*.

[4] **I**, p. 189.

[5] *Ibid.*, p. 573 and *supra*.

[6] **I**, p. 195.

> "... including [Respondent's] rejection of international accountability and its insistence upon the right to govern the Territory on the basis of an unreviewable discretion ...[1]".

As Applicants' legal conclusion is worded, it is not clear to Respondent what argument is sought to be based on Respondent's disclaimer of supervision in the context of the charge here under consideration. Do Applicants contend that Respondent's attitude relative to supervision is, in itself, an act which constitutes "a violation of Respondent's obligation to respect the separate international status of the Territory"? If so, Respondent finds it strange that Applicants do not anywhere in their Reply attempt to justify or to demonstrate the soundness of such a contention. Indeed, there is a significant omission of any treatment or discussion of such a proposition in the Reply.

Respondent submits that such a proposition would be untenable. If Respondent is correct in its contention—i.e., that its obligations to report and account to, and to submit to the supervision of, the Council of the League, lapsed upon dissolution of the League, and have not been replaced by any similar obligations relative to supervision [2]—then, surely, its rejection of so-called "international accountability" cannot constitute a violation of any obligation. If, on the other hand, it should be held that Respondent's aforementioned obligations did not lapse upon dissolution of the League, then that would signify that Respondent has erred in its aforestated rejection, and that Applicants' charge of a breach of Article 6 of the Mandate has been established, but not that the "separate international status of the Territory" has in any way been affected. The substantive nature of the discretion conferred upon Respondent regarding the administration of the Territory can in no way be affected by the presence or absence of supervision.

3. Another meaning which could be assigned to Applicants' legal conclusion is that Respondent's contention relative to supervision is an element or factor which substantiates Applicants' charge that the other acts dealt with in the Reply [3] constitute a violation of Respondent's "obligation to respect the separate international status of the Territory". But then again there is, save in one instance, a significant omission on the part of Applicants of any treatment or discussion of the matter on that basis. In the whole of Applicants' argument in the relevant part of the Reply [3] Respondent's contention relative to supervision is mentioned only once, namely in dealing with the vesting of South West Africa Native Reserve land in the South African Native Trust [5]—a matter which will be dealt with hereinafter [6]. In the premises, Respondent is at a loss to deal further with this aspect of the "legal conclusion", which is neither clear in itself nor based on any argument or discussion which could throw light on its meaning.

Respondent deals next with the several acts referred to by Applicants in the Reply [3] as being relevant to the "legal conclusion" here under consideration. In the Memorials these acts were relied upon in con-

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[1] IV, p. 576.
[2] *Vide* Chap. II, para. 5, *supra*.
[3] IV, pp. 576-586.
[4] *Ibid.*, p. 584.
[5] *Vide* paras. 24-27, *infra*.

junction with the alleged intent of incorporation [1], a charge which, as indicated above [2], is repeated in the Reply. In so far as such acts are again referred to in the Reply in the latter context, Respondent will deal therewith also on that basis.

B. Conferment of South African Citizenship [3]

4. In Applicants' Memorials the conferment of South African citizenship on the inhabitants of South West Africa was relied upon as one of several acts alleged to have "given practical effect" to a plan or purpose on Respondent's part to incorporate South West Africa [4]. Respondent in its Counter-Memorial dealt fully with this charge [5]. In the Reply Applicants now introduce the alternative contention that even "without regard to Respondent's purpose or motive" this act constitutes a "violation of the duty to respect the separate international status of the Territory" [6]. Respondent denies that the act in question constitutes such a violation, and submits that Applicants have advanced nothing in support of this newly formulated alternative contention.

5. While admitting that the conferment, by Act No. 44 of 1949, of South African citizenship on the inhabitants of South West Africa involved, in so far as the Native inhabitants were concerned, an inconsistency with the resolution of the Council of the League of Nations of 23 April 1923 [7], Respondent submits as follows, on the basis of the facts related in its Counter-Memorial—which facts are not contested by Applicants [8]—and the argument propounded therein:

(a) The admitted inconsistency centres around the *manner* in which citizenship was conferred on the Native inhabitants of the Territory. What the Council objected to was a particular manner of conferment of nationality and *not* the fact of conferment of nationality by itself. Indeed the Council specifically stated that—

> "[i]t is not inconsistent with [paragraphs 1 and 2 of its resolution] that individual inhabitants of the mandated territory should voluntarily obtain naturalisation from the Mandatory Power . . . [9]".

(b) The fact of there being a common nationality, shared by the inhabitants of the Mandatory State and that of the mandated territory, could therefore, in terms of the Council's resolution, not affect the international status of the mandated territory.

6. Applicants say in the Reply that the contentions advanced by Respondent in the Counter-Memorial to the above effect are not—

> ". . . consistent with the essential purpose of the resolution which, in the words of the Permanent Mandates Commission quoted above,

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[1] *Vide* para. 1, *supra*.
[2] *Ibid.*, and **IV**, p. 576.
[3] **IV**, pp. 576-579.
[4] **I**, p. 190.
[5] **IV**, pp. 93-100.
[6] *Ibid.*, p. 579.
[7] The relevant portion of the resolution is cited at **IV**, p. 94.
[8] *Vide* Chap. I, para. 4, *supra*.
[9] *Vide* third para. of the resolution quoted at **IV**, p. 95.

> was to assure that in accordance with the principles of Article 22 of the Covenant of the League of Nations, inhabitants of the Territory *'should be granted a national status wholly distinct from* that of the nationals of the mandatory Power' [1]".

Assuming that the purpose of the resolution was as stated by the Permanent Mandates Commission, the Council nevertheless did *not* by its resolution intend to declare a prohibition against all forms of conferment of citizenship, and could therefore not have regarded conferment of citizenship as, in itself, affecting the international status of mandated territories.

Applicants' further statement that—

> "[t]he fact that by *voluntary* action, any inhabitants of the Territory, or all of them, might be naturalized by Respondent, does not justify the prohibited action of *compulsory* conferment of Respondent's citizenship upon them [2]",

begs the question in issue. Respondent has not contended that because so-called "voluntary action" was permitted, "compulsory conferment" would be permissible in terms of the Council's resolution. What Respondent does say is that conferment of citizenship was not regarded by the Council as an act *which could, by itself, affect the international status of a mandated territory.*

7. Inasmuch as the legislation in question [3] did not extinguish or diminish any rights which the Natives of South West Africa may have had to a separate status as inhabitants of that Territory [4],—a point with which Applicants do not deal at all in the Reply—the Act did not offend against the cardinal concern of the Permanent Mandates Commission and the Council, viz., to guard against "... the assimilation of the inhabitants of the B and C mandated territories to the nationals of the mandatory Power" [5], which assimilation would be regarded by the Commission as "... contrary to the *spirit* of the mandates system ..." [5]. (Italics added.)

8. That the legislation was, as regards the *manner* of conferring citizenship, in so far as the Native inhabitants were concerned, at variance with the actual terms of the Council's resolution of 23 April 1923, is not denied. Respondent has been unable to ascertain whether the Council's resolution was considered or overlooked when the legislation in question was prepared and passed in 1949. The Parliamentary discussion throws no light on the objectives of this aspect of the legislation, nor could any assistance in this regard be derived from departmental records or officials who dealt with the matter.

Looking at the matter *ex post facto*, however, it may be relevant to point out that circumstances in 1949 were substantially different from what they had been in 1923 when the Council's resolution was passed. By 1949 the mandate system as such had ceased to exist. Various States had, particularly in debates at the United Nations, expressed the view

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[1] IV, p. 577.

[2] *Ibid.*, p. 578.

[3] Act No. 44 of 1949 in *Statutes of the Union of South Africa* 1949, pp. 414-452.

[4] *Vide* IV, p. 99 (para. 14).

[5] *Vide* Memorandum of Marquis Theodoli, *P.M.C., Min.*, II, p. 86 quoted at IV, p. 578.

that the Mandate for South West Africa had lapsed, whereas other States had contested that view [1]. The question whether the Native inhabitants of South West Africa could any longer be regarded as being under the protection of a "mandatory Power", was therefore a matter of uncertainty and controversy in the international world. In these circumstances it was, in Respondent's submission, more advantageous for the Native inhabitants of South West Africa, and therefore more in keeping with the spirit of the sacred trust, to confer upon them the definite benefits of South African citizenship—in addition to whatever rights or status they might have had as inhabitants of that Territory—than to leave the question of their national status entirely in a state of suspense and uncertainty.

Applicants do not dispute that prior to the present proceedings no-one apparently ever suggested that the passing of the Act in question was inconsistent with the international status of South West Africa [2].

9. Respondent reiterates that in passing the Act it did not intend to affect the separate international status of the Territory, and denies that the said Act constitutes a violation of the duty to respect such status.

C. Inclusion of Representatives from South West Africa in the South African Parliament [3]

10. Respondent in the Counter-Memorial [4] dealt with Applicants' allegations relative to the legislation which provided for the inclusion in the South African Parliament of representatives from South West Africa [5], including the charge that it "was part of a plan to incorporate the Territory politically". In Respondent's submission it thereby effectively refuted such charge.

In support of their present alternative contention that the said legislation "defeats Respondent's duty to respect the separate international status of the Territory" [6], Applicants neither relate any new facts nor advance any fresh argument, but content themselves with giving the "views of responsible organs of both the United Nations and the League of Nations" [6].

11. The first of such views relied upon by Applicants is expressed in the 1954 report of the Committee on South West Africa.

It is clear from the extract which Applicants cite from the report [7], that the Committee itself refrained from expressing its opinion "on the strictly legal aspect of this question", and merely stated that it "believes" that the inclusion of representatives from South West Africa in the South African Parliament *"is likely to prejudice* the development of the Territory as a separate political entity". (Italics added.)

In the first place the Committee advanced no grounds for its *belief*, and, in any event, was not prepared to say that the position affected the separate international status of South West Africa. Apparently the belief

[1] *Vide* **II**, p. 65.
[2] *Vide* **IV**, p. 99 (para. 15).
[3] **IV**, pp. 579-581.
[4] *Ibid.*, pp. 101-104.
[5] Act No. 23 of 1949 in *Statutes of the Union of South Africa 1949*, pp. 178-196.
[6] **IV**, p. 581.
[7] *Ibid.*, p. 579.

was not based on an objection to the fact of representation *per se*, but on the manner of representation, viz., "by Union nationals of European descent"[1].

12. The second statement expressing views relied on by Applicants is extracted from a report of the same Committee for the year 1956, and follows on that part of the report, cited in the Counter-Memorial in support of Respondent's proposition that the Committee itself—

> "... could not suggest that, seen objectively, representation of a Mandated territory in the legislative institutions of the Mandatory Power would be inconsistent with the international status of such Territory [2]".

The extract from the report quoted by Applicants [3] does not serve as a denial of the above proposition.

On the one hand, the Committee by implication criticized Respondent for not extending representation in the South African Parliament to all the inhabitants of South West Africa. On the other hand, the fact that the South West African representatives in the South African Parliament have a voice and vote not only in matters relating to the Territory, but in all matters affecting South Africa itself "... appear[ed] to the Committee to imply an assumption by the Union of sovereignty over the Mandated Territory ..." [4].

It is clear that the Committee did not regard representation *in itself* as inconsistent with the international status of South West Africa. The implication of an assumption of sovereignty on the part of Respondent merely because the South West African representatives have a voice and vote in the South African Parliament in matters affecting South Africa itself, is unwarranted.

Such representation and the rights of the South West African representatives, are in themselves neutral when inferences are sought to be drawn as to whether—

(a) the Territory is, in terms of the Mandate, being administered "as an integral portion of the [Republic] of South Africa", to which Respondent "may apply the laws of the [Republic] of South Africa" [5],

or whether—

(b) the Territory is actually being incorporated, with an "assumption of ... sovereignty" [6] on Respondent's part. Other or accompanying facts, or expressions of policy, have to be considered in order to determine whether there is an intent to incorporate or annex the Territory. Respondent has already denied such an intent or motive on its part [7], and Applicants have brought no new evidence with a view to showing the contrary. Indeed, the legislation is apparently now discussed by Applicants only with reference to their alter-

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[1] **IV**, p. 579.
[2] *Ibid.*, p. 102.
[3] *Ibid.*, pp. 579-580.
[4] *Ibid.*, p. 580.
[5] *Vide* Art. 2 of the Mandate for German South-West Africa.
[6] *Vide* the Committee's report as quoted at **IV**, p. 580.
[7] **IV**, p. 103.

native "legal conclusion" [1] for the purposes of which, in their own words, "motive or purpose" is irrelevant [2].

13. The other statements relied upon by Applicants as expressing the "views of responsible organs of . . . the League of Nations" [3] have been extracted by them from the Minutes of proceedings in the Permanent Mandates Commission during the year 1934 [4]. With regard to the extracts quoted by Applicants [5], Respondent states as follows:

(a) The discussion at the said session of the Commission did not relate specifically to the question of representation of the inhabitants of South West Africa in the South African Parliament, but to the much broader "question of the incorporation of South West Africa in the Union of South Africa as a fifth province" [6].

The discussion did not arise from any formal report to the Commission, but as a result of newspaper reports concerning a resolution of the Legislative Assembly of South West Africa which aimed at incorporation of the Territory [7].

(b) In the absence of full particulars of the proposal of the Legislative Assembly and the implications thereof, the discussion in the Commission took the form of a general exchange of thoughts by the individual members on the subject of incorporation.

Indeed, M. Orts, who originally raised the subject, is recorded as having said that he—

> "... felt that it would be difficult to determine exactly the scope of the problem as long as the Commission was not in possession of all the factors. At present the information it had received was merely that a vote had been taken by the Legislative Assembly of South West Africa on a motion recommending the incorporation of the mandated territory in the Union as a fifth province, subject to the provisions of the mandate.
>
> The Commission was thus faced with a somewhat vague situation, and it was impossible for it to determine to what extent the incorporation of the mandated territory as a province of the Union would affect the territorial entity of South West Africa . . .[8]"

In the circumstances, he stated that, in his view,

> ". . . the proper procedure . . . would be to frame an observation in which the Commission . . . reserved its opinion as to the compatibility with the mandatory system of the solution recommended by the Legislative Assembly [8]."

In the end this was the course adopted by the Commission [9].

(c) The extracts quoted by Applicants in the Reply [5] are from the recorded statements made on this occasion by three of the members

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[1] *Vide* para. 1, *supra*.
[2] IV, p. 576.
[3] *Ibid.*, p. 581.
[4] *P.M.C., Min.*, XXVI.
[5] IV, pp. 580-581.
[6] *P.M.C., Min.*, XXVI, p. 163.
[7] *Ibid.*, pp. 50-51.
[8] *Ibid.*, p. 164.
[9] *P.M.C., Min.*, XXVI, p. 166.

of the Commission, namely Messrs. Rappard, Merlin and Sakenobe.

Upon a proper reading of the full statements of the said members, it appears clearly that Messrs. Rappard and Merlin directed their thoughts generally to the broad question under discussion, namely incorporation, and not specifically to the question whether representation of the inhabitants of South West Africa in the South African Parliament would *per se* be in conflict with the Mandate.

Thus M. Rappard, in sounding a note of caution in answer to a statement by Lord Lugard [1], observed that—

> "... there could be no comparison between the administration of certain mandated territories as integral portions of the adjacent colonial territories belonging to the mandatory Power and the incorporation of the mandated territory in the territory of the mandatory Power itself [2]".

The portion of M. Rappard's statement quoted by Applicants merely illustrated one of the points of difference mentioned by him in order to substantiate his contention that no such comparison could be made. He did not express it as his view that representation of the inhabitants of South West Africa in the South African Parliament would *per se* be in conflict with the Mandate.

So, also, M. Merlin occupied himself solely with thoughts on the broad question of incorporation, which, in his view, would result in the Mandated Territory becoming "part of a political unity—namely, the Union of South Africa" [3]. The far narrower question here in issue, viz., representation in Respondent's Parliament, was not even mentioned by M. Merlin.

It is true that M. Sakenobe, in the course of giving what he termed a "very general opinion on the matter", expressed the view that representation of the inhabitants of South West Africa in the South African Parliament would be "quite contrary to the present status of the Territory" [3]. In advancing such a contention, which Respondent submits to be wrong, M. Sakenobe, however, stood alone.

(d) Furthermore, Applicants omit to mention that in the discussion certain members also expressed views directly in conflict with the opinion of M. Sakenobe, and with the position now taken by Applicants.

Thus Lord Lugard, referring to an opinion by Professor A. B. Keith, an eminent authority on constitutional law, to the effect that Respondent could, if it wished, incorporate South West Africa in its territory, stated that he "was inclined to share [Professor Keith's] view" [4].

Lord Lugard said that, as long as Respondent was bound by the Mandate and continued to observe the provisions thereof, "incorporation of South West Africa in the Union of South Africa could not be regarded as an attempt at annexation" [4]. And in this regard he drew attention to the fact that the motion adopted by the Legislative Assembly of South West Africa stipulated that any change should be "subject to the provisions of the Mandate" [4].

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[1] *Vide* sub-para. *(d)*, *infra*.
[2] *P.M.C.*, *Min.*, XXVI, p. 164.
[3] *Ibid.*, p. 165.
[4] *Ibid.*, p. 163.

It is implicit in the view expressed by Lord Lugard that the inclusion of representatives from South West Africa in the South African Parliament would not be in conflict with the Mandate.

14. In the premises aforestated, Respondent submits that Applicants are clearly wrong in stating that "responsible organs of both the United Nations and the League of Nations" have expressed "views . . . opposing inclusion of representatives from South West Africa in the South African Parliament" [1]. The statements of the only organ of the United Nations to which Applicants refer—the Committee on South West Africa—do not reflect the view contended for by Applicants [2].

Likewise, no such opposing view was expressed by any organ of the League of Nations—unless, of course, one member of the Permanent Mandates Commission, M. Sakenobe, can be regarded as an "organ" of the League; but then the conflicting views expressed by another member of the Commission [3] would equally have to be regarded as the views of another "organ" of the League.

15. Although Applicants mention Respondent's argument that, in the case of certain trust territories formerly under mandate, the United Nations permitted arrangements similar to that provided for in the legislation under consideration relative to South West Africa [4], they avoid dealing with the argument [5].

16. In conclusion Respondent denies that the inclusion of Representatives from South West Africa in the South African Parliament—whether viewed separately, or together with conferment of South African citizenship upon the inhabitants of South West Africa [6]—constitutes a violation of the duty to respect the separate international status of the Territory.

D. Administrative Separation of the Eastern Caprivi Zipfel from the Rest of South West Africa[1]

17. In the Memorials Applicants' charge was that the purpose of separating the administration of the Eastern Caprivi Zipfel from the administration of the rest of South West Africa was to give effect to Respondent's alleged intention to incorporate the Territory [6], and that such separation was effected under the pretext that it was occasioned by administrative difficulties [7].

In support of this charge they relied upon a contention of the Committee on South West Africa that the separate administration of the Eastern Caprivi Zipfel prejudices one of the "General Conditions" which, according to the Council of the League of Nations, had to be fulfilled "before a mandated territory [could] be released from the mandatory regime" [8].

[1] **IV**, p. 581.
[2] *Vide* paras. 11-12, *supra*.
[3] *Vide* para. 13 *(d)*, *supra*.
[4] **IV**, pp. 102 and 579.
[5] With regard to like arrangements in the said Territories while under Mandate *vide* the statement by Lord Lugard in the Permanent Mandates Commission, *P.M.C., Min.*, XXVI, p. 163.
[6] **I**, p. 193.
[7] *Ibid.*, p. 194.
[8] *Ibid.*, pp. 164-165: for the rest of the said General Conditions *vide* **IV**, pp. 114-115.

In the Reply Applicants completely shift their ground relative to this charge. They now concede "that the Eastern Caprivi Zipfel is not readily accessible from the rest of the Territory" [1], that it is in "an exceptional situation" [1], and that "problems of accessibility [could] make administrative separation expedient" [2]. While still relying on the contentions of the Committee on South West Africa regarding the aforementioned "General Conditions", their charge is now that Respondent has "... taken unjustified and improper advantage of [the] exceptional situation" [1]. This charge rests upon a contention that Respondent is obliged, in terms of the Mandate,

> "... to take other steps to preserve the territorial integrity of the Mandated Territory as a whole, and to develop the 'sense of territorial consciousness among all the inhabitants' which is required by the United Nations [2]",

and that Respondent has failed to comply with such obligation [2].

Respondent will deal with this contention in the next succeeding paragraphs, but is concerned at this stage merely with pointing out the transformation which Applicants' complaint in this respect has undergone. Whereas in the Memorials Applicants questioned the soundness of the reasons advanced for separating the administration of the Eastern Caprivi Zipfel, and condemned the act of separation as such, they now concede that such separation could have been rendered expedient by geographical and other circumstances beyond Respondent's control; but, in order to persist with a complaint in some form or another, they attempt to introduce a new obligation into the Mandate, formulated with reference to requirements of the United Nations regarding trust territories—an obligation which, as will be shown hereinafter, has no legal foundation.

18. Applicants do not specify, with regard to their factual allegations, what "other steps" Respondent should have taken, nor do they indicate, with regard to their legal contention, whence they derive an obligation in terms of the Mandate to take positive action of the vague nature contended for by them. If any such obligation were to exist, it could have arisen only under Article 2, paragraph 2, of the Mandate, and would have to be to the effect that Respondent must positively promote the integration of all the population groups into one whole. "Territorial integrity" and "territorial consciousness" are in fact expressions used in some organs of the United Nations, as describing objectives considered desirable in preparing the populations of certain trust territories for the exercise of self-determination by a particular method, viz., by a majority decision of the population of the whole territory, considered as one. Respondent has in the Counter-Memorial given its reasons [3], which have in no way been controverted by Applicants, for rejecting the suggestion that an obligation to adopt such a particular method in all cases and under all circumstances can be said to be "implicit in the undertaking of the Mandate itself" [2]. Similarly, Respondent gave its reasons [4], which have again not been controverted by Applicants, for its conviction that

[1] **IV**, p. 581.
[2] *Ibid.*, p. 582.
[3] *Vide ibid.*, pp. 71-72 (especially para. 14).
[4] *Ibid.*, pp. 71-72. *Vide* also **II**, Book IV, *passim*, especially pp. 458-461 (paras. 4-7) and 472-473 (paras. 26-29); also **IV**, pp. 213-214.

such particular method will, in the circumstances of South West Africa, not be appropriate or likely to do justice to all the various peoples concerned, *inter alios* the peoples of the Eastern Caprivi Zipfel [1]. Furthermore, the same organs of the United Nations have in certain cases accepted total partition of former mandated and/or trust territories, e.g., Palestine, the British Cameroons [2], and Ruanda-Urundi [3], which confirms the necessity of treating each case solely on its own merits.

Respondent denies that, under the circumstances pertaining to South West Africa, it was under any obligation to attempt to foster "territorial integrity" or "territorial consciousness" in so far as, in its own view, such attempts would not be realistic or conducive to the achievement of eventual self-determination by the peoples concerned in the manner most suitable and just for all concerned.

Moreover, it is not clear what relevance the concepts in question can have to a charge of failing to respect the separate international status of South West Africa.

19. With regard to Applicants' repetition of the contention of the Committee on South West Africa regarding the aforementioned "General Conditions" [4], which contention they endorsed in their Memorials [5], Respondent pointed out in the Counter-Memorial [6] that the condition in question concerned the ability of a territory to maintain its territorial integrity and political independence *after having been granted independence*, and was therefore intended to arise for consideration only when it was proposed to bring the Mandatory regime in respect of a particular territory to an end by the grant of independence.

Applicants' response thereto is that—

> "... the said General Condition is applicable throughout the course of the development of a Mandated Territory, and not merely in connection with a proposal to bring a Mandate régime to an end [7]".

Not only do Applicants fail to state any reason for this contention, but a reference to the other conditions in the set of "General Conditions" wholly disproves this contention [8]. Furthermore, it must be noted that the "General Conditions" are negative in nature—they prescribe *conditiones sine qua non* for the grant of independence, and do not stipulate positive duties incumbent on a Mandatory. Indeed, neither the Permanent Mandates Commission nor the League Council was competent to prescribe the positive duties contended for by Applicants. The immediate reason why the League Council requested an enquiry, and the Permanent Mandates Commission conducted the enquiry which gave rise to the formulation of the conditions in question, viz., the proposed grant of

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[1] *Vide*, e.g., **IV**, p. 118 (para. 36).

[2] **II**, pp. 519-520.

[3] *Ibid.*, p. 525.

[4] *Vide para.* 17, *supra.*

[5] **I**, p. 193.

[6] **IV**, pp. 114-115.

[7] *Ibid.*, p. 582.

[8] *Vide* No. (1) of the two "classes of preliminary conditions", cited at **IV**, p. 114 and the conditions cited at pp. 114-115.

independence to Iraq, also corroborates Respondent's contention [1]. And, finally, Respondent points out that the Commission in its report to the League Council referred to the said conditions as—

> "... conditions the presence of which will in any case indicate the *ability of a political community to stand alone and maintain its own existence as an independent State* [2]". (Italics added.)

20. Applicants argue further as follows:

> "Moreover, the General Condition is applicable even in a situation in which a Mandated regime ended by lawful incorporation, inasmuch as such incorporation must be the result of a free exercise of the right of self-determination, implying a choice among several alternatives, one of which might be independence. Irrespective of the ultimate choice by the inhabitants of a Mandated Territory, the Territory must, prior to such choice, 'be capable of maintaining its territorial integrity and political independence' [3]."

This argument involves a *non sequitur*. Self-determination does imply a choice between alternatives, one of which might be independence; but that is no ground for saying that the League Council intended the conditions in question to operate before the choice is made, and whatever the choice may be. Indeed, non-application of one or more of the conditions may be a reason for the inhabitants to prefer incorporation in, or amalgamation with, another Territory or State. Particularly in the case of C Mandates, it was conceivable, by reason of the circumstances set out in Article 22 (6) of the Covenant, that the inhabitants would reach a stage of maturity sufficient for the exercise of self-determination, but without any prospect of satisfying the requirements for independence. Their choice of alternatives at such a stage could be only between, on the one hand, incorporation in, or amalgamation with, another territory, and, on the other hand, indefinite prolongation of the mandate status. The "General Conditions" would be totally inapplicable when a choice between such alternatives had to be made. Respondent, therefore, reiterates that the Mandates Commission, in framing the conditions in question, and the League Council in approving thereof, were concerned only with the case where a mandated territory was "desirous of emancipation", thereby raising the question whether the people concerned had "become fit to stand alone without the advice and assistance of a mandatory" [4].

21. Applicants' further statement that—

> "[t]he Permanent Mandates Commission ceased to function in the year of the adoption of the foregoing Proclamation, and thus the Commission had no opportunity to consider or express views thereon [3]",

is partly true and partly false.

Although the Commission ceased to function in 1939, it was informed early in that year of the proposed proclamation to bring about a separa-

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[1] *Vide* Evans, L. H., "The General Principles governing the Termination of a Mandate", *The American Journal of International Law*, Vol. 26, No. 4 (Oct. 1932), pp. 735-758, at p. 739.

[2] *Ibid.*, p. 749.

[3] **IV**, p. 582.

[4] *Vide* general considerations mentioned by the Commission; **IV**, p. 113.

tion of the administration of the Eastern Caprivi, and expressed the view that—

"... the administrative arrangement contemplated calls for no observations on its part provided all the provisions of the mandate are properly applied in the eastern portion of the Caprivi Zipfel [1]".

22. Applicants conclude their argument as follows:

"Respondent's failure to take any measures designed to preserve the territorial integrity of the Mandated Territory as a whole, Respondent's total legal separation of the Eastern Caprivi Zipfel from the Territory, and Respondent's annexation of the area, must, in Applicants' submission be regarded as elements in Respondent's plan to incorporate and annex the Territory as a whole. By such actions Respondent has failed and refused to respect the separate international status of the Territory, thereby violating Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations [2]."

Respondent feels inclined to ignore the several irresponsible assertions rolled up in this concluding passage of the argument, but will for the sake of completeness deal briefly therewith.

In the first place, as regards the idea of "territorial integrity", in so far as separate administration of the Eastern Caprivi may possibly be said to run counter to this idea, Respondent has shown that the only objectives involved are the best interests of the people concerned, and that no support is thereby afforded for a charge of failing to respect the separate status of South West Africa [3]. *A fortiori* no support can be afforded thereby for an allegation of a plan "to incorporate and annex the Territory as a whole".

Secondly, there has not been a "total legal separation" of the Eastern Caprivi from the rest of South West Africa. The Eastern Caprivi has, as from 1939, merely "cease[d] to be administered" [4] as part of the Territory. In all other respects it remains in law part of the Territory and shares its separate international status. Reference may in this regard be made to paragraph 20 of Respondent's Memorandum on the Odendaal Commission's report [5], which shows contemplation of a possibility that the administration of the Eastern Caprivi may again be joined with that of the rest of South West Africa.

Thirdly, there has been no "annexation" of the area. Applicants' allegation that it has been annexed, *pro tanto* even outstrips their original contention relative to the whole of South West Africa, namely that although Respondent has as yet "not chosen ... to announce *de jure* annexation, its purpose is incorporation" [6].

Finally, Applicants revert to a consideration of motive and purpose when they refer to "elements in Respondent's plan to incorporate and annex the Territory as a whole", a consideration which, on their own presentation, has no relevance to their second legal conclusion at present

[1] *P.M.C., Min.*, XXXVI, p. 281. *Vide* also **IV**, pp. 111-112.

[2] **IV**, p. 582.

[3] *Vide* para. 18, *supra*.

[4] *Proc.* No. 147 of 1939 (S.A.) in *The Laws of South West Africa 1939*, Vol. XVIII, p. 28.

[5] **IV**, pp. 212-213.

[6] **I**, p. 189.

under discussion. In any event, Respondent repeats its denial that there is any such plan [1].

23. In the premises Applicants' charge that Respondent has, in separating the administration of the Eastern Caprivi, "failed and refused to respect the separate international status of the Territory" [2], is denied.

E. Vesting of South West Africa Native Reserve Land in the South African Native Trust

24. Applicants' charge regarding the vesting of South West Africa Native Reserve land in the South African Native Trust, as presented in the Memorials, was that such vesting is to be regarded as an element "of [Respondent's] plan to incorporate the Territory" [3]. In the course of discussion they also stated that it was an act which could not be "reconciled with the international status of the Territory" [4]. Respondent denied this charge and averment, and dealt fully with the whole situation in order to demonstrate that such vesting in the South African Native Trust was a purely administrative enactment which in no way affected the distinct character of the reserves as portion of South West Africa, which Territory is administered by Respondent as a territory with a separate international status [5].

25. Applicants now recite passages quoted in Respondent's Counter-Memorial from a report of M. van Rees to the Permanent Mandates Commission, from a Memorandum of the Legal Section of the Secretariat of the League of Nations, and from a resolution of the Permanent Mandates Commission of 7 July 1924, and they say:

> "The South West Africa Native Affairs Administration Act of 1954 (which Act vested the South West African Native Reserve Land in the South African Native Trust), is by its terms in conflict with the conclusions of the Legal Section of the Secretariat to the effect that Respondent acquired no 'right of absolute ownership' of lands and other public property in the Territory [6]."

The particular respect in which Applicants allege that Act No. 56 of 1954 is by its terms in conflict with the conclusions of the Legal Section of the Secretariat, is the provision in section 5 (2) of the said Act to the effect that land, the setting apart or reservation of which as trust land is rescinded, becomes "unalienated State property and may be dealt with as such" [7]. The whole charge as regards vesting of reserve land in the trust has therefore now been made to rest on this submission regarding section 5 (2) of the Act.

26. The submission of Applicants is without substance. The provision in question is in no way in conflict with the conclusions of the Legal Section of the Secretariat. Any land released from the trust, and becoming

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[1] **IV**, p. 113 and Chap. II, para. 12, *supra*.
[2] **IV**, p. 582.
[3] **I**, p. 194; *vide* also p. 195.
[4] *Ibid.*, p. 195.
[5] **IV**, pp. 121-131.
[6] *Ibid.*, p. 584.
[7] Act No. 56 of 1954, sec. 5 in *Statutes of the Union of South Africa 1954*, p. 563; *vide* also **IV**, p. 584.

"unalienated State property" in terms of the said provision, is held by Respondent in exactly the same way as any other unalienated lands in the Territory which vest in Respondent.

In this regard Respondent repeats what was stated in its Counter-Memorial relative to unalienated state lands in the Territory, viz.,

> "Respondent has at all times accepted the legal position as set out in the said resolution [i.e., the resolution of the Permanent Mandates Commission of 7 July 1924] and in the Memorandum of the Legal Section of the Secretariat of the League, *viz.*, that Respondent did not receive 'absolute ownership' of the land in question, but that it . . . 'obtained the cession of the territory and the transfer of the property in question' only in its capacity as Mandatory, or Trustee, with powers of management and administration. Respondent has, furthermore, at all times acted on the principles set out in the Legal Section's Memorandum, *viz.*, that whilst it has the power to dispose of 'State lands', such right is subject to the obligation of using the proceeds for 'furthering the prosperity and development of the Mandated territory as a whole' [1]." (Footnotes omitted.)

The attitude now adopted by Applicants in their argument in the Reply is that their complaint is directed not at the vesting of reserve land in the South African Native Trust, but as a provision which enables the release of such land from the Trust. Why this provision, which enables Respondent to deal with released land as "unalienated State property", should call for complaint, is the more difficult to understand when regard is had to the fact that the same position obtained prior to the passing of Act 56 of 1954, when the reservation of any land for the sole use and occupation of Natives could be rescinded by a resolution of both Houses of Parliament and the land could thereupon be treated as unalienated state land [2]. The position then was, and still is, in no way at variance with the conclusion of the Legal Section of the Secretariat.

27. With regard to Applicants' further statement that—

> "[s]uch reserved power must, in addition, be appraised in the light of Respondent's refusal to submit its policies and acts in respect of the Territory to international review, supervision or accountability [3]",

Respondent refers to what has been stated in paragraph 3 above. Respondent does not appreciate how its contention that the United Nations has no supervisory powers over its administration of South West Africa—a contention which Respondent submits is sound—can have any bearing on the propriety or otherwise of its acts of administration in the Territory. If such acts of administration are in themselves unquestionable, the fact that there is no supervision cannot render them questionable. On the other hand, if such acts of administration constitute violations of Respondent's obligations, then again the existence or non-existence of supervision cannot alter the situation.

28. In the premises aforestated, Respondent denies Applicants' charge that Act No. 56 of 1954 *ipso facto* violates Respondent's duty to respect

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[1] IV, p. 125.
[2] *Vide* Act No. 49 of 1919, sec. 4 (3), referred to IV, p. 128, footnote 7.
[3] IV, p. 584.

the separate international status of the Territory, and Respondent reiterates its denial of the further charge that there is a plan to incorporate the Territory of South West Africa into the Republic or to annex the Territory [1].

F. Transfer of Administration of Native Affairs to the Minister of Bantu Administration and Development

29. In the Memorials Applicants charged that this transfer was also to be regarded as an element "of the plan to incorporate the Territory into the Union" [2], and further averred that the "[t]ransfer of 'Native' affairs to an agency external to the Territory ... cannot be reconciled with the international status of the Territory" [3].

Respondent in the Counter-Memorial dealt with, and in its submission refuted, this charge and averment [4].

Applicants in the Reply merely repeat the averment that the transfer is "inconsistent with Respondent's duty to respect the separate international status of the Mandated Territory" [5] without advancing any argument in support thereof.

They also repeat the charge that the legislation effecting the said transfer [6] is "one of many measures ... by which Respondent has manifested its intention to incorporate and annex the Territory" [7]. This charge too is made in the Reply without further evidence or argument, save that Applicants quote the views of the United Nations Committee on South West Africa to the effect that the transfer in question "... forms part of the process and policy of progressive political integration of the Territory with the Union ..." [8], and was designed to—

> "... bring about as complete an assimilation of 'Native' policies in the Union [now Republic] and the Territory, taken as a whole, as the Union Government may wish to achieve [7]".

In the light of Respondent's clear and full statement as to the intended purpose and effect of the said transfer [4], which has not in any way been dealt with by Applicants, and is in no respect controverted in the Committee's report, there is no need to deal with the Committee's views, save to deny their unwarranted and unsubstantiated conclusion as to Respondent's motives.

30. With regard to the legal position, however, Respondent does point out that the Committee on South West Africa, in the same report from which Applicants have quoted, was not prepared to express the view that such transfer *ipso facto* constituted a breach of the Mandate. The Committee reported that—

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[1] *Vide* IV, p. 119.
[2] I, p. 194 and *vide* also p. 195.
[3] *Ibid.*, p. 194.
[4] IV, pp. 119-121.
[5] *Ibid.*, p. 584.
[6] Act No. 56 of 1954, sec. 5 in *Statutes of the Union of South Africa 1954*, p. 563.
[7] IV, p. 585.
[8] *G.A., O.R., Eleventh Sess., Suppl.* No. 12 (A/3151), para. 36, p. 11, as quoted at IV, p. 585.

"[f]rom a strictly legal point of view, and regarded as an isolated act, it may be possible to claim that the transfer falls within [Respondent's] authority under the Mandate to administer the Territory as an integral portion of the Union [1]".

31. In a footnote at **IV**, page 586 of the Reply Applicants state:

"Respondent's continuing purpose to carry out to the fullest extent its plan for incorporation and annexation of the Territory is confirmed by its endorsement of the principles of the Odendaal Commission . . .[2]",

and they refer to the Commission's recommendation that—

". . . the Government of the Republic of South Africa take over [certain] existing branches which are at present administered by the South West Africa Administration [3]".

In advancing this contention Applicants entirely ignore the fact that Respondent was granted "full powers of administration and legislation over the territory . . . as an integral portion of the Union of South Africa" [4], and that the organization of the administration of the Territory is a matter vested in Respondent's discretion. Applicants further ignore the cogent reasons advanced by the Commission for the recommendation here in issue, as well as Respondent's stated attitude thereanent. The purpose for which the Commission made such recommendation was, as stated by the Commission, simply and solely the advancement of the interests of the Territory and its inhabitants, particularly the non-White population groups, by better administration and increased assistance from the Republic's resources, especially financial and technological. The Commission, after careful consideration and motivation, recommended ". . . major development projects which will require big capital sums, a high degree of managerial talent and trained manpower" [5], and the Commission stated that it was convinced—

". . . that its recommendations can best be carried out by the Government of the Republic of South Africa if the Territory can be linked up more closely, both administratively and financially, with the Republic, so that the Government of the Republic of South Africa can take over the financial burdens and the functions of control involved in the carrying out of the recommendations [5]".

The Commission concluded that—

". . . the upliftment and development of the non-White groups . . . is a task for direct handling in all its facets by the Central Government of the Republic of South Africa, and that, largely in view of the implications involved, only the proposed White area in South West Africa should be administered by an Administrator, Executive Committee and Legislative Assembly [6]".

The fundamental considerations in arriving at this conclusion were summarized by the Commission to the following effect:

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[1] *G.A., O.R., Eleventh Sess., Suppl.* No. 12 (A/3151), para. 36, p. 11.
[2] **IV**, p. 586, footnote 1.
[3] *R.P.* No. 12/1964, p. 61 (para. 221).
[4] Art. 2 of the Mandate for German South-West Africa.
[5] *R.P.* No. 12/1964, p. 57 (para. 195).
[6] *Ibid.*, p. 61 (para. 214).

(i) the spirit of responsibility to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory [1];

(ii) the considerable extent of the new phase of development envisaged by the Commission, especially in regard to acceleration of the rate of development of homelands for the various non-White groups [2];

(iii) the requirement, apart from financial implications, of expert guidance, technical knowledge and effective planning [3];

(iv) the desire to promote the participation of the non-White population groups in every sphere of the development of their respective homelands [4]; and

(v) the desirability of eliminating overlapping of responsibility in the government and administration [5].

In reacting to the Commission's approach outlined above, Respondent's Government stated that—

> "... it is in agreement with the general view of the Commission, and believes that closer investigation will confirm that the major development projects contemplated, particularly in the interests of the non-White population groups, can be carried out to the best advantage through greater financial and administrative contributions thereto from the Republic, of the nature envisaged in the recommendations [6]".

Respondent, however, clearly indicated that this was one of the matters raised by the Commission's report "which require further investigation, information and consideration before the Government can reach any final decisions" [7], and stated that a number of considerations had combined to produce the result that with regard to the recommended "reorganization of administrative functions as between organs of the Territory and those of the Republic ... no decisions concerning implementation are at present being taken" [6].

It will therefore be clear that the approach of the Commission and Respondent's attitude thereanent, concern prospective measures entirely within the provisions of the Mandate, directed solely at the well-being of the inhabitants of the Territory. Respondent fails to appreciate how anything in this regard can be said to support, let alone confirm, a "continuing purpose to carry out ... [a] plan for incorporation and annexation of the Territory".

32. Respondent accordingly denies the charges which are made in Applicants' Reply relative to the transfer in question.

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[1] *R.P.* No. 12/1964, p. 61 (para. 216).
[2] *Ibid.* (para. 217).
[3] *Ibid.* (para. 218).
[4] *Ibid.* (para. 219).
[5] *Ibid.* (para. 220).
[6] IV, p. 214.
[7] *Ibid.*, p. 212 (para. 20).

CHAPTER IV

THE ALLEGATION THAT RESPONDENT'S POLICIES AND MEASURES ARE INCOMPATIBLE WITH ITS DUTY TO PROMOTE CONDITIONS UNDER WHICH THE INHABITANTS OF THE TERRITORY MAY PROGRESS TOWARD SELF-DETERMINATION

1. The third legal conclusion formulated by Applicants in the Reply [1] reads as follows:

> "Respondent's policies and acts complained of by Applicants, constitute a violation of Respondent's duty to promote conditions under which the inhabitants of the Territory may progress toward self-determination of the future status of the Territory [2]."

In the Counter-Memorial Respondent dealt with this charge in relation to each of the measures and acts complained of by Applicants [3], and, it is submitted, refuted the charge in each respect.

Save for their reference in passing to "Respondent's denial of international accountability" [4], Applicants' argument in the Reply contains nothing new, and no new allegations of fact are advanced. Applicants do not say in what respect Respondent's denial of international accountability is at all relevant in the present enquiry, and, save for referring to what has already been stated with regard to supervision and accountability in the present context [5], Respondent does not consider it necessary to deal further therewith.

2. Applicants state that—

> ". . . [Respondent's] policies and measures . . . violate the territorial integrity of the Mandate and its political independence. The thrust and effect of such measures is to foster disintegration of the Territory and its political dependence upon Respondent.
>
> It is self-evident that such a state of affairs is incompatible with, and frustrating of, progress of the inhabitants toward self-determination [4]."

This statement illustrates the extent to which Applicants produce a confused, inconsistent and anomalous result in circumscribing their conception of "progress toward self-determination". They indiscriminately use the words "self-determination", "political independence", "self-government" and "sovereignty" [6] as if these concepts are all synonymous. In their confusion they imply, in the statement here under discussion, that a mandated territory enjoyed "political independence", which is, in Respondent's submission, *ipso facto* a contradiction of the mandate system, certainly in so far as the C Mandates were concerned, and which exceeds *pro tanto* all Applicants' previous submissions and statements.

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[1] **IV**, p. 573. *Vide* Chap. I, para. 5, *supra*.
[2] *Ibid.*, pp. 573-574.
[3] *Ibid.*, pp. 93-131.
[4] *Ibid.*, p. 586.
[5] *Vide* Chap. III, paras. 2-3, *supra*.
[6] **IV**, pp. 238-242.

Amidst the confusion, however, it appears as if Applicants' line of reasoning in this passage proceeds from two basic premises, viz.,

(a) that the political development of the Territory must, in terms of the Mandate, be directed specifically towards the achievement of "independence" [1], and

(b) that a majority decision by the population of the Territory, seen as one, in accordance with the concept of "territorial integrity", is the only permissible method whereby the various peoples of the Territory can, in terms of the Mandate, exercise "self-determination" [2].

Respondent has given its reasons [3], which have in no way been controverted by Applicants, for rejecting both of these basic premises.

In the absence of any substantiation of their allegations, and in the absence, moreover, of any answer by Applicants to the exposition in the Counter-Memorial of the reasons for, and effect of, the acts and measures complained of by them, Respondent submits that the charge formulated by Applicants in the "legal conclusion" here under consideration is devoid of substance.

3. In concluding their argument, Applicants add the following remarks:

> "... such a state of affairs ... is ... consistent only with Respondent's avowed purpose and manifest plan to treat the Mandate as 'being, in effect, close to annexation', and in line with Respondent's explicit disclaimer:
>
> > '... that its right of administration is based on continued existence of the Mandate' [4]". (Footnotes omitted.)

In Respondent's submission these remarks are pointless. Although Respondent disclaims that its right of administration is based on continued existence of the Mandate, it has in fact administered the Territory in the spirit of the Mandate. Moreover, Respondent has dealt with Applicants' charges on the assumption, for purposes of argument, that the Mandate is still in force [5], and has in its respectful submission justified its acts on that basis.

4. In conclusion, Respondent repeats its explicit denial of Applicants' charge that it has violated its obligation to promote conditions under which the inhabitants of South West Africa may progress toward self-determination [6].

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[1] **IV**, pp. 238-242.
[2] *Ibid.*, p. 582.
[3] *Vide*, e.g., **II**, pp. 458-460 and 472-473; **IV**, pp. 70-73; pp. 213-214 and *vide* also Chap. III, para. 18, *supra*.
[4] **IV**, p. 586.
[5] *Vide* Chap. I, para. 2, *supra*.
[6] *Vide* **IV**, p. 132.

CHAPTER V

CONCLUSION

1. In the light of what has been stated in Respondent's Counter-Memorial [1], and in the foregoing chapters of this Rejoinder, Respondent denies each and every one of the charges advanced by Applicants in Chapter VIII of the Memorials, as repeated and amplified in the Reply [2].

2. In the premises Respondent denies Applicants' conclusion that Respondent's policies and acts "violate its obligations as stated in Article 22 of the Covenant of the League of Nations and Article 2 of the Mandate agreement" [3].

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[1] **IV**, pp. 67-132.
[2] *Ibid.*, pp. 572-586.
[3] *Ibid.*, p. 586.

PART VI

ALLEGED VIOLATIONS OF ARTICLE 7 OF THE MANDATE

A. Introductory

1. Respondent deals in this Part of the Rejoinder with section C of Chapter VII of the Reply [1], which is concerned with alleged violations by Respondent of Article 7 (1) of the Mandate.

The subject-matter of the charge under consideration will be dealt with herein under the following heads:

The legal basis of Applicants' charge;
Applicants' statements of fact;
Conclusion.

The treatment of the said matters will be in the order aforestated.

B. The Legal Basis of Applicants' Charge

2. The charge made in the Memorials was that Respondent's alleged acts as particularized in Chapters V, VI, VII and VIII of the Memorials, "*read in the light of [Respondent's] intent*, constitute a unilateral attempt to modify the terms of the Mandate without the consent of the United Nations, and that such acts accordingly are, severally and in their totality, a violation of Article 7 of the Mandate" [2]. (Italics added.)

In support of this charge Applicants relied on the Advisory Opinion of 11 July 1950 in which the Court held, *inter alia*, that, as a result of the dissolution of the League of Nations, modifications of the terms of the Mandate require the approval of the General Assembly of the United Nations.

In the Counter-Memorial Respondent indicated that there was an essential link between the Court's finding relative to Article 7 of the Mandate and its previous finding in the Opinion that "powers of supervision in respect of the administration of the Mandates" were vested in the General Assembly of the United Nations [3], and Respondent contended that, inasmuch as, in its submission, the last-mentioned finding was incorrect, the first-mentioned finding was equally unacceptable in law.

For the reasons advanced in the Counter-Memorial [4], as amplified in this Rejoinder [5], Respondent repeats the contention aforestated; but, as in the Counter-Memorial, Respondent regards it as unnecessary to devote further consideration to this question, inasmuch as, for the reasons hereinafter stated, a determination whether in the present circumstances the terms of the Mandate, if it should still be in existence, can be modified, and, if so, in what manner, appears to be of academic interest only.

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[1] IV, p. 587.
[2] I, p. 196.
[3] IV, p. 135.
[4] *Vide* II, pp. 113-164.
[5] *Vide* Part II, Chap. III, *supra*.

3. Before proceeding to deal with the allegations of fact made by Applicants in the Reply, Respondent draws attention in the following paragraphs to certain matters concerning the legal aspect of Applicants' charge as now formulated in the Reply.

4. In the Counter-Memorial Respondent remarked, with reference to Applicants' allegations in the Memorials, that they appear—

> ". . . to concede that, in order to establish a contravention of Article 7, they would be required to prove an intent on Respondent's part to modify the terms of the Mandate [1]".

Applicants' reaction thereto in the Reply is that Respondent—

> ". . . misconstrues [their] Submission 9 as being limited to a complaint that Respondent is, or has been 'motivated by an intent to modify the terms of the Mandate' [2]",

and they say in this regard:

> "As Applicants have made clear, Respondent's violations of the Mandate in this, as in other respects, 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 . . . [2]"

Attention has already been drawn to the fact that Applicants adopt the very same attitude in the Reply relative to their charges concerning alleged violations of Article 2 of the Mandate [3]. Whereas, on the one hand, they aver that their charges are not based on *mala fides*, they contend, on the other hand, in accordance with a "universally accepted axiom" [4], that "in the absence of evidence to the contrary, the predictable consequences of conduct are presumed to be intended" [4], and, by the application of this principle in their examination of Respondent's acts, they draw inferences which are compatible only with improper motives on Respondent's part. And thus, while disclaiming reliance on what they term "subjective motivation" [2], they in fact seek to establish motivation by an alleged "objective evaluation of [Respondent's] conduct" [4]. In effect, therefore, Applicants' charge, as already demonstrated [3], is clearly one of *mala fides*. Similarly, in the present instance their contention rests in principle on alleged intent on Respondent's part to modify the terms of the Mandate [2].

5. Whereas, in their treatment of Respondent's alleged violations of Article 2 of the Mandate, Applicants in the Reply seek to introduce a new cause of action based on the alleged existence of a so-called legal norm of "non-discrimination or non-separation", no mention is made of such a norm in the part of the Reply at present under consideration. There is accordingly a striking contradiction in Applicants' approach as now evidenced in the Reply. Their contention relative to Article 7 is that the terms of the Mandate cannot be modified "unilaterally"—which can only mean that consent to modification is required on both sides, i.e., on the part of Respondent as well as, according to their argument, on the

[1] IV, p. 135.
[2] *Ibid.*, p. 587.
[3] *Vide* Part III, sec. A, para. 6 and sec. C, paras. 29-38, *supra*.
[4] IV, p. 257.

part of the United Nations—nevertheless their contention relative to a particular term of the Mandate, viz., Article 2, is that its content has now become redefined, and in effect altered, by a process independent of consent, i.e., by the application of a so-called legal norm, the existence and applicability of which have always been contested by Respondent [1].

Respondent has demonstrated that no such legal norm is embodied in the Mandate, or is otherwise binding on Respondent [1]. For the present Respondent is concerned only with drawing attention to the fact that Applicants' charge relative to Article 7, as advanced in the Memorials, is inconsistent with their contention regarding the alleged norm of "non-discrimination or non-separation", and that a consequential amendment to their charge would accordingly be necessary. In fact, however, no such amendment is sought, and Applicants in the Reply simply—

> "... reaffirm their contention that Respondent's policies and actions complained of in the Memorials, constitute an attempt on the part of Respondent unilaterally, and without consent of the United Nations, to modify the terms of the Mandate [2]". (Footnotes omitted.)

In the result Applicants have apparently overlooked the fact that Respondent's policies and acts complained of in Chapter V of the Memorials, which chapter was concerned with Respondent's duties under Article 2 of the Mandate [3], are now, in the Reply, sought to be evaluated and adjudged against the criterion embodied in an alleged legal norm which is said to have come into existence, and to be binding on Respondent, without its consent and even without the formal consent of the United Nations.

If there has indeed been an attempt to modify the terms of the Mandate *unilaterally*, which is the charge advanced by Applicants, then it seems that the party guilty of such attempt is not Respondent.

C. Applicants' Statement of Fact

6. Applicants deal with the facts considered by them to be relevant to their charge relating to Article 7 of the Mandate in one passage of the Reply which reads as follows:

> "On the basis of the demonstration made in the Memorials, and elaborated in this Reply, that Respondent has admittedly dealt with the Territory as if it were vested with 'day-to-day sovereignty' thereover and that Respondent has denied obligations of international accountability while at the same time asserting rights of administration and possession, Respondent's policies and actions reflect its premise that the Mandate has survived, but only to the extent necessary to give Respondent the colour of a claim to the Territory [1]."

In the Counter-Memorial and in other Parts of this Rejoinder Respondent has dealt with Applicants' charges relative to alleged violations of

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[1] *Vide* Part III, sec. B, *supra*.

[2] **IV**, p. 587.

[3] The policies and acts complained of in Chapter V of the Memorials were relied upon by Applicants in respect of their charge relative to Article 7 (**I**, p. 196) and are still so relied upon in the Reply (*vide* **IV**, p. 587, footnote 2).

Articles 2, 4 and 6 of the Mandate, which form the basis of Applicants' further charge that Respondent has violated Article 7 by attempting to modify the terms of the Mandate unilaterally. Respondent submits that in answering the allegations made by Applicants in respect of the aforementioned charges, it has shown conclusively that it has not violated any of the said Articles of the Mandate.

In the following paragraphs Respondent deals with the further contentions advanced by Applicants in the above-quoted passage of the Reply.

7. Elsewhere in this Rejoinder [1] Respondent has explained what was meant in the Counter-Memorial by the use of expressions such as "*in their practical effect, not far removed from annexation*" [2] and the "*day to day exercise of the attributes of sovereignty*" [3]. It is not necessary to repeat here what has been stated in this regard, save to say that, on the assumption that the Mandate is still in existence [4], the contention that within its powers of administration of the Territory the "day to day exercise of the attributes of sovereignty" vests in it—in the sense in which that expression has been explained—can in no way be regarded as inconsistent with the terms of the Mandate. Respondent has at all times since the inception of the Mandate administered the Territory in accordance with its said conception regarding its powers, and denies that in so doing it has in any way violated its obligations under the Mandate or has attempted to modify the terms of the Mandate [5]. Respondent in this regard also draws attention to the fact that Applicants use a self-coined expression "day to day sovereignty" [5], the meaning of which is apparently understood by them, whereas elsewhere in the Reply they profess to have difficulty with regard to the meaning of the more exact expression used by Respondent, viz., "the day to day exercise of the attributes of sovereignty", in connection with which they remark as follows:

> "Respondent does not offer an indication of the respects, if any, in which 'day to day' exercise of sovereignty differs from year to year exercise of the same prerogative [6]."

In Respondent's submission further comment on Applicants' attitude in this regard would be superfluous.

8. With regard to Applicants' statement that Respondent has "denied obligations of international accountability while at the same time asserting rights of administration and possession", Respondent admits that it has since, and as a result of, the dissolution of the League of Nations contended that it is not obliged to account to, and to submit to the supervision of, any international organization or body with respect to the administration of the Territory. Respondent's contention cannot however be regarded as a unilateral attempt to modify the terms of the Mandate.

Upon the dissolution of the League the provisions of Article 6 of the

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[1] *Vide* Part II, Chap. II, para. 10 and Part V, Chap. II, paras. 3-12, *supra*.

[2] *Vide* **II**, p. 96.

[3] **IV**, p. 69.

[4] It is upon this assumption, for the purpose of argument, that Respondent dealt with Applicants' charge relative to alleged violations of Article 7 of the Mandate; *vide* **IV**, p. 135.

[5] **IV**, p. 587.

[6] *Ibid.*, p. 574, footnote 2.

Mandate became inoperable and, inasmuch as they were, in Respondent's submission, not modified into or replaced by other provisions serving the same or similar purposes, the said provisions lapsed [1].

Respondent therefore denies that its attitude in this regard amounts to an attempt to modify the terms of the Mandate.

9. The only contention of Applicants which remains to be dealt with is that—

> "... Respondent's policies and actions reflect its premise that the Mandate has survived, but only to the extent necessary to give Respondent the colour of a claim to the Territory [2]".

What Applicants have conveniently ignored in advancing this contention is that Respondent stated specifically in the Counter-Memorial that it "... does not claim, but on the contrary expressly disclaims, that its right of administration is based on continued existence of the Mandate" [3], a matter which is again dealt with elsewhere in this Rejoinder [4].

There is accordingly no substance in Applicants' contention that Respondent acts on the "premise that the Mandate has survived" for the purpose of giving it "the colour of a claim to the Territory". Respondent has indeed, as an alternative contention—founded on the premise that accountability to the League supervisory organs was not an essential part of the Mandate—advanced that the Mandate is still in existence but without any duty of report and accountability to any supervisory body [5]. Furthermore, for the purpose of its argument relative to alleged violations of Article 7, Respondent has assumed that the Mandate is still in existence [6]. Without such an assumption any discussion of alleged attempts to modify the terms of the Mandate would have been pointless. Neither this alternative contention, however, nor this assumption, affords any ground for the statement that Respondent advances the "premise that the Mandate has survived" as something "necessary to give Respondent the colour of a claim to the Territory" [7].

The above answer, in Respondent's submission, also disposes of Applicants' further comment that "[n]o more drastic or effective 'modification' of the terms of the Mandate is imaginable than one which disclaims duties while asserting rights" [2].

Respondent does not, on the alternative basis that the Mandate is in existence, disclaim all duties thereunder: indeed, it has assumed *arguendo* that the Mandate survives and that its duties under the Mandate (excepting those depending on the existence of the League of Nations) accordingly remain in existence. It is upon this basis that Respondent has met Applicants' charge that it has attempted to modify the terms of the Mandate.

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[1] *Vide* Part II, Chap. III, *supra*.
[2] **IV**, p. 587.
[3] **II**, p. 174.
[4] *Vide* Part II, Chap. IV A, paras. 32-35, *supra*.
[5] *Vide* **II**, p. 97 and Part II, Chap. IV A, para. 13, *supra*.
[6] **IV**, p. 135.
[7] On the contrary, *vide* Part II, Chap. IV A, para. 35, of this Rejoinder.

D. Conclusion

10. In the premises aforestated Respondent submits that, quite apart from the legal contention advanced in the Counter-Memorial [1] and repeated above [2], Applicants have failed to establish in any way that Respondent is, or has been, motivated by an intent to modify the terms of the Mandate, or that it has—

> "... conducted itself with regard to the Territory in a manner consistent only with a Mandate the terms of which would be utterly incompatible with those of the Mandate in issue [3]".

11. Respondent therefore denies Applicants' charge that it has violated Article 7 (1) of the Mandate.

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[1] **IV**, p. 135.
[2] Para. 2, *supra*.
[3] **IV**, p. 587.

PART VII

SUBMISSIONS

1. Upon the basis of the statements of law and fact set forth in the Counter-Memorial, as supplemented in this Rejoinder and as may hereafter be adduced in further proceedings, Respondent reaffirms the Submissions made in the Counter-Memorial [1] and respectfully asks that such Submissions be regarded as incorporated herein by reference.

2. Respondent further repeats its prayer that it may please the Court to adjudge and declare that the Submissions of the Governments of Ethiopia and Liberia, as recorded in the Memorials [2] and as reaffirmed in the Reply [3], are unfounded, and that no declaration be made as claimed by them.

(Sgd.) R. McGregor

(Sgd.) J. P. verLoren van Themaat

Agents of the Government
of the Republic of South Africa

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[1] II, p. 6.
[2] I, pp. 197-199.
[3] IV, p. 588.

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2. *Special Committee for South West Africa*
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   Report of the Special Committee for South West Africa, G.A., O.R., Seventeenth Sess., Suppl. No. 12 (A/5212), p. 20.

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IV. Palestine

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V. Union of South Africa

1. *Rex* v. *Christian*, 1924 A.D. p. 101 *et seq*.
2. *Van Ryn Wine and Spirit Co.* v. *Chandos Bar*, 1928, T.P.D. p. 417, at pp. 423-424.
3. *Rex* v. *Magosane and Others*, 1937 Griqualand West Local Division, pp. 47 ff.
4. *Rex* v. *Blom*, 1939 A.D. p. 188, at pp. 202-203.
5. *Winter* v. *Minister of Defence and Others*, 1940 A.D. p. 194, at pp. 197-198.
6. *Du Plessis* v. *Minister of Justice*, 1950 (3) S.A. pp. 579 ff.
7. *Rex* v. *Ramakan*, 1959 South African Law Reports, Part 4, pp. 642 ff.

VI. United Kingdom

1. *General Assembly of Free Church of Scotland and Others* v. *Lord Overtoun and Others*, 1904 A.C. p. 515, at p. 695.
2. *Rex* v. *Brighton Corporation: Ex parte Shoosmith*, 1907, Vol. XCVI, L.T.R. p. 762, at p. 763.
3. *Jerusalem-Jaffa District Governor and Another* v. *Suleiman Murra and Others*, 1926 A.C. p. 321, at pp. 327 and 328.

VII. United States of America

Brown v. *Board of Education of Topeka*, 347 U.S. 493, in United States Supreme Court Reports, Lawyers' Edition, Book 98 (1954), pp. 880 ff.